



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 100

Court enforceable undertakings

November 2021

About this guide

A court enforceable undertaking is an administrative remedy for contraventions of legislation administered by ASIC. It contains a set of undertakings provided by another person to ASIC that ASIC has accepted. This guide is for an entity or person and their legal advisers who are considering offering a court enforceable undertaking to ASIC.

It explains our approach to accepting court enforceable undertakings under the legislation we administer, including:

- s93A or 93AA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act);
- s322 of the *National Consumer Credit Protection Act 2009* (National Credit Act); and
- s262A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in November 2021 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Regulatory Guide 100 *Enforceable undertakings*, issued February 2008, reissued February 2012 and February 2015
- Superseded Guide 300, issued March 2007, rebadged as a regulatory guide 5 July 2007
- Superseded Practice Note 69, issued 7 April 1999

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Contents

A	Overview	4
B	What is a court enforceable undertaking?	5
	ASIC's power to accept court enforceable undertakings	5
	How a court enforceable undertaking works	5
C	When will we consider accepting a court enforceable undertaking?	7
	Our approach to accepting court enforceable undertakings	7
	When we will not accept a court enforceable undertaking	8
	Examples of court enforceable undertakings we may accept	8
D	What terms should a court enforceable undertaking include?.....	10
	Acceptable and standard terms	10
	Unacceptable terms	11
E	Are court enforceable undertakings made public?	12
	Our approach to publicising court enforceable undertakings	12
	Disclosure to the market operator	13
	Reporting on compliance	13
F	Can a court enforceable undertaking be varied or withdrawn?	15
	Varying a court enforceable undertaking	15
	Withdrawing an offer of a court enforceable undertaking	15
G	What happens if a court enforceable undertaking is not complied with?	16
	Appendix: Guidance on the use of independent experts	17
	Reports by independent experts	17
	Appointment of an independent expert by ASIC	18
	Appointment of an independent expert by the party	18
	Assessing the independence of the expert	19
	Expert's arrangements to manage conflicts of interest	21
	Publicity for independent expert reports	22
	Key terms	24
	Related information	25

A Overview

Key points

ASIC accepts court enforceable undertakings where we consider that they will be likely to improve and enforce compliance with the law. This guide explains our approach to court enforceable undertakings, including:

- when we will consider accepting an undertaking;
- what terms may be acceptable and when we will consider consenting to requests to vary or withdraw an undertaking;
- public reporting on compliance with undertakings; and
- what happens if an undertaking is not complied with.

RG 100.1 Court enforceable undertakings are a flexible remedy that ASIC may accept to improve and enforce compliance with the law.

Note: Court enforceable undertakings were previously referred to as 'enforceable undertakings'.

RG 100.2 This guide explains our approach to accepting court enforceable undertakings, using the numerous powers given to ASIC by the legislation that we administer. Some of these powers are in:

- (a) s93A and 93AA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act);
- (b) s322 of the *National Consumer Credit Protection Act 2009* (National Credit Act); and
- (c) s262A of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

RG 100.3 This guide explains:

- (a) what a court enforceable undertaking is (Section B);
- (b) when we will consider accepting a court enforceable undertaking (Section C);
- (c) the types of terms that are generally acceptable to ASIC (Section D);
- (d) when we will make court enforceable undertakings public (Section E);
- (e) when we will consider consenting to requests to vary or withdraw a court enforceable undertaking (Section F);
- (f) what happens if a court enforceable undertaking is not complied with (Section G).

RG 100.4 We have also set out our guidance and requirements for using independent experts as part of a court enforceable undertaking: see the appendix.

B What is a court enforceable undertaking?

Key points

A court enforceable undertaking is an administrative remedy that ASIC may accept to address contraventions of legislation: see RG 100.5.

This section sets out the parties from whom we will accept a court enforceable undertaking: see RG 100.6 and Table 1.

It also sets out how court enforceable undertakings work, including who can offer and accept the undertaking, and when the undertaking takes effect: see RG 100.7–RG 100.11.

ASIC’s power to accept court enforceable undertakings

RG 100.5 Court enforceable undertakings are one of a range of enforcement remedies available to ASIC. We use them to address contraventions of the legislation we are responsible for administering.

RG 100.6 We may accept a court enforceable undertaking from the parties set out in Table 1.

Table 1: Parties from whom we may accept a court enforceable undertaking

Party	Situation	Legislative reference
A person or company	The person or company has contravened the ASIC Act or the <i>Corporations Act 2001</i> (Corporations Act)	s93AA(1) of the ASIC Act
A responsible entity of a registered scheme	The responsible entity or registered scheme has contravened the Corporations Act	s93A(1) of the ASIC Act
A person or company	The person or company has contravened the National Credit Act	s322(1) of the National Credit Act
A trustee of a superannuation fund	The trustee has contravened the SIS Act	s262A(1) of the SIS Act

How a court enforceable undertaking works

RG 100.7 The party providing a court enforceable undertaking to ASIC can be a company, an individual or a responsible entity. The party can initiate the court enforceable undertaking, or it can be initiated by ASIC. ASIC does not have the power to require a person to provide an undertaking. Similarly, a person cannot compel ASIC to accept an undertaking.

- RG 100.8 The terms of an undertaking may be the subject of negotiation between the party offering the undertaking and ASIC. ASIC's Commission, or a delegate of the Commission, will make the decision to accept or reject the undertaking.
- RG 100.9 A court enforceable undertaking will not take effect until the Commission or a delegate formally accepts it.
- RG 100.10 Each party will keep a signed original of the court enforceable undertaking.
- RG 100.11 Court enforceable undertakings are available for public inspection on the court enforceable undertakings register: see RG 100.30.

C When will we consider accepting a court enforceable undertaking?

Key points

A court enforceable undertaking is an administrative remedy we may accept as an alternative to, or in conjunction with, civil court action or administrative action.

We may accept a court enforceable undertaking if we consider it will provide an effective and appropriate regulatory outcome that is in the public interest: see RG 100.12–RG 100.18.

We will not usually accept a court enforceable undertaking:

- for criminal conduct;
- in cases of deliberate misconduct; or
- for conduct involving a high level of recklessness (see RG 100.19).

We have set out examples of the types of undertakings we may accept at Table 2.

Our approach to accepting court enforceable undertakings

RG 100.12 We will only accept a court enforceable undertaking when we consider it will achieve an effective and appropriate regulatory outcome that is in the public interest. We have set out our general approach to enforcement remedies in [Information Sheet 151](#) *ASIC's approach to enforcement* (INFO 151).

RG 100.13 We will consider a range of factors before accepting a court enforceable undertaking. These factors will vary according to the circumstances. Factors we typically consider include:

- (a) whether the person is likely to comply with the undertaking;
- (b) the likely effect of the undertaking on the person's future conduct, including whether the undertaking is likely to deter the person from engaging in misconduct in the future;
- (c) whether the undertaking will deter others from engaging in similar conduct; and
- (d) the public interest, including remediation outcomes such as compensation for affected consumers.

RG 100.14 We will also take into account:

- (a) the significance of the issues to the market and the community;
- (b) the nature and seriousness of the alleged contravention; and
- (c) the compliance history of the party providing the court enforceable undertaking.

- RG 100.15 We will not accept a court enforceable undertaking unless we have reason to believe there has been a contravention of relevant legislation.
- RG 100.16 We will generally only consider accepting a court enforceable undertaking after we have weighed up the effectiveness of the regulatory outcome offered by the undertaking compared to outcomes offered by other available enforcement remedies.
- RG 100.17 We may also accept a court enforceable undertaking in conjunction with other enforcement action. For example, we may commence or continue civil penalty proceedings against a party, but also accept an undertaking from that party that results in remediation outcomes for a wider class of affected consumers than those referred to in the court proceedings.
- RG 100.18 Our acceptance of a court enforceable undertaking in a particular set of circumstances should not be regarded as binding on ASIC in the future. For example, accepting an undertaking from one person does not necessarily mean we will accept an undertaking for similar misconduct from another person, or that we will accept a further undertaking from the same person.

When we will not accept a court enforceable undertaking

- RG 100.19 We will not usually accept a court enforceable undertaking from a party:
- (a) instead of referring a brief of evidence to the Commonwealth Director of Public Prosecutions (CDPP) for potential criminal prosecution;
 - (b) where the misconduct is deliberate or involves a high level of recklessness;
 - (c) after a matter has been referred to an ASIC delegate or other specialist body; or
 - (d) as an alternative form of relief if conditional relief has not been complied with.

Examples of court enforceable undertakings we may accept

- RG 100.20 The examples in Table 2 illustrate in general terms the kinds of court enforceable undertakings we may accept. These examples are intended as a guide only and are not exhaustive.

Table 2: Examples of court enforceable undertakings

Corporate governance	<p>The party will refrain from taking part in the management of specified corporations for a specific period of time.</p> <p>The party will remedy deficiencies in the company's compliance systems. They will take specified action and have this reviewed by an auditor or expert.</p>
-----------------------------	--

Auditors and liquidators	<p>The party will refrain from performing a significant role in an audit engagement for a set period of time. They will also complete additional professional education and be subject to technical supervision on future audit engagements for a set period of time.</p> <p>The party will refrain from accepting appointments to insolvency administrations for a set period of time. They will also complete additional professional education and be subject to technical supervision on future insolvency administrations.</p>
Disclosure	<p>The party will inform the market to correct previous false or misleading disclosure, or any continuing misrepresentation for which the person is responsible.</p> <p>The party will set up and implement an internal compliance plan. They will periodically report on this plan to the market.</p>
Takeovers	<p>The party will remedy the unacceptable circumstances that have occurred, or may have occurred, in a takeover. They will do this by carrying out certain necessary action (provided that the matter has not been referred to the Takeovers Panel).</p>
Remediation	<p>The party will investigate the conduct that is the subject of the court enforceable undertaking. The investigation should identify affected consumers and any loss suffered. The remediation should aim to return affected consumers as closely as possible to the position they would have otherwise been in. The process for bringing this about may be described in the undertaking.</p>
Systemic compliance issues	<p>The party will remedy the underlying compliance or systems error. They will also take any necessary rectification steps to ensure that existing compliance measures, systems and controls are corrected or strengthened. If necessary, they will undertake appropriate remediation steps to remedy any loss to consumers .</p>
Corrective notices	<p>The party will write to investors or parties affected by the misconduct. The corrective notice will inform them of the court enforceable undertaking, its terms and how a copy of it can be obtained.</p> <p>The party will also issue an advertisement or engage in corrective advertising (on a website or otherwise) to rectify any misleading conduct.</p>

D What terms should a court enforceable undertaking include?

Key points

This section provides guidance about the terms that should be included in a court enforceable undertaking: see RG 100.21 and Table 3. It also explains when the undertaking should contain admissions that the law was contravened: see RG 100.22.

There are some terms that we will generally not accept: see RG 100.23.

Acceptable and standard terms

RG 100.21 Table 3 lists the areas that a court enforceable undertaking may cover.

Table 3: What a court enforceable undertaking may cover

Background	This section sets out the details of the relevant conduct and the nature of our views about the conduct.
Compliance and monitoring	<p>We must be satisfied the court enforceable undertaking identifies the relevant misconduct and explains how the party providing the court enforceable undertaking will ensure it does not occur again. We must also be satisfied that there are adequate arrangements for monitoring how the undertaking is implemented and for reporting to ASIC.</p> <p>Details might include:</p> <ul style="list-style-type: none"> • monitoring and reporting mechanisms (e.g. internal control or compliance programs); • any external assessment of the changes that are put in place; • the name of the contact officer who is responsible for monitoring compliance with the court enforceable undertaking (and any external expert); and • the ASIC officer who the party will report to about compliance with the court enforceable undertaking.
Remediation	<p>When a court enforceable undertaking includes remediation, we may require the party to:</p> <ul style="list-style-type: none"> • investigate the conduct the subject of the court enforceable undertaking; • identify the affected consumers; • identify any loss suffered; and • return affected consumers as closely as possible to the position they would have otherwise been in. <p>For more guidance on our expectations for how a remediation should be conducted, see Regulatory Guide 256 <i>Client review and remediation conducted by advice licensees</i> (RG 256).</p>
Corrective notices	In cases of misleading conduct, we may require the party to correct the misleading impression for which it is responsible.

Other action	The party must acknowledge that the court enforceable undertaking does not affect the rights of other parties or constitute any restraint on ASIC. The exception to this is any specific enforcement action that ASIC has agreed to compromise. We may accept an undertaking while continuing with our investigation into other matters not covered by the undertaking.
Compliance attestations	Where appropriate, we will require a party to provide ASIC with a statement attesting to compliance with the terms of a court enforceable undertaking. This may be required from an appropriate senior officer or from the party's board or governing body.
Independent expert report	Some court enforceable undertakings will contain terms requiring an independent expert to review and report on specified matters. Further information about ASIC's requirements for court enforceable undertakings that involve the appointment of an independent expert are set out in the appendix.
Publicity and public access	<p>All court enforceable undertakings accepted by ASIC are made public, must contain a clause that waives confidentiality, and acknowledges ASIC's publicity and public access policy: see RG 100.24–RG 100.30. The clause may exclude certain information where necessary: see RG 100.28.</p> <p>We will publicly report on a promisor's compliance with undertakings given in a court enforceable undertaking.</p>

When admissions of contravening conduct will be required

RG 100.22 When ASIC accepts a court enforceable undertaking in final resolution of a matter, we will generally require that it contains admissions that the promisor contravened specific legislative provisions. The admissions must properly reflect the seriousness of the conduct.

Unacceptable terms

RG 100.23 Generally, we will not accept a court enforceable undertaking that:

- (a) contains a clause denying liability or omitting any standard terms;
- (b) does not include details of the conduct that gave rise to the undertaking;
- (c) contains any clause that sets up defences for possible non-compliance with the undertaking; or
- (d) contains terms of confidentiality (see RG 100.25).

E Are court enforceable undertakings made public?

Key points

This section provides guidance about our approach to publicising and giving access to court enforceable undertakings: see RG 100.24–RG 100.27.

We will not accept court enforceable undertakings on a confidential basis. However, there may be times when we will agree not to disclose some information contained within a court enforceable undertaking: see RG 100.28–RG 100.29.

We will not remove a court enforceable undertaking from the register: see RG 100.30.

Listed companies may need to disclose the court enforceable undertaking to the relevant market operator: see RG 100.31.

We may report publicly on whether a court enforceable undertaking has been complied with or if we become aware of a failure to comply with the undertaking: see RG 100.32–RG 100.36.

Our approach to publicising court enforceable undertakings

- RG 100.24 Our approach to public comment on enforcement action is contained in [Information Sheet 152](#) *Public comment on ASIC's regulatory activities* (INFO 152). There is significant public interest in ensuring that consumers, industry and the broader community are aware of the enforcement action we take. Transparency and disclosure are important factors in market integrity and consumer confidence—they serve to promote deterrence and educate consumers and industry.
- RG 100.25 Given this, we will not accept court enforceable undertakings in confidence, or on the basis that the terms of an undertaking or the parties to it are confidential.
- RG 100.26 Court enforceable undertakings accepted by ASIC are made available to the public on the [court enforceable undertakings register](#) on the ASIC website (see www.asic.gov.au/euregister).
- RG 100.27 It is also our practice to issue a media release in a form determined by ASIC when we accept an undertaking. We may also report on compliance with the undertaking, and make available for public inspection summaries of reports by independent experts on compliance with the undertaking.

- RG 100.28 A party providing a court enforceable undertaking may ask for certain information not to be released. We will not release information if we are satisfied that the information:
- (a) is commercial in confidence;
 - (b) consists of personal details of an individual; or
 - (c) should not be disclosed because its release would be against the public interest.

Note: Other information about an undertaking will also be made available for public inspection—see RG 100.67–RG 100.74.

- RG 100.29 If information is deleted, the copy of the court enforceable undertaking will include a note stating that certain information has been deleted.

- RG 100.30 The [court enforceable undertakings register](#) provides a complete record of the undertakings ASIC has accepted over time. It is our policy not to remove an undertaking from the register once the obligations of the undertaking have been fulfilled.

Disclosure to the market operator

- RG 100.31 A company listed on a prescribed financial market may give ASIC a court enforceable undertaking. In this circumstance, the listing rules of that market may require the company to release a copy of the undertaking to the market operator. The company should also ensure they comply with s674 of the Corporations Act.

Note: For example, if a company is listed on the financial market operated by ASX Limited (ASX), this obligation may arise under ASX Listing Rule 3.1.

Reporting on compliance

- RG 100.32 We may report publicly on whether a party that has provided a court enforceable undertaking has complied with it.
- RG 100.33 A court enforceable undertaking may require reporting by an independent expert. In these cases, we will generally make a summary of the final report, or a statement that refers to the content, public: see RG 100.67.
- RG 100.34 Our statements on compliance with undertakings will also be available on the [court enforceable undertakings register](#) on the ASIC website (see www.asic.gov.au/euregister).
- RG 100.35 We will not usually report publicly on compliance with a court enforceable undertaking to refrain from engaging in particular conduct or activities. For

example, undertakings to refrain (whether permanently or for a period of time) from:

- (a) taking part in the management of corporations;
- (b) providing financial services;
- (c) performing a significant role in an audit; or
- (d) accepting appointments to insolvency administrations.

RG 100.36 However, we will report publicly if we become aware there has been a failure to comply with the undertaking.

F Can a court enforceable undertaking be varied or withdrawn?

Key points

A party who has provided a court enforceable undertaking may withdraw or vary the undertaking only with ASIC's consent in writing: see s93A(2) and 93AA(2) of the ASIC Act, s322(2) of the National Credit Act and s262A(2) of the SIS Act.

We will agree to vary a court enforceable undertaking (see RG 100.37–RG 100.39), or allow for a court enforceable undertaking to be withdrawn (see RG 100.40–RG 100.41), in limited circumstances.

Varying a court enforceable undertaking

- RG 100.37 Variations of a court enforceable undertaking do not replace the original undertaking—they merely modify it.
- RG 100.38 We will generally only agree to vary a court enforceable undertaking when:
- (a) the variation will not alter the spirit of the original undertaking;
 - (b) compliance with the original undertaking is frustrated; or
 - (c) there has been a material change in the circumstances that led to the original undertaking being given.
- RG 100.39 A variation of a court enforceable undertaking should be in writing. It should be offered by the party and accepted by ASIC in the same manner as the original undertaking. The original undertaking should be attached to the variation document. Both the original undertaking and the variation document remain on the [court enforceable undertakings register](#) on the ASIC website (see www.asic.gov.au/euregister).

Withdrawing an offer of a court enforceable undertaking

- RG 100.40 In exceptional circumstances, we may allow a party to withdraw a court enforceable undertaking after we have accepted it. If we consent to the withdrawal, the party is no longer bound by the terms of the undertaking. An example of an exceptional circumstance is where an Australian financial services (AFS) licensee has asked ASIC to revoke its licence and is no longer able to comply with the undertaking (and nor is it necessary that it do so).
- RG 100.41 Withdrawals of court enforceable undertakings are also recorded on the [court enforceable undertakings register](#) on the ASIC website.

G What happens if a court enforceable undertaking is not complied with?

Key points

We will ordinarily apply to the court for appropriate orders if we consider there has been a breach of a term of a court enforceable undertaking and further action by ASIC is warranted

RG 100.42 If we have reason to believe that a party has not complied with a term of a court enforceable undertaking, we may apply to the court for appropriate orders.

RG 100.43 We will publicise our application to the court and may seek legal costs.

RG 100.44 If the court is satisfied that the party has breached a term of the court enforceable undertaking, it has several options. The court can:

- (a) direct the party to comply with the particular term of the undertaking;
- (b) direct the party to transfer money to:
 - (i) the Commonwealth, if it is a person or a company; or
 - (ii) the scheme property, if it is a responsible entity under the ASIC Act.

The amount of money can be up to the amount of any financial benefit the party obtained, directly or indirectly, that is reasonably attributable to the breach.

- (c) direct the party to compensate any other person who has suffered loss or damage as a result of the breach of the undertaking; or
- (d) make any other order that the court considers appropriate.

Note: See s93A(4) and 93AA(4) of the ASIC Act, s322(4) of the National Credit Act and s262A(4) of the SIS Act.

RG 100.45 The aim of the court orders is to compel the party to comply with the court enforceable undertaking. The aim is also to put all parties in the position they would have been in had the undertaking not been breached.

Appendix: Guidance on the use of independent experts

Key points

This appendix provides guidance on our requirements whenever a court enforceable undertaking requires an independent expert to report on specified matters: see RG 100.46–RG 100.50.

The expert can be appointed by ASIC (see RG 100.51–RG 100.52) or by the party providing the undertaking (see RG 100.53–RG 100.55).

Experts must be capable of exercising objective and impartial judgement during an engagement. We will assess the independence of the expert before we appoint them or consent to their appointment: see RG 100.56–RG 100.66.

We will make public a summary of the report or a statement that refers to the content of the report: see RG 100.67–RG 100.74.

Reports by independent experts

RG 100.46 The guidance in this appendix applies whenever a court enforceable undertaking requires independent reporting on undertakings given by, or the conduct of, the party providing the undertaking.

RG 100.47 In most cases the party may appoint the expert, subject to ASIC consent. However, in some cases, we will appoint the independent expert and require the party to undertake to bear the cost of the expert's work under the court enforceable undertaking: see RG 100.51–RG 100.52.

RG 100.48 Regardless of who appoints the independent expert, we will assess:

- (a) the competence of the expert (see RG 100.49);
- (b) the independence of the expert (see RG 100.56–RG 100.62); and
- (c) the expert's arrangements for managing conflicts of interest arising during the engagement (see RG 100.63–RG 100.66).

Our assessment of these factors will help ensure the expert is capable of exercising objective and impartial judgement during an engagement.

RG 100.49 We will assess the competence of the independent expert against the following factors:

- (a) whether the expert has adequate resources to perform the necessary work. 'Adequate resources' may include access to appropriate third-party specialists;
- (b) the qualifications of the expert and whether the expert has the requisite level of technical expertise. This will include whether the expert meets the requirements of any relevant industry codes;

- (c) the experience of the expert (e.g. whether the expert has undertaken comparable work); and
- (d) whether the expert can meet relevant reporting timeframes.

Note: These factors non-exhaustive. They are adapted from [Regulatory Guide 112 Independence of experts](#) (RG 112) at RG 112.40.

RG 100.50 The independent expert appointed under a court enforceable undertaking will provide the report to ASIC, and usually to the party providing a court enforceable undertaking. ASIC will publish a summary of the final report of the expert, or a statement that refers to the content of the final report: see RG 100.67.

Appointment of an independent expert by ASIC

RG 100.51 We will generally appoint an independent expert when:

- (a) a court enforceable undertaking requires an expert to assess the development or implementation of a large scale, complex or significant compensation or remediation program or rectification of compliance systems;
- (b) there have previously been significant shortcomings in work undertaken or remediation implemented by the party providing a court enforceable undertaking; or
- (c) the party has a history of failing to adequately address compliance issues.

RG 100.52 The party must bear the cost of the independent expert's work under the court enforceable undertaking.

Appointment of an independent expert by the party

RG 100.53 If we do not appoint an independent expert, a party providing a court enforceable undertaking may appoint an independent expert. When this is the case, we require a standard term in the court enforceable undertaking that the promisor will obtain our consent to the appointment, and to the terms of the expert's retainer, before appointment. For some of the matters we will consider before consenting to an appointment, see RG 100.57 and RG 100.64.

RG 100.54 When a party appoints an independent expert, we will also require the standard terms to set out that:

- (a) the party's retainer for the expert must include a statement that the work of the expert is being carried out for the party and ASIC. The statement

must also acknowledge that ASIC is relying on the work of the expert;
and

- (b) we are entitled to be informed of, provided with, or copied into all communications between the party and the expert. This includes, but is not limited to, negotiations about fees.

RG 100.55 These terms will help ASIC ensure an expert retains independence when performing an engagement under a court enforceable undertaking.

Assessing the independence of the expert

RG 100.56 In deciding whether to appoint an expert or to consent to the appointment of an expert proposed by a party providing a court enforceable undertaking, we will consider whether the proposed expert is independent of the party. We will not appoint an expert or consent to an appointment unless we are satisfied that the proposed expert can exercise objective and impartial judgement.

Note: See [RG 112](#) and [Regulatory Guide 111](#) *Content of expert reports* (RG 111).

RG 100.57 We will assess the following non-exhaustive factors in our consideration of the independence of a proposed expert:

- (a) whether the expert is the auditor of the party;
- (b) whether fees and remuneration from the party in the two years before the proposed appointment are material to the expert's revenue in Australia;
- (c) whether the staff undertaking work on the engagement or their immediate family have a financial interest in the party, including financial interests held through an intermediary;
- (d) whether the staff undertaking work on the engagement or the expert owe an amount to the party that has been advanced other than in the ordinary course of business or on terms and conditions other than those that would normally apply to such a loan. The loan can also be from a related body corporate of the party;
- (e) whether there are any existing or previous business or personal relationships between the expert or the expert's staff or their immediate family and the party or its officers;
- (f) whether the expert or the expert's staff are officers of the party, or have been in the previous two years;
- (g) whether the expert has participated in strategic planning for the party;
- (h) whether the expert has previously reviewed the transactions or compliance systems that are to be evaluated, or has designed or implemented those systems;

- (i) whether there is actual or potential litigation between the expert and the party;
- (j) whether the expert has acted on behalf of the party in litigation or disputes with third parties;
- (k) if the expert has done work related to another court enforceable undertaking in the past, whether the expert, in the two years following appointment under the undertaking, has performed work for that party (other than under the undertaking) that generated material fees;
- (l) whether the expert has appropriate arrangements to manage conflicts of interest that may arise in the engagement under the court enforceable undertaking (see RG 100.63 and RG 100.66); and
- (m) any other matters that render, or may reasonably be perceived to render, the expert or the expert's staff incapable of exercising objective and impartial judgement.

RG 100.58 A party providing a court enforceable undertaking should obtain information about all of these factors from a proposed expert, and provide that information to ASIC when seeking our consent to the appointment of the proposed expert. We may refuse to consent to an appointment where this information is not provided.

RG 100.59 We will assess all of the factors in RG 100.57 on a case-by-case basis. Our assessment will aim to determine the cumulative effect of the factors on a proposed expert's ability to exercise objective and impartial judgement.

RG 100.60 We will carefully scrutinise any proposal by a party providing a court enforceable undertaking to appoint the promisor's auditor as an independent expert under a court enforceable undertaking. We will consider the nature of the engagement, the risk of self-review and the public perception created by any such appointment.

RG 100.61 We will also look carefully at the information provided about the following factors from RG 100.57:

- (a) whether fees and remuneration from the party in the two years before the proposed appointment are material to the expert's revenue in Australia (see RG 100.57(b)) or
- (b) whether the expert can demonstrate appropriate arrangements to manage conflicts of interest that may arise in the engagement, taking into account the nature of the engagement and the size, scope and nature of the expert's business (see RG 100.57 and RG 100.63–RG 100.66).

RG 100.62 We consider that these are factors that indicate risks relating to an expert's ability to exercise objective and impartial judgement.

Expert's arrangements to manage conflicts of interest

RG 100.63 We will assess the independence factors set out at RG 100.57 before we consent to the appointment of an independent expert. However, it is important that an expert is able to manage conflicts of interest that may arise during an engagement under a court enforceable undertaking. Conflicts of interest may compromise the expert's ability to exercise objective and impartial judgement during the engagement.

RG 100.64 Accordingly, we will also consider whether the proposed expert can demonstrate appropriate arrangements to manage conflicts of interest. We will assess the following non-exhaustive factors:

- (a) procedures for identifying conflicts of interest;
- (b) procedures for assessing and evaluating conflicts of interest;
- (c) procedures for dealing with, and responses to, particular conflicts;
- (d) whether there is a written conflicts management policy;
- (e) the period of time that has elapsed since the arrangements were last reviewed internally or by a third party (e.g. an auditor);
- (f) the structural arrangements in place to manage conflicts of interest and how they support management of conflicts of interest;
- (g) the information barriers in place to assist in managing conflicts of interest;
- (h) how the conflicts management arrangements in place ensure that conflicts do not affect the quality of work undertaken for a party providing a court enforceable undertaking, or ASIC, under a court enforceable undertaking, and how the effectiveness in achieving this is tested;
- (i) how conflicts management arrangements are formulated and approved (e.g. whether they were approved by the board or governing body—or by a delegated body);
- (j) how conflicts management arrangements are communicated to staff;
- (k) whether a person is nominated to be responsible for the implementation, review and updating of the conflicts management arrangements, and who the relevant staff report to;
- (l) the procedures in place to identify instances of non-compliance with the conflicts management arrangements, how non-compliance is dealt with, and how non-compliance is recorded and reported;
- (m) how the arrangements in place ensure remuneration policies and the provision of benefits practices do not significantly compromise the integrity and quality of services provided;

- (n) whether the processes in place ensure that more serious conflicts are referred to senior management or a governing body; and
- (o) the circumstances where conflicts of interest are avoided (as opposed to dealing with conflicts through disclosure or internal controls) and the procedure for making and recording these decisions.

Note: The factors in RG 100.64 are adapted from Table 1 in [Regulatory Guide 181 Licensing: Managing conflicts of interest](#) (RG 181). [RG 112](#) also contains relevant guidance for managing conflicts of interest under an engagement. Most entities undertaking independent reviews and reports under a court enforceable undertaking will be AFS licensees, and accordingly ought to be able to demonstrate the matters in RG 100.64.

RG 100.65 We do not suggest that all the issues are relevant to every particular proposed expert, or that they are exhaustive: see RG 181.64. The party should obtain from a proposed expert information about as many of the factors in RG 100.64 as are relevant in the circumstances. The party should then provide that information to ASIC when seeking our consent to the appointment of the proposed expert. We will carefully consider whether a proposed expert can demonstrate appropriate arrangements to manage conflicts of interest: see RG 100.64(b). We may be satisfied that particular arrangements are not relevant to an engagement or to the size, scope and nature of the proposed expert's business.

RG 100.66 The expert must notify ASIC if a conflict of interest arises during an engagement. We may require the party to terminate an expert's engagement if the conflict compromises, or may reasonably be seen to compromise, the expert's ability to exercise objective and impartial judgement.

Publicity for independent expert reports

RG 100.67 We will publish a summary of the independent expert's final report, or a statement that refers to the content of the report. We will publish this on the [court enforceable undertakings register](#) on the ASIC website (see www.asic.gov.au/euregister).

RG 100.68 We may also issue a media release referring to the content of an expert report, and may from time to time refer publicly to the content of the report.

RG 100.69 Publishing summaries of expert reports promotes the integrity of, and public confidence in, our financial markets and corporate governance.

RG 100.70 Generally, we will not accept a court enforceable undertaking that limits our rights to publish a summary of an expert's final report and make reference to the content of that report. If an undertaking requires delivery of an interim report, we will normally also make publicly available a summary of the interim report or a statement that refers to the content of the interim report.

However, we may agree not to publish a summary of an interim report. We expect those cases to be rare. We consider that public confidence in our financial markets and corporate governance is likely to be promoted by publishing summaries of all expert reports under a court enforceable undertaking.

- RG 100.71 When we make a summary of an expert report available to the public, we may agree to use a summary prepared by the expert. Experts appointed to do work required by a court enforceable undertaking should, accordingly, prepare a summary of their report that is suitable for publication.
- RG 100.72 We may supplement the summary provided by the expert, or prepare our own summary of a report. We will do this if we consider a summary prepared by an expert is not adequate or accurate.
- RG 100.73 Generally, we will not refer to any information from an expert report that:
- (a) is personal information of an identified natural person whose acts or omissions are not the subject of, or a concern mentioned in, the court enforceable undertaking;
 - (b) we are satisfied would be unreasonable to release. Information is generally unreasonable to release if it would unreasonably affect the business, commercial or financial affairs of the party providing a court enforceable undertaking or a third party. The effect must be other than an effect that arises from the execution, implementation and reporting of the outcomes of the court enforceable undertaking;
 - (c) we are satisfied should not be released because it would be against the public interest to do so; or
 - (d) the party has asked ASIC not to release. We must be satisfied that:
 - (i) it would be unreasonable to release (see RG 100.73(b)); or
 - (ii) it should not be released because it would be against the public interest to do so (see RG 100.73(c)).
- RG 100.74 The standard terms of a court enforceable undertaking will reflect our policy. The terms will require the party to acknowledge that we:
- (a) may issue a media release referring to the content of the expert report;
 - (b) may from time to time publicly refer to the content of the expert report; and
 - (c) will make available for public inspection a summary of the content of the expert report, or a statement that refers to the content of the expert report.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
CDPP	Commonwealth Director of Public Prosecutions
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
INFO 151 (for example)	An ASIC information sheet (in this example numbered 151)
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
RG 256 (for example)	An ASIC regulatory guide (in this example numbered 256)
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
s93A (for example)	A provision of the ASIC Act (in this example numbered 93A), unless otherwise specified

Related information

Headnotes

acceptable and standard terms, appointment of independent experts, compliance with the law, court enforceable undertaking, court enforceable undertakings register, effective regulatory outcome, enforcement remedy, expert report, public reporting, unacceptable terms

Regulatory guides

[RG 78](#) *Breach reporting by AFS licensees and credit licensees*

[RG 98](#) *ASIC's powers to suspend, cancel and vary AFS licences and make banning orders*

[RG 111](#) *Content of expert reports*

[RG 112](#) *Independence of experts*

[RG 181](#) *Licensing: Managing conflicts of interest*

[RG 218](#) *Licensing: Administrative action against persons engaging in credit activities*

[RG 256](#) *Client review and remediation conducted by advice licensees*

Information sheets

[INFO 28](#) *About the enforceable undertakings register*

[INFO 151](#) *ASIC's approach to enforcement*

[INFO 152](#) *Public comment on ASIC's regulatory activities*

Legislation

ASIC Act, s93A, 93A(1), 93A(2), 93A(4), 93AA, 93AA(1), 93AA(2), 93AA(4)

Corporations Act, s674

National Credit Act, s322, 322(1), 322(2), 322(4)

SIS Act, s262A, 262A(1), 262A(2), 262A(4)