Enforceable Undertakings: An Improved Form of Settlement

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A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy

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Successful completion of this thesis would not have been possible without the invaluable advice and assistance of many people; and it is both a duty and a pleasure to express and record my gratitude.

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Finally, my heartfelt love and gratitude go to my mother, Susan Nehme, my father, Jean Nehme and my brother, Henri for their understanding, sacrifices and love. It is to them that I dedicate this work.
The work presented in this thesis is, to the best of my knowledge and belief, original except as acknowledged in the text. I hereby declare that I have not submitted this material, either in full or in part, for a degree at this or any other institution.

Marina Nehme
# Table of Contents

Acknowledgments ............................................................................................................. ii
Statement of Authenticity ................................................................................................ iii
Table of Contents ............................................................................................................. iv
List of Tables ..................................................................................................................... x
List of Diagrams ............................................................................................................... xi
C1 Publications Based on this Thesis ........................................................................... xiii
Abstract ........................................................................................................................... xiv

## Chapter 1: Introduction ................................................................................................. 1

1.1 Research Proposal ..................................................................................................... 1

1.1.1 Research Question ........................................................................................ 2

1.1.2 Theoretical Framework ................................................................................. 3

1.2 Justification of Research ..................................................................................... 4

1.2.1 Legislative Aspect ....................................................................................... 7

1.2.2 Benefits to ASIC ........................................................................................ 9

1.2.3 Benefits to the Regulated Entities ............................................................... 10

1.2.4 Benefits to Society ...................................................................................... 10

1.3 Scope of the Thesis .............................................................................................. 11

1.4 Methodology ....................................................................................................... 11

1.4.1 Issues Relating to Transparency ............................................................... 13

1.4.2 Possible Unreasonableness in the Terms of Settlements ......................... 14

1.4.3 Monitoring Compliance ............................................................................. 15

1.4.4 The Enforcement of Enforceable Undertakings ......................................... 16

1.5 Structure of the Thesis ....................................................................................... 17
Chapter 2: Theories of Regulation and Strategies for Efficiency

2.1 Introduction

2.2 Normative Analysis as a Positive Theory

2.3 Economic Theory of Regulation

2.4 Game Theory of Regulation

2.5 Strategic Regulation Theory
   2.5.1 The Enforcement Pyramid: An Example of Strategic Regulation
   2.5.2 Regulatory Tripartism
   2.5.3 Braithwaite Theory Reassessed

2.6 Restorative Justice

2.7 Self-regulation

2.8 Problem Solving Strategy
   2.8.1 Need for Cooperation between Enforcement and Prevention Approaches
   2.8.2 Need for Proactive Strategies
   2.8.3 Other Problems with Problem Solving Strategy

2.9 Questioning the Reasonableness of Regulation

2.9.1 Plugging the Loopholes in Legislation
   2.9.2 Tough Regulation and Legalism
   2.9.3 Resentment of the Regulator by Regulated Entities

2.10 The Social Responsibility of Regulators

Chapter 3: The Use of Enforceable Undertakings by the Australian Securities and Investments Commission

3.1 ASIC and its Powers

3.2 The Origin of Enforceable Undertakings and their Introduction into ASIC’s Regulatory System

3.3 The Nature of the Enforceable Undertaking

3.4 Policy behind the Use of Enforceable Undertakings by ASIC
   3.4.1 Considerations Taken into Account When Accepting an Undertaking
3.4.2 During and after Court Proceedings .................................................. 75
3.4.3 In Conjunction with Administrative Appeal Tribunal Proceedings ........ 77

3.5 Analysis of the Enforceable Undertakings Accepted by ASIC .................. 78

3.5.1 Who Has Entered into Undertakings with ASIC? ............................... 80
3.5.2 The Alleged Breaches That Have Been the Subject of an Undertaking ..... 81
3.5.3 The Particular Advantages of Undertakings in Achieving Effective Regulatory Outcomes ................................................................. 82
3.5.4 The Promises Made in the Undertakings ............................................. 85
3.5.5 Correspondence between Promises and Goals of Undertakings .......... 87

3.6 In Summary ................................................................................................. 90

Chapter 4 : Enforceable Undertakings: Are They Procedurally Fair? ............. 92

4.1 The Importance of Procedural Fairness .................................................... 92
4.2 Procedural Fairness and its Elements ....................................................... 98

4.2.1 Criteria from an Administrative Law Perspective ............................... 100
4.2.2 Criteria from the Perspective of Regulated Entities .......................... 110
4.2.3 In Brief ................................................................................................. 119

4.3 The Extent of Procedural Fairness in Enforceable Undertakings .......... 121

4.3.1 Representation Rule ........................................................................... 123
4.3.2 Correctability Rule ............................................................................. 126
4.3.3 Impartiality Rule ................................................................................ 133
4.3.4 Consistency Rule ................................................................................ 136

4.4 In Summary ................................................................................................. 137

Chapter 5 : Reasonable Undertakings? ....................................................... 142

5.1 The Importance of Reasonableness ....................................................... 142
5.2 Disclosure .................................................................................................. 146

5.2.1 Disclosure in a Settlement v Disclosure in an Undertaking .......... 146
5.2.2 Disclosure in Litigation v Disclosure in an Undertaking ..................... 148
5.2.3. Corrective Nature of Disclosure in Undertakings ................................. 151
5.3. Implementation and/or Review of Compliance Program .......................... 154
5.3.1. Costs .................................................................................................. 155
5.3.2. Benefits ............................................................................................ 159
5.4. Refund ................................................................................................... 163
5.5. Voluntary Ban ....................................................................................... 166
5.6. In Summary .......................................................................................... 171

6.1 The Wide Impact of Enforceable Undertakings ........................................ 172
6.2 Case Study: An Undertaking Protecting Victims of an Alleged Breach ....... 174
6.3 Protecting the Interests of Victims of an Alleged Breach ............................. 177
6.3.1 Disclosure .......................................................................................... 177
6.3.2 Compensation ..................................................................................... 184
6.3.3 Community Service Obligations ........................................................ 187
6.4 Businesses in a Similar Industry ............................................................... 190
6.5 Rights of the Victims to Sue ................................................................... 193
6.5.1 May an Undertaking be Used as Evidence in Court? ............................ 195
6.5.2 Impact of Breach of an Undertaking on Third Parties ......................... 201
6.5.3 Use of Information Collected by ASIC in Proceedings ....................... 204
6.6 In Summary ............................................................................................ 210

Chapter 7: Enforceable Undertaking: A Restorative Sanction? ...................... 212
7.1 Enforceable Undertaking and its Link to Restorative Justice ..................... 212
7.2 The Elements of Restorative Justice ....................................................... 213
7.2.1 The Reparation of Harm .................................................................... 213
7.2.2 The Involvement of Stakeholders in the Justice Process ...................... 215
7.2.3 Community and Government Cooperation ......................................... 216
7.3 Applying the Elements of Restorative Justice to Enforceable Undertakings . 220
Chapter 7: The Reparation of Harm

7.3.1 The Reparation of Harm ................................................................. 221
7.3.2 Stakeholder Involvement ................................................................. 232
7.3.3 Community and Government Cooperation ...................................... 239
7.4 In Summary ......................................................................................... 241

Chapter 8: Monitoring Compliance with Enforceable Undertakings

8.1 The Importance of Monitoring ............................................................ 246
8.2 Methods Used by ASIC to Monitor Undertakings .................................. 250
8.3 Monitoring of Companies ..................................................................... 252
  8.3.1 Only Company Monitoring Compliance ...................................... 253
  8.3.2 Monitoring by Officers of the Company ...................................... 255
  8.3.3 Monitoring by External and Independent Person ....................... 264
  8.3.4 No Monitoring ............................................................................ 277
8.4 Monitoring of Individuals .................................................................... 279
  8.4.1 Only Self-monitoring ................................................................. 280
  8.4.2 Monitoring by Employer .............................................................. 280
  8.4.3 Monitoring by External and Independent Person ....................... 283
  8.4.4 No Monitoring ............................................................................ 283
  8.4.5 Assessment and Suggestions ...................................................... 285
8.5 ASIC on the Offensive ......................................................................... 289
8.6 In Summary ......................................................................................... 292

Chapter 9: Enforceable Undertakings and the Court System

9.1 Consequences of Non-compliance with the Terms of an Undertaking ...... 296
9.2 Regulators’ Policies in Relation to Enforcement ..................................... 299
9.3 Judicial Attitudes to the Use of Enforceable Undertakings .................... 304
9.4 Matters Considered by the Courts before Enforcing an Undertaking ....... 312
  9.4.1 What Circumstances Led to the Undertaking? .............................. 313
  9.4.2 Is There a Breach of the Undertaking? ......................................... 316
9.4.3 If There is a Breach, Should the Court Enforce the Undertaking? .......... 318
9.5 Results of Applications for Orders to Enforce Undertakings .................. 332
9.6 In Summary ............................................................................................. 339

Chapter 10: Conclusion .................................................................................... 343
10.1 Aim of this Thesis .................................................................................... 343
10.2 Transparency of an Enforceable Undertaking ......................................... 345
10.3 Reasonableness of an Enforceable Undertaking ...................................... 347
10.4 Monitoring Compliance with the Terms of an Undertaking .................. 351
10.5 Enforcement of an Undertaking ............................................................... 353
10.6 In Summary ............................................................................................. 354

Bibliography ..................................................................................................... 356
<table>
<thead>
<tr>
<th>Table 3.1.</th>
<th>ASIC in a Snapshot</th>
<th>60</th>
</tr>
</thead>
<tbody>
<tr>
<td>Table 5.1.</td>
<td>Comparison of ACCC press releases</td>
<td>150</td>
</tr>
<tr>
<td>Table 6.1.</td>
<td>Disclosure to victims of the alleged breach</td>
<td>178</td>
</tr>
<tr>
<td>Table 6.2.</td>
<td>Matters where ASIC required the promisor to disclose the undertaking to victims of the alleged offence</td>
<td>182</td>
</tr>
<tr>
<td>Table 6.3.</td>
<td>Matters where ASIC required the promisor to pay compensation to victims of the alleged offence</td>
<td>185</td>
</tr>
<tr>
<td>Table 7.1.</td>
<td>The principles and values of restorative justice</td>
<td>220</td>
</tr>
<tr>
<td>Table 8.1.</td>
<td>Monitoring by external and independent experts</td>
<td>265</td>
</tr>
<tr>
<td>Table 8.2.</td>
<td>Monitoring of individuals who entered into undertakings</td>
<td>284</td>
</tr>
</tbody>
</table>
List of Diagrams

Diagram 2.1. Braithwaite’s enforcement pyramid ................................................................. 27
Diagram 2.2. Vicious cycle resulting from legalistic and unreasonable legislation ...... 52
Diagram 3.1. Enforcement Pyramid: Sanctions Available to ASIC ................................. 66
Diagram 3.2. ASIC’s use of enforceable undertakings .................................................. 78
Diagram 3.3. Alleged offenders entering into enforceable undertakings ...................... 80
Diagram 3.4. The interaction of the different promises in undertakings ....................... 86
Diagram 4.1. Outcome of an enforceable undertaking in case of lack or perceived lack of procedural fairness ........................................................................ 95
Diagram 4.2. Outcome of an enforceable undertaking in case of procedural fairness .... 96
Diagram 4.3. Overlap between right to be heard in administrative law and representation from a psychological perspective ............................................. 119
Diagram 4.4. Interaction of the different criteria ............................................................. 120
Diagram 4.5. Procedural fairness and its application to enforceable undertakings ...... 139
Diagram 6.1. Parties involved in negotiations that may lead to an enforceable undertaking ........................................................................................................... 172
Diagram 6.2. Parties affected by an alleged breach of the law that may lead to an enforceable undertaking ................................................................. 173
Diagram 7.1. Application of the three principles of restorative justice to enforceable undertakings ............................................................................................... 243
Diagram 7.2. Enforceable undertakings: the middle ground ........................................ 244
Diagram 8.1. Impact of monitoring system on an enforceable undertaking .................. 249
Diagram 8.2. Monitoring of undertakings ..................................................................... 294
Diagram 9.1. Possible result of non-enforcement of an undertaking ......................... 298
Diagram 9.2. Steps taken by the regulators when an enforceable undertaking is breached ........................................................................................................... 300
Diagram 9.3. Factors that may be considered by the Court when enforcing the undertaking ........................................................................................................... 341
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
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<tbody>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
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<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
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<td>ADJR Act</td>
<td>Administrative Decisions (Judicial Review) Act 1977 (Cth)</td>
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<td>ASX</td>
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<td>Corporations Act 2001 (Cth)</td>
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</tr>
</tbody>
</table>
**C1 Publications Based on this Thesis**


**Marina Nehme**, ‘Justice to Outsiders through Undertakings’ (2009) 9 *Queensland University of Technology Law and Justice Journal*, 85–100

**Marina Nehme**, ‘The Use of Enforceable Undertakings by the Australian Competition and Consumer Commission’ (2008) 27 *University of Tasmania Law Review*, 197–228


**Forthcoming Publications in C1 Journals:**


**Marina Nehme**, ‘Enforceable Undertakings: Are They Procedurally Fair?’ (September 2010) *Sydney Law Review*
An enforceable undertaking is an administrative sanction available to a number of Australian regulators at both the Federal and State level. It is a promise enforceable in court. In an enforceable undertaking, the alleged offender, known as the promisor, promises the regulator (for the purpose of this thesis, the Australian Securities and Investments Commission (‘ASIC’)) to do or not to do certain actions. Such a sanction is the result of an agreement between the alleged offender and the regulatory agency. An enforceable undertaking is thus a form of settlement.

By analysing the 286 enforceable undertakings accepted by ASIC over the last decade (1998-2008), this thesis considers whether an enforceable undertaking is an improved form of settlement and identifies the strengths and weaknesses of this sanction. For the purpose of comparison, the manner in which enforceable undertakings are used by other regulators such as the Australian Competition and Consumer Commission is also considered. Some of the criticisms levelled at settlements, such as issues relating to transparency and accountability, are referred to and an assessment is made as to whether such criticisms apply to enforceable undertakings.

The study finds that an enforceable undertaking is a flexible sanction that provides the regulator with a creative way to deal directly with certain alleged contraventions of the law. Further, an enforceable undertaking may be deemed to be moderately restorative in nature. Accordingly, this sanction may provide, in certain instances, a better outcome than other remedies that are at the regulator’s disposal. Such a remedy has its own place in the Braithwaite’s enforcement pyramid.
An enforceable undertaking is, in addition, more transparent than a settlement. Its terms are unlikely to be perceived as unreasonable either by the promisor or the victims of the alleged offender. Further, while the use of settlements raises issues of accountability, the fact that an enforceable undertaking is subject to judicial review and is enforceable in court provides a certain protection to the promisor. Ultimately, if the terms of an undertaking are unreasonable, it is unlikely for the courts to give such promises any legal effect.

Lastly, to ensure compliance of the promisor with the terms of the undertaking, an effective monitoring system has to be in place. However, since ASIC is more reactive than proactive in relation to the monitoring of undertakings, such a monitoring system relies heavily on self-regulation by the promisors. The thesis concludes that the current system of monitoring enforceable undertakings has a number of flaws that should be taken into account by the regulator.

In summary, an enforceable undertaking is an enhanced form of settlement, the use of which by regulators should continue and generally replace the use of other forms of settlements.
Chapter 1 : Introduction

1.1 Research Proposal

An enforceable undertaking is a promise enforceable in a court of law. Whilst the breach of such an undertaking is not considered contempt of court, once the court orders a person to comply with an undertaking, a breach of the court order is contempt.\(^1\) Enforceable undertakings were first introduced to the Australian Competition and Consumer Commission (‘ACCC’) in 1993 through s 87B of the Trade Practices Act 1974 (Cth) (‘Trade Practices Act’).\(^2\) The sanction became available to the Australian Securities and Investments Commission (‘ASIC’) in July 1998 following the introduction of ss 93AA and 93A to the Australian Securities and Investments Commission Act 2001 (Cth) (‘ASIC Act’).\(^3\) It is the use of the sanction by ASIC that will be the focus of this study.

The enforceable undertaking formalises a commonly used regulatory sanction known as the settlement,\(^4\) and may be adapted to apply to different types of situations including situations that might normally escape traditional sanctions. This thesis

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\(^2\) With the passage of the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth), the Trade Practices Act 1974 (Cth) is to be renamed the Competition and Consumer Act 2010 (Cth). The relevant section regarding enforceable undertaking in the Competition and Consumer Act 2010 (Cth) is s 218.

\(^3\) The history behind the introduction of the enforceable undertaking in Australia is discussed in Chapter 3 of this thesis.

examines the manner in which the enforceable undertaking addresses the criticisms faced by regulators when they enter into a settlement.\(^5\) The aim of this research is to illustrate that an enforceable undertaking is a more efficient and effective form of settlement than was previously available to regulators. Further, this study suggests ways to improve the use of the enforceable undertaking so as to make it a sanction that is not only useful but essential to the regulatory system.

1.1.1 **Research Question**

This research studies the use by ASIC of one particular sanction, the enforceable undertaking, because this sanction is considered by many to be a quick, cheap and successful way of dealing with breaches of the law.\(^6\) Further, little research has been undertaken into ASIC’s use of the enforceable undertaking to determine the strengths and weaknesses of that sanction.\(^7\)

The main research question of this thesis is the following: Is the enforceable undertaking an improved form of settlement? Accordingly, the objects of this study are:

- to examine the enforceable undertakings accepted by ASIC, in order to comprehend the policies behind the use of the sanction;

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\(^5\) These criticisms are discussed in 1.4 below.


• to observe the effect that an enforceable undertaking has on the promisor
and on the victims of the alleged offender;
• to study the compliance regime applicable to enforceable undertakings;
and
• to consider the enforceability of the terms of such undertakings.

The way in which this thesis will study these points is set out in the methodology: see 1.4 below.

1.1.2 Theoretical Framework

The research in this thesis is underpinned by the ‘strategic regulation theory’, a theory
of economic regulation usually characterised and represented graphically by John
Braithwaite’s pyramid of enforcement model. In the author’s view, this theory paves
the way for a system of effective regulatory compliance.

The concepts of restorative justice and self-regulation also play a role in this study.
Restorative justice is of importance because an undertaking may provide justice to
third parties, while self-regulation is relevant to the system of monitoring
undertakings. The thesis examines whether these two concepts apply to the use of
enforceable undertakings. Emphasis is also placed on the procedural fairness of
sanctions. These concepts are discussed in detail in the literature review: see Chapter
2.

8 George Gilligan, Helen Bird and Ian Ramsay, ‘Civil Penalties and the Enforcement of Directors’
Duties’ (1999) 22(2) University of New South Wales Journal, 417, 425-6. Braithwaite’s pyramid of
enforcement is discussed in 2.5.1.
1.2 Justification of Research

The importance of an effective regulatory system not only for the regulator and the regulated entities, but also for the community in general, is apparent. Sanctions are the cornerstone of any regulatory system. They can act as a catalyst to ensure that laws are complied with because they enable law enforcers to promote desired behaviour and punish undesirable acts.\(^9\) The threat of a sanction may be an incentive towards improved outcomes and compliance with the rules.\(^{10}\) However, people may find themselves surrounded by laws and sanctions that are supposed to protect them when, in reality, those sanctions may not operate effectively. The Australian legal system contains an abundance of sanctions and remedies. Research undertaken by the Australian Law Reform Commission (‘ALRC’) shows that approximately 2400 regulatory penalty provisions exist in areas such as aged care, aviation, banking, border control, corporations, customs, environmental protection, social security and trade practices. The regulatory system has probably reached its saturation point.\(^{11}\) As a result, some sanctions may make other penalties obsolete and/or irrelevant.

Today, the sanctions available under the *Corporations Act 2001* (Cth) (‘*Corporations Act*’) and the *ASIC Act*, for example, are both wide in scope and large in number.\(^{12}\)

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\(^{12}\) ASIC has at its disposal criminal, civil and administrative sanctions. The terms ‘penalty’ and ‘sanction’ have a punitive connotation and have traditionally been used when dealing with criminal actions, while the term ‘remedy’ is used in relation to civil actions. However, due to the blurring of
The existing penalties regulate different offences ranging from contraventions of disclosure requirements to breaches of directors’ duties.\textsuperscript{13}

Yet with all the sanctions available, some offenders still escape punishment. This may be explained by the fact that the sanctions available to law enforcers are not applicable in all situations.\textsuperscript{14} This leaves law enforcers frustrated, and creates a public perception that there is a need for even more sanctions to regulate situations that are beyond the current scope of the legislation. But the reality is that, as commercial activities expand, so non-regulated situations will always appear. If the rules and laws fail to respond to new circumstances and remain inflexible in the face of changes, the statutes will not be applicable and will become of little consequence. All the sanctions in place will not be useful.\textsuperscript{15}

Braithwaite proposed that the more sanctions there are, the better, since if there are a multitude of sanctions dealing with one act, at least one of those sanctions may be able to be used to deal with the offending behaviour.\textsuperscript{16} But, arguably, creating more

\textsuperscript{13} Corporations Act 2001 (Cth).

\textsuperscript{14} John Braithwaite, \textit{To Punish or Persuade: Enforcement of Coal Mine Safety} (State University of New York Press, 1985), 117–18.


\textsuperscript{16} Brent Fisse and John Braithwaite, \textit{Corporations, Crime and Accountability} (State University of New York Press, 1993), 91; Braithwaite, above n 14, 142; Ayres and Braithwaite, above n 10, 36; John Braithwaite, ‘Convergence in Models of Regulatory Strategy’ (1990–91) \textit{2 Current Issues in Criminal Justice} 59, 59; Helen Bird, ‘The Problematic Nature of Civil Penalties in the Corporations
sanctions does not guarantee that an offence will be punishable. As Philip Howard has observed: 17

We seem to have achieved the worst of two worlds; a system of regulation that goes too far while it also does too little.

In the author’s view, this observation reflects today’s reality. A great number of sanctions are contained in the Corporations Act and the ASIC Act, yet there are still a number of situations that escape regulation. 18 This may lead some to believe that the regulatory penalty regime is cumbersome and ineffective. What is required is a sanction that can adapt itself to different situations, a sanction that has proven its effectiveness by its flexibility, cost effectiveness and ease of use by both regulators and regulated entities alike. 19 Such a sanction may already exist in the form of an enforceable undertaking.

Consequently, before any new sanctions are introduced to the regulatory system, it is essential to learn more about the sanctions already available to regulators, because the more that is known about the way existing sanctions—for the purpose of this thesis,

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19 Yeung, above n 4, 2–4.
enforceable undertakings—are applied, the more effective they and the regulatory system may become.

1.2.1 Legislative Aspect

In Australia, regulators such as ASIC have a series of administrative sanctions at their disposal and they use them regularly due to their flexibility and cost effectiveness.\(^{20}\)

For instance, banning orders are one such sanction and in 2008–09, ASIC banned 49 directors from managing companies and 42 people from offering financial services.\(^{21}\)

Similarly, enforceable undertakings are another sanction used by ASIC to ensure compliance with the law,\(^{22}\) and ASIC has accepted 286 such undertakings in the period from 1998 to 2008.\(^{23}\) These are some of the administrative sanctions at ASIC’s disposal and the figures quoted indicate that such sanctions are commonly used by the regulator.

Administrative sanctions are also popular overseas. For example, in the United States, administrative sanctions are extensively used by the different regulatory agencies. At the federal level, in the area of environmental regulation, over 90 per cent of enforcement activity is conducted through the imposition of administrative

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21 Under *Corporations Act*, ss 206F and 920A: see ASIC, *Annual Report 2008–09*, 19. The annual report also noted that ‘a relatively new development for ASIC is our great focus on bannings as deterrent in market abuse matters’ (at 6). Other administrative sanctions available to ASIC are listed in 3.1.

22 *ASIC Act*, ss 93AA and 93A.


sanctions.24 Similarly, financial settlements are commonly used by the Securities Exchange Commission to deal with certain breaches of the securities law.25

In the United Kingdom, administrative sanctions have until recently mostly consisted of monetary penalties that are directly applied to offenders by the regulator, and these penalties were largely limited to the financial regulators. As a result of the Macrory Review report and consultation paper,26 however, the United Kingdom introduced a number of new administrative sanctions into its regulatory system in 2008. One of these new sanctions is the enforcement undertaking, the equivalent of an enforceable undertaking in Australia.27

While discussion continues regarding the benefits or otherwise of introducing additional sanctions and powers into regulatory systems, the use of administrative sanctions such as enforceable undertakings and settlements is on the rise both in Australia and around the world. In this context, a study examining the manner in which the enforceable undertaking is being used is essential in order to understand the strengths and weaknesses of the sanction. This knowledge will permit the enforceable undertaking to be used to its greatest effectiveness, and so may improve the current regulatory system without perhaps any need to introduce additional sanctions.


26 Macrory, above n 9.

27 Regulatory Enforcement and Sanctions Act 2008 (UK), s 50.
Sometimes, simple modifications in the use of an existing sanction may be all that is required to improve the system.\textsuperscript{28}

\textbf{1.2.2 Benefits to ASIC}

It is essential that ASIC assesses from time to time the sanctions at its disposal, since the needs of the community and thus the enforcement policies of the regulator may vary over time. Such an assessment can reveal the strengths and weaknesses of particular sanctions, which may in turn enable the regulator to implement new strategies to overcome difficulties in enforcement it has experienced in the past. Knowing why some sanctions do not operate effectively in some situations, or why other sanctions are not being used, will allow ASIC to improve its enforcement strategies.\textsuperscript{29}

In addition, potential corporate offenders usually calculate the likelihood of being caught. If the sanctions in the system are effective, the chances of being caught and punished will be increased. It follows that this may increase the deterrent effect on potential offenders.\textsuperscript{30}

\begin{flushleft}


\textsuperscript{30} Ayres and Braithwaite, above n 10, 36.
\end{flushleft}
1.2.3 Benefits to the Regulated Entities

William Chambliss states that white-collar criminals are among the most deterrable offenders because they satisfy the following two conditions:31

- they have no commitment to crime as a way of life; and
- their offences are ‘instrumental’ rather than ‘expressive’.

Based on this analysis, effective sanctions are potent in deterring white-collar criminals.32 In addition, when a regulator imposes obsolete or unreasonable sanctions on the regulated entities, resentments are generated in the companies that have been dealt with harshly. This leads to less cooperation from the business community. Effective sanctions should improve compliance in the future and lessen the cost of business. They also benefit the community we live in.33

1.2.4 Benefits to Society

Public confidence in the regulatory system is essential for the wellbeing of all. Effective sanctions ensure better protection for the general public. The feeling of security emanating from this protection leads to greater confidence in the regulatory system and its law enforcers. This may deter people from breaching the law. Furthermore, since sanctions may affect the communities in which a breach has occurred, understanding the social impact of sanctions helps to protect society from undesirable repercussions.

32 Braithwaite, above n 14, 87–8.
1.3 **Scope of the Thesis**

The ALRC has distinguished three categories of penalties that are sometimes wrongly described as administrative penalties in Australian federal regulation. The first category is infringement notices. The second category is that of ‘quasi-penalties’ that vary, qualify or revoke the distribution of benefits. The major areas of operation of such penalties are licensing regimes and social security, but the enforceable undertaking is also considered by the ALRC to be a quasi-administrative penalty. The third category is the financial administrative penalties usually found in taxation and customs legislation. The application and the method of calculation of monetary administrative penalties are predetermined by the relevant legislation.\(^{34}\)

However, for the purposes of this study, the enforceable undertaking is considered to be an administrative sanction. This thesis concentrates on the enforceable undertakings that have been accepted by ASIC between 1998 and 2008, allowing the author to consider the evolution of the use of the enforceable undertaking over a decade. Further, this thesis will mostly focus on cases relating to enforceable undertakings which fall during that decade.

1.4 **Methodology**

In order to enhance the effectiveness of enforceable undertakings accepted by ASIC, the notion of regulation needs to be examined because the framework of this thesis will be directed toward regulatory enforcement activities. Although there is not one

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specific definition of regulation, the following chapters will adopt a functional
definition of regulation: 35

... any control system in art or nature must by definition contain a minimum of the
three components... There must be some capacity for standard setting, to allow a
distinction to be made between more or less preferred states of the system. There
must also be some capacity for information-gathering or monitoring to produce
knowledge about current or changing states of the system. On top of that must be
some capacity for behaviour-modification to change the state of the system.

The database examined in this thesis was accessed via ASIC’s website, where all
enforceable undertakings accepted by ASIC are made available to the public. 36
Analysing the enforceable undertakings that have been accepted by ASIC in the past
is an essential part of this thesis because it reveals the way the sanction is used by
ASIC. Some references to the use of enforceable undertakings by the ACCC are also
made in this thesis due to the similarity of the use of the sanction by the two
regulators. 37

As noted previously, an enforceable undertaking is a form of settlement.
Consequently, to determine any benefits that the enforceable undertaking may have
over the settlement and to understand the strengths and weaknesses of the sanction, it

35 It is important to note that the notion of regulation is difficult to define clearly and precisely;
Bronwen Morgan and Karen Yeung, An Introduction to Law and Regulation (Cambridge
University Press, 2007), 3.

36 ASIC, above n 23.

37 This point is discussed in more detail in Chapters 3 and 9 of this thesis.
is necessary to be aware of criticisms directed toward the use of settlements. Some of the common criticisms of settlements are the following:  

- Lack of transparency of settlements;
- Possible unreasonableness of the terms of the settlement;
- Monitoring compliance; and
- Doubt about the enforceability of settlements.

These four criticisms are the yardsticks against which this thesis measures the enforceable undertaking in seeking to determine whether the enforceable undertaking is a more effective sanction than other forms of settlement.

1.4.1 Issues Relating to Transparency

Settlements, while commonly used by regulators, are not transparent. They are not necessarily disclosed to the public, and although regulators such as ASIC have often issued regulatory guides explaining how they interpret the law and the principles underlying their approach, as well as giving practical guidance to regulated entities, they have not issued such guides relating to their use of settlements. This lack of

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40 Yeung, above n 38, 116–17; Yeung, above n 4, 75–6, 108.

41 For example, ASIC does not maintain a register of settlements accepted by it. There is no statutory obligation on ASIC to disclose the details of any settlement to the public. The only way, therefore, to know about such settlements is through ASIC media releases or annual reports.

transparency may give rise to a view that the settlements negotiated are not adequately grounded in fact and legal principle. Such a perception raises issues relating to the procedural fairness of the settlement. The presence of procedural fairness is very important because if an alleged offender perceives that procedural fairness has not been complied with, he or she may resent the regulator and this in turn may either cause the alleged offender to stop complying with the law or encourage only minimal compliance.

One chapter of this thesis (Chapter 3) therefore, focuses on the policies behind the use of enforceable undertakings by ASIC to examine whether clear guidelines apply to the use of the sanction. Another chapter (Chapter 4) considers the procedural fairness of the enforceable undertaking, both from an administrative law perspective, and also the manner in which a promisor may perceive the procedure relating to enforceable undertaking: Will such a promisor deem the procedure to be fair?

1.4.2 Possible Unreasonableness in the Terms of Settlements

Due to the lack of transparency of settlements, there are no available benchmarks relating to the content of a settlement and an alleged offender may view some of the terms of their agreement as unreasonable. Further, if a person has decided to enter into a settlement with the regulator not because they have breached the law but

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43 Yeung, above n 4, 92.


45 See Chapter 3, especially 3.4.

46 See Chapter 4.

47 Fiss, above n 38, 1076.
because they want to avoid long and expensive court proceedings, the person may deem any admission of liability in such a settlement to be unjust and this may cause the person to resent the regulator.\textsuperscript{48} Additionally, due to the secrecy surrounding settlements, victims of the alleged breach may remain oblivious to the subsequent conduct of the alleged offender. In such situations, the terms of a settlement may be considered to be unreasonable from the perspective of the alleged offender (in cases of the innocence of the person, or where the terms of the settlement impose an onerous obligation on the alleged offender) and/or from the perspective of victims of the alleged breach (in cases where the settlement does not take their interest into account).

To address these issues, two chapters of this thesis (Chapters 5 and 6) consider the impact of the use of enforceable undertakings by ASIC on the promisor and on victims of the alleged breach.\textsuperscript{49} Further, owing to the fact that an enforceable undertaking can impact on the victims of the alleged breach, a third chapter in this thesis (Chapter 7) assesses the restorative nature of the sanction.\textsuperscript{50}

\subsection*{1.4.3 Monitoring Compliance}

Settlements do not necessarily contain information relating to their monitoring. In the absence of such information, there is no guidance on how the regulator is going to monitor the settlement. This may mean that certain breaches of the terms of the settlement may go unnoticed by the regulator. Such a lack of detection would be

\textsuperscript{48}Ibid; Yeung, above n 38, 114–15.

\textsuperscript{49}See Chapters 5 and 6.

\textsuperscript{50}See Chapter 7.
problematic because, if it is perceived that the regulator is not monitoring the settlement, the promisor may stop complying with the terms of their agreement.\textsuperscript{51} Because an enforceable undertaking is similar to a settlement, this problem may also arise in the case of an undertaking.

Accordingly, the existence of a monitoring system in the enforceable undertaking is essential for the successful application of this sanction. Compliance with an undertaking maximises the chance that the goals sought by entering into the undertaking are achieved.\textsuperscript{52} Correspondingly, if an undertaking is not complied with, its purpose is lost and its efficacy is next to nil. As a consequence, it is important to examine the compliance of alleged offenders with enforceable undertakings. One chapter of this thesis (Chapter 8) studies the system of monitoring enforceable undertakings to assess whether it effectively detects breaches of undertakings.\textsuperscript{53} 

\textbf{1.4.4 The Enforcement of Enforceable Undertakings}

Doubt about the enforceability of the terms of settlements in cases where an alleged offender did not comply with his or her obligations under the settlement was one of the reasons that led to the introduction of enforceable undertakings into the Australian regulatory system.\textsuperscript{54}

\textsuperscript{51} Tom Tyler, \textit{Why People Obey the Law} (Princeton University Press, 2\textsuperscript{nd} ed, 2006), 19.

\textsuperscript{52} The goals relating to an undertaking are discussed in Chapter 3.

\textsuperscript{53} See Chapter 8.

\textsuperscript{54} Parker, above n 1, 214; Yeung, above n 4, 105.
One chapter of this thesis (Chapter 9), therefore, assesses the enforceability of enforceable undertakings.\textsuperscript{55} It examines the reaction of the courts when faced with an undertaking: Will they be willing to enforce the terms of the undertaking or not? The enforceability of an undertaking is very important because if such undertakings are not easily enforceable in court, or if the courts refuse to enforce them, then breach of an undertaking will not have any negative consequences. If an undertaking is not enforceable the alleged offender will not have any incentive to comply with the undertaking and, as a result, the sanction will lose its effectiveness.

1.5 Structure of the Thesis

Before applying the methodology discussed in 1.4 above, Chapter 2 of this thesis considers the literature relevant to this study. Subsequent chapters analyse the elements mentioned in the methodology. Chapter 3 briefly looks at ASIC’s powers and the history and nature of enforceable undertakings before focusing on the policies behind ASIC’s use of undertakings. Chapter 4 analyses the procedural fairness of the enforceable undertaking. Chapters 5 and 6 observe the effects that an undertaking may have on the promisor and on victims of the alleged breach. Chapter 7 assesses the restorative nature of the enforceable undertaking while Chapter 8 looks at the monitoring system that applies to undertakings. Chapter 9 considers the enforceability of undertakings in court. This thesis concludes with Chapter 10 which determines that an enforceable undertaking is an improved form of settlement.

\textsuperscript{55} See Chapter 9.
Chapter 2 : Theories of Regulation and Strategies for Efficiency

2.1 Introduction

A theory of regulation is a coherent group of principles of explanation for a class of issues including the reasons behind the emergence of regulation, the identity of the actors which have contributed to such an emergence, and the patterns of interaction that may exist between the different regulatory actors. Over time, a number of theories of regulation have developed and have impacted on our perception of regulation and on the evolution of our laws.

For example, such theories have influenced the way Australian corporations law has evolved. The phase of deregulation in the 1980s, which was attended by huge corporate collapses, was followed by a new phase of regulation during which the corporations law was codified and new regulators were created to ensure better outcomes. But this codification did not escape criticism. Consequently, the Liberal

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4 For example, Ken Robson noted that ‘We are now approaching some ten years of Corporations Law simplification and economic reform. Yet the law is longer than ever and is beginning to mount a serious challenge to the ITAA for the most complex legislation award; Ken Robson, quoted in
Federal Government announced in 1997 that Australia’s corporate law would be given a new economic focus to ensure that the law was ‘not out of touch with modern commercial practice’. Following the recent Global Financial Crisis, new reforms are being considered to improve and enhance our corporate and financial laws.

Ultimately, the different reforms that have taken place and are now taking place are based on different regulatory approaches. This chapter briefly introduces several examples of different regulatory theories—normative analysis as a positive theory, the economic theory of regulation and the game theory of regulation—and then focuses on the theories of regulation which have had the greatest impact on this thesis, namely, strategic regulation theory and the theories of restorative justice and self-regulation. The chapter subsequently considers a number of strategies that regulators may employ when imposing the different sanctions available to them. Such strategies may be of particular relevance to regulators utilising the sanction the subject of this study, the enforceable undertaking.

2.2 Normative Analysis as a Positive Theory

Until the early 1960s, the most prominent theory of regulation was what Paul Joskow and Roger Noll termed ‘normative analysis as a positive theory’ (‘NPT’). This theory

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regards market failure as the motivation for the introduction of regulation. Once created, regulatory bodies are intended to lessen or eliminate the inefficiencies engendered by market failure. In the 1960s, the most popular culprit for causing market failure was monopoly, followed at some distance by externalities.  

The main problem with this theory is that until the 1960s it had not been systematically tested. There was an assumption that regulatory activities usually compressed the gap which would otherwise exist between price and marginal cost. The first real test of this theory was George Stigler and Claire Friedland’s 1962 analysis of the effects of regulation on electricity rates. According to NPT, restricting entry and imposing maximum rates in the electricity field should have resulted in lower than usual rates. However, the authors found otherwise. Stigler and Friedland’s article had a catalytic effect, stimulating an ongoing debate about the effects of regulation. The seeds of the economic theory of regulation were planted by that first decade of debate.  

2.3 Economic Theory of Regulation

The economic theory of regulation (‘ET’) was introduced in an article by Stigler in 1971. The most important element of this theory is its fusion of two concepts: the analysis of political behaviour with the larger body of economic analysis. Politicians, 

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9 Baldwin, Scott and Hood, above n 7, 95–6.
like the rest of humankind, are presumed to be self-interested maximisers. This means that interest groups may influence the regulatory process by giving financial or other types of support to politicians and regulators.\textsuperscript{10}

Simultaneously with Stigler, Richard Posner provided an important critique of this theory.\textsuperscript{11} The biggest subsequent developments of ET were made by Sam Peltzman in 1976\textsuperscript{12} and Gary Becker in 1983.\textsuperscript{13}

According to this theory, regulation occurs when there is a wide discrepancy between the political balance of pressure and the unregulated distribution of wealth. The main tenets of ET are the following:\textsuperscript{14}

- Firm, compressed and well-organised groups will benefit more under this theory than broad, diffused groups.
- The regulatory policy will try to preserve a politically optimal distribution of rents across this coalition. As a result, the policy tends to offset changes in this optimal distribution arising from shifts in demand or cost conditions. At any one time, the price structure will cross-subsidise high-cost consumers from rents generated by prices of other groups.


\textsuperscript{14} Baldwin, Scott and Hood, above n 7, 103.
• Because the political payoff of regulation arises from distributing wealth, the regulatory process is sensitive to deadweight losses. As a consequence, policies that will diminish the wealth available for distribution will be avoided because they reduce the payoff of regulation.

The theory principally targets the behaviour of established regulatory bodies by asking: who will be favoured by the regulators and what is the reason behind an amendment of their policies? But the question of why a regulatory body was established in the first place cannot be ignored. The response that ET gives to this question is not really satisfying. It considers that politicians will regulate politically rewarding fields and use regulation to avoid, or exit from, losing situations. The problem with this theory as an entry theory is that it never goes beyond this level of generality. Other theories appeared in an attempt to find more useful explanations in answer to this question.\textsuperscript{15}

\subsection*{2.4 Game Theory of Regulation}

The game theory of regulation argues that regulation is a game of negotiation and interaction between the regulator and the entities regulated. It is based on the hypothesis that the entity regulated is a rational single actor who will decide whether or not to comply with regulation by appraising the costs and benefits which compliance produces for the entity at a particular time.\textsuperscript{16}

\begin{flushright}
\textsuperscript{15}Ibid, 105.
\end{flushright}

\begin{flushright}
\textsuperscript{16}George Gilligan, Helen Bird and Ian Ramsay, \textit{Regulating Directors' Duties: How Effective are the Civil Penalty Sanctions in the Australian Corporations Law} (Centre for Corporate Law and Securities Regulation, 1999), 9.
\end{flushright}
John Scholz considered regulation to be a ‘prisoner’s dilemma game’. The motivations of the parties involved are that the regulated entity, the firm, desires to minimise regulatory costs, while the regulator’s desire is to maximise compliance outcomes. Scholz noted that these motivations will lead to a tit for tat (‘TFT’) enforcement strategy which ensures the creation of a mutually beneficial cooperation. The TFT strategy means that the regulator will refrain from a deterrence response as long as the firm is cooperating. But when the firm starts exploiting the regulatory system and stops complying with the law, the regulator will shift from a cooperative approach to a deterrence response. In short, the regulator will retaliate. It is only when the firm starts cooperating again that the regulator will forgive and restore the benefits of mutual cooperation.

For Scholz, this strategy permits the regulator to be lenient and to engage in less regulatory supervision and monitoring. Since the regulator will allow literal violation of regulation, a firm will be able to spend its resources on meeting the underlying goals of regulation instead of meeting the literal rules of the regulation. This will create equilibrium between the parties involved: the regulator will overlook minor offences if the firm uses its power to minimise harm in ways not directly considered in the regulation.

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19 Scholtz, above n 17.
The TFT strategy will prompt an ‘egoistic cooperation’ from the regulated community, while the regulator will follow an enforcement strategy that is at the same time ‘vengeful and forgiving’. But there are situations that challenge this theory and demonstrate its weaknesses. One weakness is the danger of capture. Another is the situation where the regulator is dealing with irrational actors: here the TFT strategy will definitely cause regulatory failure if its sanctions are limited to purely deterrent penalties. This is where the strategic regulation theory comes into play.

2.5 Strategic Regulation Theory

In To Punish or Persuade: Enforcement of Coal Mine Safety, John Braithwaite planted the seeds of what he later named ‘the enforcement pyramid’. The focus of his study in that book was discovering the best way to achieve safe practices by coal mine companies. He reached the conclusion that both punishment and persuasion work to limit violations of the law. Punishment by itself is not an effective method of business regulation, because the harm that can be caused is often not addressed by up-to-date laws. To ensure regulatory effectiveness, the regulator should impose punishment when needed, but use persuasion whenever possible.

20 Ibid, 181.
21 Regulatory ‘capture’ describes the situation where regulatory agencies, created to act for the public interest, start acting in favour of regulated entities due to the close relationship they develop with the entities they regulate; it is thus a form of government failure: see Marver Bernstein, Regulatory Business by Independent Commissions (Princeton University Press, 1955); Samuel Huntington, ‘The Marasmus of the ICC: The Commission, the Railroad and the Public Interests’ (1952) 61 Yale Law Journal 467.
22 Ayres and Braithwaite, above n 18, 30, 69–70.
23 John Braithwaite, To Punish or Persuade: Enforcement of Coal Mine Safety (State University of New York Press, 1985), 142–8.
Because punishment usually depletes the resources of regulators, strategies must be found to reserve punishment for situations in which it is maximally effective. Punishment and persuasion will be compatible as long as punishment may be imposed with a certain amount of discretion. The power to punish allows regulators to persuade. After all, one will probably be inclined to listen to the concerns of a regulator if the consequences of not listening are drastic.\textsuperscript{25}

Strategic regulation theory therefore advocates a mix of enforcement strategies and sanctions. A regulatory body that has only one sanction, which cannot politically or legally be used in some situations, will not be able to deliver a ‘punishment payoff’, since it is easy for the rational offending firm to calculate the cost-benefit of breaking the law. On the other hand, when a regulator has a number of weapons available for any particular offence, the information costs of calculating these probabilities will be discouragingly high, even for a large company with a legal team at its disposal.\textsuperscript{26}

\section*{2.5.1 The Enforcement Pyramid: An Example of Strategic Regulation}

The information costs referred to above mean that a regulator with an ‘enforcement pyramid’ may have superior resources with which it can bargain with the entities it regulates. Compliance is most likely when an agency displays an explicit enforcement pyramid. Braithwaite and Ian Ayres described such an enforcement pyramid in their \textit{Responsive Regulation: Transcending the Deregulatory Debate}.\textsuperscript{27}

\begin{footnotesize}

\footnotesubnote{26}{Ayres and Braithwaite, above n 18, 36.}

\footnotesubnote{27}{Ibid, 35–6.}
\end{footnotesize}
As depicted in Diagram 2.1, the base of the pyramid represents attempts to coax compliance by persuasion. The next stage of enforcement is a warning that action may be taken if the violation continues. If this fails to secure compliance, civil penalties will come into play, followed by criminal prosecution. If these methods do not work to secure compliance, the regulator might then temporarily suspend the offender’s licence to operate. If all else fails, permanent revocation of the offender’s licence is the last step taken by the agency. This escalation of sanctions is sketched in the form of a pyramid.
Diagram 2.1. Braithwaite’s enforcement pyramid\textsuperscript{28}

The width of each layer represents the proportion of the total number of enforcement activities that occur at that level. The explanation for the varying size is simple. If the regulator can plausibly threaten to match any non-compliance by moving up successive levels of the pyramid, then most of the regulator’s work will be done effectively at the bottom levels of the pyramid. The lighter sanctions may dissuade the regulated entity from continuing its illegal activities because it will not want the

\textsuperscript{28} Braithwaite’s enforcement pyramid as illustrated in Ayres and Braithwaite, above n 18, 35.
regulator to use its strong sanctions. Put another way, when there is an equilibrium between harsh and soft sanctions, the regulator attains the result it requires by speaking softly.²⁹

In summary, the basic idea of Braithwaite enforcement pyramid is that governments should respond to the conduct of those they seek to regulate in deciding whether a more or less interventionist approach is needed. It is better to begin with dialogue and then increase in severity.

### 2.5.2 Regulatory Tripartism

The enforcement pyramid model proposed by Braithwaite and Ayres may be criticised for being oversimplified because it only reflects state regulatory action and not the activity of regulated entities. In addition, the same regulatory features that encourage the cooperation of regulated entities also encourage the evolution of capture and corruption.³⁰ Ayres and Braithwaite’s solution to these problems is ‘regulatory tripartism’. They defined tripartism as a regulatory policy that promotes the participation of public interest groups in the regulatory process by giving them:

- access to all the information available to the regulator;
- a seat at the negotiating table with the firm and the regulatory agency when deals are being done; and

²⁹ Ayres and Braithwaite, above n 18, 35–6; Braithwaite, above n 23, 63–4.


³¹ Ayres and Braithwaite, above n 18, 55, 57.
• the same rights as the regulator to sue or prosecute under the regulatory instrument.

Such participation in the regulatory procedure should inject public accountability into the system. Tripartism should be like a ‘guardian of the guardians’, ensuring more decent, democratic and efficient regulatory institutions and more effective restorative justice. But for some, this two-dimensional pyramid is not enough.

2.5.3 Braithwaite Theory Reassessed

The enforcement pyramid is based on the concept that the regulator has discovered a breach of legislation by a regulated entity. But in certain cases the regulated entity will use techniques to achieve non-compliance with the intent of the law without actually violating its content. In such instances, the law is not broken and the law enforcers will not be able to do anything to stop the regulated entity because there has been no breach. The law becomes ineffective and merely symbolic because its aims cannot be realised. Regulators need, therefore, to encourage compliance with the spirit of the law rather than compliance simply with the words of the law. If this is not done, regulated entities will try to discover ways to accomplish compliance with the letter of the law while undermining the policies behind its words.

Another issue that has arisen relates to the fact that Braithwaite’s pyramid is two-dimensional and does not take into account all aspects of regulation. To deal with this

32 Ibid, 57, 97–8. As to restorative justice see 2.6 below.

problem, Peter Grabosky gave the pyramid a new horizon.34 A given regulatory system joins elements of state, self-regulation and third party activity, all of them depicted in one way or another in the pyramid.

Grabosky’s pyramid provides a graphical representation of an entire regulatory system, permitting us to see its coercive properties as well as visualise the mix of its constituent institutional forms. It also allows a comparison of regulatory systems in terms of both their coerciveness and institutional composition.35

2.6 Restorative Justice

The concept of restorative justice does not have one universal definition. However, one of the most commonly accepted definitions is provided by Tony Marshall, who described restorative justice as a ‘process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implication in the future’.36

This definition identifies three central elements of restorative justice:37

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35 Grabosky, above n 34, 198.


• It is a process that centres on notions of empowerment, dialogue, negotiation and agreement.\(^{38}\)

• It involves stakeholders. Marshall’s definition does not refer to the parties whose interests are to be restored. Braithwaite broadened the definition, arguing that ‘restorative justice is about restoring victims, restoring offenders and restoring communities’.\(^{39}\)

• The outcomes of restorative justice may be very broad and are primarily decided based on the satisfaction of stakeholder needs: Are the needs of the community, victims and offenders met?\(^{40}\) Thus, the specific goals of restorative justice vary from case to case. Braithwaite noted that restorative justice may revolve around ‘restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and restoring social support’.\(^{41}\)

\(^{38}\) Ibid.


This thesis adopts such a definition of restorative justice. Since breaches of the law negatively impact both people and their relationships with each other, restorative justice aims to right the harm caused by offenders.\textsuperscript{42} It is about restoring equilibrium in a relationship where one party has not fulfilled its obligations.\textsuperscript{43} It requires all parties to be ‘empowered together to make innovative, flexible and expansive undertakings that go beyond what a court would order’,\textsuperscript{44} with the purpose of identifying and correcting the original breach and its underlying causes. Accordingly, restorative justice empowers primary stakeholders.\textsuperscript{45}

Some elements of restorative justice are not new but, rather, can be found in criminal justice systems throughout most, if not all, of human history.\textsuperscript{46} For instance, the

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\textsuperscript{45} Charles Barton, Restorative Justice: The Empowerment Model (Federation Press, 2003), 15; McCold, above n 40, 85; Ashworth, above n 37, 582.

\textsuperscript{46} Braithwaite, above n 39, 5. See also Jim Consedine, Restorative Justice: Healing the Effects of Crime (Ploughshares Publishing, 1995), 12 (where it is noted that ‘biblical justice was restorative. So too was justice in most indigenous cultures’); Elmar Weitekamp, ‘The History of Restorative
acephalous (non-state) societies dealt with crime informally. After evaluating the harm caused by an offender, such a society redressed the harm by taking action that satisfied the victim. A state of unrest existed until that satisfaction was achieved. Breaches of the law were resolved through blood revenge, retribution, ritual satisfaction and restitution. Blood revenge usually applied in the case of homicide; however, such a remedy was not very popular due to the serious problems it could cause the acephalous society.47

For example, in Inuit villages, blood revenge, though accepted, was rarely used because blood feuds between relatives or close friends were mutually destructive. In most situations, the murderer was obliged to take over the responsibilities of the deceased.48

Restitution, on the other hand, was a very common form of resolving conflict in an acephalous society. The offender’s clan and the victim’s clan were involved in the negotiation that would lead to repairing the harm. The early Hebrews, for example, required a person who injured another to pay the wages the injured party would lose during the healing process.49

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49 Weitekamp, above n 46, 74.
In traditional Maori culture, when a wrong was committed, the harm caused to the victim and their family had to be rectified through mediation. The Maori people created a *runanga i nga tura* (council of law or court). This council consisted of experts in law, elders, representatives of the offender’s family and representatives of the victim’s family. The representatives protected the rights of the offender and of the victim. One of the possible outcomes of the mediation was a direction that the offender pays compensation to the victim. The Maori people kept the *runanga i nga tura* in place until colonisation.\(^{50}\)

With the emergence of state societies, the notion of reparation continued. For example, ancient Babylon’s Code of Hammurabi c. 1780 BCE contained such an element of reparation:\(^{51}\)

> If a man let in the water, and the water overflow the plantation of his neighbour, he shall pay ten gur of corn for every ten gan of land.

The Salic Law of the Franks and the Laws of Ethelbert of Kent in the early and late sixth century respectively treated every crime as a crime against the family or clan of the victim. The offender’s clan was held responsible for the crimes of its members.


The Laws of Ethelbert of Kent put in place a system of compensation that ensured the payment of a certain sum of money to victims and their families.\textsuperscript{52}

However, in ninth century Europe, a change began. In criminal trials, compensation was replaced by fines which were assessed and determined by a tribunal. This was the beginning of state control over criminal punishment. By the 12th century, the erosion of restorative justice based on compensation was complete in most European feudal state systems.\textsuperscript{53} Howard Zehr has noted the irony that a number of the words relating to retributive justice have restorative origins. For instance, ‘the Greek word \textit{punē} refers to an exchange of money for harm done. Similarly, guilt may derive from the Anglo-Saxon \textit{geldan}, which, like the German word \textit{Geld}, refers to payments’.\textsuperscript{54} A distinction appeared between private and public wrong and this led to the separation of the law of torts from the criminal law.\textsuperscript{55} While the civil law continued to allow victims and their families to be compensated for their losses and thereby to find some closure,\textsuperscript{56} criminal law ignored the interests of victims and offenders during a trial and concentrated on punishing the offender.

\textsuperscript{52} Weitekamp, above n 47, 75.

\textsuperscript{53} Ibid, 76. Certain states in Europe, such as Scotland, applied the concept of restorative justice until the 19th century: Braithwaite, above n 39, 7. See further Tony Marshall, ‘The Evolution of Restorative Justice in Britain’ (1996) 4 \textit{European Journal on Criminal Policy and Research} 21.

\textsuperscript{54} Howard Zehr quoted in Braithwaite, above n 39, 5.


In the 19th century, legal reformers began to discuss integrating reparation into penal systems throughout Europe. In 1895, at the Prison Congress in Paris, the members agreed on the benefits that may arise from restitution and compensation and recommended that further study be conducted into the matter. However, the next meeting, which was held in Brussels in 1900, did not result in any breakthrough on this topic.

It was not until the 1960s that attempts were made to restore the old system of conflict reparatory resolutions. This concept was revived by a number of movements, such as the victims’ movement and the women’s movement, peacemaking criminology and growing interest in the native justice traditions of indigenous


Weitekamp, above n 47, 76.


It was Albert Arthur Eglash who apparently coined the term ‘restorative justice’ in 1977. As Braithwaite noted, one of the most influential texts on this notion was written by Nils Christie in 1977 when he argued that, through prosecution, conflicts between people were ‘stolen’ by governments, causing victims to be viewed as ‘non-entities’ in criminal law. Christie supported the involvement of victims in criminal trials, advocating the establishment of victim-oriented courts in the criminal justice system to allow victims’ situations to be taken into account.

As a consequence, a number of countries began to introduce restorative justice into their criminal justice systems, but no single practice was universally accepted as ‘the’ process that represented restorative justice. The main restorative justice practices in use today are reconciliation and mediation programmes, family group conferencing and sentencing circles.

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64 Braithwaite, above n 39, 5.


66 Christie, above n 65, 10.


68 A detailed analysis of this topic is found in Allison Morris and Gabrielle Maxwell, ‘Restorative Justice in New Zealand: Family Group Conferences as a Case Study’ (1998) 1(1) *Western Criminology Review*, <http://wcr.sonoma.edu/v1n1/morris.html>; George Mousourakis,
Restorative justice is not without its critics, however, as the following arguments indicate:

- Restorative justice may fail to promote social justice.
- Restorative justice may widen nets of social control.
- Restorative justice relies on a kind of community that is not adaptable to industrialised societies. It is more suitable in rural areas.
- Restorative justice may lead to capture of regulatory practices by businesses.

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• Restorative justice has the potential to extend unaccountable police power. It may even compromise the separation of powers between the legislative, executive and judicial arms of government.

• Restorative justice practices may trample on certain rights because its procedural safeguards are poorly articulated.

• Restorative justice may not provide any benefits to some victims. Victims of white-collar crimes may not realise they were victims in the first place, and even when the victims become aware of their status as victims, only a minority of cases are followed by arrest.

• Restorative justice practices may increase a victim’s fears of revictimisation. When offenders are formidable and scary, the system of restorative justice loses its stability and effect, since the offender can scare the victim again.

• Restorative justice may oppress offenders with a ‘tyranny of the majority’. Empowering indigenous justice in many parts of the world gives communities the power to kill offenders or to punish them corporally.

• Restorative justice may worsen the stigmatisation and shaming of offenders. The process of restorative justice is already riddled with shaming, since victims and their supporters express the consequences of the crime committed.

• If restorative justice works, the following questions remain to be answered: Does it have a major effect on the crime rate? Does it stop recidivism?

The notion of restorative justice is not limited to the criminal justice system. It may be used in different areas,\footnote{Martin Wright, ‘Is it Time to Question the Concept of Punishment?’ in Lode Walgrave (ed), Repositioning Restorative Justice (Willan Publishing, 2003), 19.} for instance in the context of regulatory sanctions. The dominant mode of corporate regulation is arguably restorative justice, as Keith Hawkins observed:\footnote{Keith Hawkins, Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency (Oxford University Press, 2002), 15.}

> Extensive empirical research has shown that the usual response of regulatory officials to companies which have breached standards is to negotiate with them to secure their compliance with rules rather than to prosecute and punish them.

Christine Parker applied the notion of restorative justice to enforceable undertakings in order to determine whether enforceable undertakings could be considered to be an application of restorative justice.\footnote{Christine Parker, ‘Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings’ (2004) 67 Modern Law Review 209.} While enforceable undertakings may be linked to restorative justice,\footnote{This topic will be discussed in more detail in Chapter 7 of this thesis.} another theory relevant to enforceable undertakings is self-
regulation because the monitoring of enforceable undertakings heavily relies on self-regulation.76

2.7 Self-regulation
The theory of self-regulation permits regulated entities that are deemed trustworthy to conduct and report on their own audits and inspections subject to verification. Some consider that self-regulation is better than regulation imposed by law.77 The appropriate form of self-regulation depends on the goals of the industry and of the regulators, but it should effectively fix identified problems and diminish costs for the industry. Self-regulation is likely to be effective if firms acknowledge that their future viability depends on their relationships not only with their current customers and shareholders but also with the wider community.78

It is therefore essential for large organisations to implement a hierarchical and centralised management system that will answer stakeholder concerns and ensure employee integrity. Most firms should have a basic self-regulation system that allows them to learn from individuals’ mistakes in order to prevent future oversights. Firms should also identify their obligations under the law and have in place an effective

76 This topic will be discussed in more detail in Chapter 8 of this thesis.

77 Ayres and Braithwaite, above n 18, 103; John Braithwaite, ‘Enforced Self-Regulation: A New Strategy for Corporate Crime Control’ (1981) 80 Michigan Law Review 1466, 1467–8 (where it is noted that self-regulation is ‘an attractive alternative to direct governmental regulation because the state simply cannot afford to do an adequate job on its own’).

complaint handling system that will recognise the pattern of complaints and be able to resolve them. But such self-regulation cannot be integrated into every system.

Regulatory gaps and overlaps continually appear and reappear in dynamic markets. This does not mean that self-regulation is the best solution. Sometimes it is not. Small businesses may have difficulties in joining self-regulatory schemes because they are less able to cope with the expenses associated with participating in a scheme such as a code of conduct. They would need to pass the costs of such participation on to the consumer, who would suffer as a consequence.

Braithwaite fortified the concept of self-regulation by introducing the notion of enforced self-regulation. He suggested that with the latter, ‘the government would compel each company to write a set of rules tailored to the unique set of contingencies facing that firm’. Such a model would require a compliance director to report to the relevant regulatory authority on ‘any management overruling of compliance group directives’. Parker referred to the concept of ‘meta-regulation’, in which regulators would hold corporate self-regulation accountable.

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80 Taskforce on Industry Self-Regulation, above n 78, 29, 32.
81 Ayres and Braithwaite, above n 18, 106.
82 Braithwaite, above n 77, 1470.
83 Parker, above n 79, 246. See also Peter Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995) 8 Governance 527, 543 (where he referred to the notion of ‘meta-monitoring’).
A self-regulatory scheme, whether or not fortified by the refinements proposed by Braithwaite, Parker and others, will not be deemed a success unless industry participants are ready to sign up to it. Consequently, its success depends on the strategies adopted by regulators. For instance, a regulator persuaded by the strategic regulation theory of regulation will put more emphasis on persuasion than enforcement and will follow a pyramid of enforcement strategy. This chapter takes into account certain considerations that may have an impact on the use of enforceable undertakings and they are:

- the problem solving strategy: the use of such a strategy may improve the way enforceable undertakings are relied on. This strategy is discussed in paragraph 2.8; and
- being prepared to question the reasonableness and flexibility of regulation: the reasonableness of an enforceable undertaking for example has to be taken into account by the regulators when setting the terms of the undertaking. Paragraph 2.9 of this chapter considers the negative impact unreasonable regulation may have on compliance.

2.8 Problem Solving Strategy

Malcolm Sparrow proposed a simple idea about what regulators need to achieve in order to ensure that sanctions are effective. Sparrow argued that regulatory and enforcement operations should be constructed around an explicit problem solving strategy. Regulators should not necessarily amend the regulatory instrument that is in

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84 Other fortifications to the notion of self-regulation may also be found in the literature. For example, reference to the notion of co-regulation is common: Peter Grabosky and John Braithwaite, Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies (Oxford University Press, 1986), 83; Neil Gunningham and Joseph Rees, ‘Industry Self-Regulation: An Institutional Perspective’ (1997) 19 Law and Policy 363; Christine Parker, ‘Reinventing Regulation within the Corporation’ (2000) 32 Administration and Society 529.
place but should ameliorate the system by improving the management of the regulatory agency. Three elements should be present to achieve such a goal: ⁸⁵

- A clear focus on result. This means regulatory agencies should reject traditional outputs and productivity measures when considering the basis of effect or impact. There should be perseverance in the search for more meaningful indicators of agency performances. Agencies should also rely on measurable reductions achieved in specific and well-defined areas as indicators of success.

- The adoption of a problem solving approach. This involves detection by the system of important hazards, risks and patterns of non-compliance. The emphasis should be on risk assessment and developing organisational capacity for designing and implementing effective and efficient solutions for each problem. To this end regulatory agencies should use a range of tools for procuring compliance and eliminating risks. Finally, the regulator should acknowledge a need to retain and ameliorate the agency’s enforcement ‘sting’.

- An investment in collaborative partnerships. Partnerships with industries, unions, lobby groups and other governmental agencies are necessary to create a sense of shared purpose and more effective intervention.

When regulators start focusing on implementing any one of these elements, they will usually end up engaging all three, since they are interdependent.

As can be seen, the problem solving strategy is quite simple and reflects common sense, but can it overcome the tension that exists between the enforcement and prevention camps within a regulatory agency?

2.8.1 Need for Cooperation between Enforcement and Prevention Approaches

Failure to understand the problem solving strategy may create a tension between the enforcement and prevention camps within a regulatory agency. The enforcement camp may complain that the agency is growing soft and that compliance is not occurring because of a lack of enforcement. The voluntary compliance camp may proclaim that successful prevention renders enforcement unnecessary, because focusing on compliance produces a greater gain than focusing on enforcement. This tension is accentuated by the fact that when practitioners discuss problem solving, they place it on the side of ‘soft’ approaches along with education, outreach and partnerships. They associate problem solving with a search for preventive alternatives to enforcement.  

However, the problem solving strategy should not be considered alone. Combined with enforcement strategies, it will have a greater effect than it would on its own. Voluntary compliance is by no means a replacement for enforcement. Rather, the two approaches should coexist. Enforcement approaches usually wait until the damage is done before intervening. They react case by case and incident by incident. As a result, enforcement agencies have tended to organise their activities around their

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86 Sparrow, above n 85, 94.
failures rather than around opportunities for intervention. By adding the problem solving strategy to this equation, the results will definitely be better.\(^{87}\)

### 2.8.2 Need for Proactive Strategies

A proactive strategy is essential for solving any problem and regulators need to be proactive on different levels. One way for regulators to be proactive is to extend their view. Sparrow argued that in order to identify all problems, regulators should look beyond existing workloads to uncover those predicaments represented only partially, or not at all. To succeed in this objective, they should create and pay more attention to techniques that will allow them to ‘see the invisible’.\(^{88}\)

Regulators also need to adopt a proactive stance in terms of encouraging opinions and perspectives that might not normally be heard, since the best outcomes are reached when all interested parties are heard. To achieve this, regulators should engage with others during the stages of problem solving or risk assessment. They should make their drafts public and give communities the opportunity to be active in weighing the advantages and disadvantages of proposed solutions. They should also encourage contributions to the solutions advanced. After hearing the different opinions and suggestions put forward, the regulators, who retain their discretion, can decide on the best solution to create a more effective regulatory system.\(^{89}\)

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\(^{88}\) Sparrow, above n 85, 191–2.

\(^{89}\) Ibid.
2.8.3 Other Problems with Problem Solving Strategy

With all its advantages, the problem solving strategy may be difficult to apply within a major regulatory agency for the following reasons:90

- It is viewed as an ‘extra’. As a consequence, problem solving will not be considered as a priority. Everyone is already busy with more structured, manageable tasks, all of which have deadlines and thereby take precedence.
- The required analytical support is not available. This makes discovering where the risk lies very difficult.
- There may also be financial difficulties because problem solving has no formal budgetary support or legislative mandate. Everything else in the agency has both.
- Real world problems come in awkward shapes and sizes. Dealing with them will probably require coordination and commitment across units and agencies. This by itself is extremely hard to achieve.
- Management may fail to understand or support it.
- Problem solving brings an unfamiliar degree of discretion and an uncertain degree of authorisation. Teams are not sure what they are and are not able to propose. Such uncertainty may bring any project to a standstill. Guidelines on this subject are needed.
- Staff may be confused by the notion of problem solving. They will never be committed to it because they lack the knowledge they need to understand the subject.
- Seeking other people’s opinions without giving them some powers may strike the participants as odd.

90 Ibid, 208–9.
• Problem solving is considered by many as an alternative to enforcement and is seen as an option that management will use when facing political pressure.

The idea of problem solving is good and it applies common sense, but the notion is still elusive. It is still in the development phase.

2.9 Questioning the Reasonableness of Regulation

In 1977, Eugene Bardach and Robert Kagan began a study on the pro-regulation movement that was at its height at the time. They noticed that a good deal of the regulation in place was self-defeating. Their research demonstrated that increasing regulation would not ensure the protection of the community, because even the best regulation can produce a deplorable result if it is considered by the public to be unreasonable. Even if the ‘unreasonableness’ of a regulation was unintended and incidental to the accomplishment of a larger purpose, such regulation may still be felt as unreasonable by the individual who is subjected to it. But what is considered as unreasonable? Bardach and Kagan argued that ‘unreasonableness’ involves economic inefficiency.  

- The regulator’s requirements are unreasonable if compliance with the regulation would not yield the desired benefits.
- A regulatory requirement is unreasonable if it entails costs that will clearly exceed the resulting social benefits.
- Lastly, unreasonableness means cost-ineffectiveness.

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Similarly, when the penalty is unreasonable the community will not always respond positively, and its actions can become shaded with anger and resentment at the departure from common sense.

2.9.1 Plugging the Loopholes in Legislation

When legislation puts into place ambitious regulatory goals and rights, regulators may have difficulty enforcing them. The rules will have loopholes, through which some activities will escape regulation. In response to newly perceived dangers, regulators devise new rules to plug the loopholes and bring the newly discovered menace under the umbrella of regulation. Little by little, this system leads to more expensive, costly and intrusive forms of legislation.  

Julia Prichard and Louis Jordan observe that since some companies always manage to escape regulation, regulators react by asking for stronger powers and the problem of unreasonableness may surface. The need to expand the powers of regulatory agencies is usually particularly felt when scandals and catastrophes occur. Newspaper and television reporting tends to strengthen the link between the catastrophe and the regulator, implying that the scandal was partly due to lax legislation. As a result, a vicious cycle can appear: see Diagram 2.2 below. In this model, the regulator

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93 Ibid.

94 A perfect example may be found in the collapse of HIH Insurance Ltd and the Royal Commission that followed it: Jean Du Plessis, ‘Reverberation after the HIH and Other Recent Australian Corporate Collapses: The Role of ASIC’ (2003) 15 *Australian Journal of Corporate Law* 225.
responds to the criticism by creating more and more legislation, which leads to more loopholes in the law and additional unreasonableness.  

However, this is not the only problem that may arise. When a legislature responds with regulation that is centralised, detailed and programmed, certain disadvantages appear because such regulation tends to assume that uniformities exist in the problems that are to be controlled. In reality, the world requiring regulation is diverse, changeable and ambiguous. The causes of harmful events are not entirely predictable. Frictions will appear, especially when enforcement officials are denied the power to adjust some of the rules to suit situations not covered by the law. The consequences may be that the regulator will be perceived as unreasonable—because the imposition of uniform law will not make sense in some instances—and unresponsive—because there will be a failure by the regulator to listen to the arguments of the regulated entities that exceptions should be made sometimes.  

2.9.2 Tough Regulation and Legalism  
A move toward more aggressive and legalistic enforcement no doubt has its advantages, making regulation more effective in some respects. When regulated entities know that harsher penalties may be applied this generally induces compliance with the law, leading in turn to a reduction in the number of unlawful acts. But tough regulation may also be unreasonable. Stringent regulation is designed to cope with ‘bad apples’ and unusually hard cases which, in reality, constitute a minority of

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96 Ibid, 58.  
97 Ayres and Braithwaite, above n 18, 36.
all the problems in the domain of regulatory supervision. Most firms, being ‘good apples’, are accordingly subjected to unreasonable regulation. If this population (‘good apples’) is large, such harsh regulation will appear even more unreasonable because it raises the costs of business, leading to lost opportunities for the progress of the ‘good apples’ businesses.98

Bardach and Kagan also observed that inspectors generally tend to look at the set of rules listed in the regulation and expect them to be followed. But, they argued that those rules might not be the most serious rules and the inspector’s attention will thus be diverted to trivial matters. The rules may also be expensive to implement and not very relevant.99 This could lead the inspector to fail to observe a source of potential harm that escapes the rule. This blindness could also afflict the regulated entity, whose management may concentrate on the set of rules listed in the regulation and in doing so fail to devote time and money to serious problems.100 Greater communication between the regulators and the regulated entities is required, because such legalism can lead to resentment on the part of the regulated entities, ultimately tending to destroy their cooperation.

2.9.3 Resentment of the Regulator by Regulated Entities

Resentment and hostility from regulated entities can cause the following vicious cycle:


99 The rules in general cannot be detailed enough to cover all the different situations and dangers that may emerge from technological changes and human interaction.

100 Bardach and Kagan, above n 91, 105.
Resentment towards the regulator can blossom if a regulated entity believes that the rules imposed are unreasonable or excessively legalistic. For instance, if regulated entities have a fine imposed on them when they believe they have acted responsibly, the result may be counter-productive. Some business managers may respond by

Diagram 2.2. Vicious cycle resulting from legalistic and unreasonable legislation.\textsuperscript{101}

\textsuperscript{101} This diagram is based on information given by Bardach and Kagan, above n 91, 105. The author took the information and formulated it in the form of Diagram 2.2.
taking the position that they will act no more responsibly than the regulatory agency’s rules require them to. This will lead to minimal compliance and more legalistic and unreasonable legislation.102

2.10 The Social Responsibility of Regulators

Albert Einstein was an advocate of world peace, whose formula on the equivalence of mass and energy provided the foundation for the creation of the atomic bomb. In his last letter, written to Bertrand Russell one week before his death, Einstein agreed that his name should appear on a manifesto urging all nations to give up nuclear weapons.103 Sometimes, actions begun in the hope of ameliorating the system may lead to the opposite effect.104

Regulations do not escape this reality any more than Einstein. They are implemented in the hope of improving the system, but may sometimes cause more problems. Instead of developing the capacity of regulated entities for social responsibility, regulation may diminish it. In the end, the social responsibility of regulators does not stop with the implementation of new rules designed to protect and improve regulatory systems; they must draw upon the consciences and talents of those they seek to regulate. Cooperation between regulators and regulated entities is essential.105

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Self-regulation, unreasonableness, restorative justice, problem solving and strategic regulation theory are all notions that will be revisited in later chapters of this thesis in the context of the study of the use of enforceable undertakings.
Chapter 3: The Use of Enforceable Undertakings by the
Australian Securities and Investments Commission

3.1 ASIC and its Powers

As a consequence of the enactment on 1 July 1998 of the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998 (Cth), the Australian Securities Commission (‘ASC’) was renamed the Australian Securities and Investments Commission (‘ASIC’).\(^1\) The change of name indicated to the public that the regulator had acquired additional responsibilities for the protection of investors in the financial sector.\(^2\)

ASIC regulates companies and the securities and futures industries in Australia. Today, the day-to-day responsibility for the administration and enforcement of Australian corporations’ law rests with ASIC by virtue of s 11 of the ASIC Act. The ASIC Act also contains provisions for monitoring and regulating financial services, which closely follow the consumer protection provisions of Part V of the Trade Practices Act.\(^3\) The consumer protection provisions applicable in relation to financial

\(^1\) These changes to the financial sector were the result of the federal government’s response to the 1997 Financial System Inquiry (the Wallis Report): see further Robert Baxt, Ashley Black and Pamela Hanrahan, Securities and Financial Services Law (LexisNexis, 7th ed, 2008), 35.

\(^2\) Roman Tomasic, Stephen Bottomley and Rob McQueen, Corporations Law in Australia (Federation Press, 2nd ed, 2002), 72; See Australian Securities Commission Act 1989 (Cth) (‘ASC Act’), s 1(2)(a): the Commission must strive to maintain, facilitate, and improve, the performance of ‘companies, and of the securities markets and futures markets …’. Compare the language of s 1(2)(a) of the ASIC Act in the text below which covers a the protection of investors in the financial sector.

\(^3\) ASIC Act, Pt 2 Div 2, inserted by the Financial Sector Reform (Consequential Amendments) Act 1998 (Cth). Further reforms to the ASIC Act will take place as a result of the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth).
services are found in the *ASIC Act* and the *Corporations Act* rather than the *Trade Practices Act*. This change shifted the administrative responsibility for the protection of investors and consumers in the financial sector from the ACCC to ASIC.\footnote{Michael Adams and Jeremy Green, *Changes in Liability for the Superannuation Industry*, Research Report (2001), 7–8. The change is highlighted by the change in language between s 1(2)(b) in the *ASC Act* (the Commission must strive ‘to maintain the confidence of investors in the securities markets and futures markets by ensuring adequate protection for such investors’) and the same provision of the *ASIC Act* (ASIC must strive to ‘promote the confident and informed participation of investors and consumers in the financial system’); see also *ASIC Act*, s 12A(2) (‘ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system’).}

Section 1(2) of the *ASIC Act* sets out the objectives and goals of the regulator. In performing its functions and exercising its powers, ASIC must strive to:

(a) maintain, facilitate, and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and

…

(g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

Paragraphs (b)–(f) of s 1(2) set out other goals that ASIC must strive for in performing its functions and exercising its powers. These will not be studied here, however, because they are beyond the scope of this thesis. Part 2 of the *ASIC Act* details ASIC’s responsibilities in protecting consumers of financial services. Part 3 describes the investigative and information-gathering powers of ASIC as it conducts investigations into companies suspected of contravening the law.
The *ASIC Act* sets out four grounds upon which ASIC may commence a formal investigation:

- where ASIC has reason to suspect that there may have been a contravention of the *Corporations Act* or of the *ASIC Act*;\(^5\)
- where ASIC has reason to suspect that there may have been a contravention of a law of the Commonwealth or of a State or Territory, being a contravention that:\(^6\)
  - concerns the management or affairs of a corporation or managed investment scheme; or
  - involves fraud or dishonesty and relates to a corporation or managed investment scheme or to financial products;
- where the Minister directs ASIC to investigate a certain specified matter in the public interest;\(^7\) and
- where a report of a receiver or liquidator has been lodged with ASIC under ss 422 or 533 of the *Corporations Act*, ASIC may investigate a matter to which the report relates to for the purpose of determining whether a person should be prosecuted for an offence against the corporations legislation.\(^8\)

When conducting a formal investigation, ASIC has the power to acquire information concerning the state of the companies and securities market to ensure a proper

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\(^5\) *ASIC Act*, s 13.

\(^6\) *ASIC Act*, s 13.

\(^7\) *ASIC Act*, s 14.

\(^8\) *ASIC Act*, s 15.
environment is maintained for traders and investors.\textsuperscript{9} As a consequence, ASIC may order the production of books about the affairs of a corporation or a registered scheme or about financial products or services. It may also require an explanation of any matter to which any such books relate or about the compilation of any such books. Further, ASIC may require the disclosure of information about securities or financial products.\textsuperscript{10}

When ASIC suspects or believes that a person might be able to give information relevant to the investigation that is conducted, the regulator has the power to undertake an examination of the person in private. But it must first send to the person in question a formal notice advising the person of the matter, including the nature of the matter being investigated and information on his or her rights. Any information ASIC receives in such a way may be used by it in criminal or civil proceedings.\textsuperscript{11}

In instances where ASIC believes that a breach of the law has occurred, ASIC has at its disposal a number of sanctions which may be categorised as being criminal, civil or administrative in nature. As discussed in Chapter 1, sanctions are essential for the functioning of the regulatory system as without them the regulator is powerless to uphold the law. Prior to July 1998, the sanctions ASIC had at its disposal were as follows:

\begin{itemize}
\item \textsuperscript{9} Baxt, Black and Hanrahan, above n 1, 64.
\item \textsuperscript{10} \textit{ASIC Act}, ss 29–39. See also Baxt, Black and Hanrahan, above n 1, 67; Ashley Black, ‘Representation of Clients in Investigations by the Australian Securities and Investments Commission’ (2005) 19(2) \textit{Civil Justice Quarterly} 16.
\item \textsuperscript{11} \textit{ASIC Act}, ss 19–24, 49, 50. See also George Gilligan, Helen Bird and Ian Ramsay, \textit{Regulating Director’s Duties: How Effective are the Civil Penalty Sanctions in the Australian Corporations Law?} (Centre for Corporate Law and Securities Regulation, 1999), 18–19.
\end{itemize}
• criminal sanctions, such as
  o imprisonment
  o fines
  o community service orders;

• civil sanctions, such as
  o injunctions
  o disqualification from managing a corporation for a specific period of time
  o pecuniary penalties
  o compensation to third parties
  o community service orders; and

• administrative sanctions, such as
  o withholding licences
  o restricting rights and banning orders
  o withholding financial benefits
  o negotiated penalties
  o publicity.

While criminal and civil sanctions play an important role in ASIC’s enforcement strategy, the use of administrative sanctions by the corporate regulator is common.\textsuperscript{13}

\textsuperscript{12} ASIC, \textit{Annual Report 2001–02}, 24.

\textsuperscript{13} As shown in 1.2.2.
Administrative remedies such as the sanctions listed above are essential because ASIC’s resources are stretched to the maximum, as illustrated in Table 3.1.

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<td>1 224 207</td>
<td>1 299 985</td>
<td>1 427 573</td>
<td>1 645 805</td>
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Table 3.1. ASIC in a Snapshot

While ASIC’s income has increased over the years so have ASIC’s operating expenses. Over the past decade ASIC’s income has risen by 99.0% and its operating costs by 88.6%, while the total number of companies regulated by ASIC has grown by 43.2%. The ratio of companies regulated by ASIC to its full time equivalent staff numbers has increased from 938 companies to every one full time equivalent staff member in 1998–99 to 986 companies to every one full time equivalent staff member in 2007–08. Accordingly, ASIC is required to stretch its resources further than ever before, and the regulator cannot initiate litigation when dealing with every

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15 These figures are based on the information presented in Table 3.1.
contravention of the law. Lawsuits may be very expensive, especially if the alleged offender contests the charges. For example, ASIC’s costs in litigation against Citigroup Global Markets Australia Pty Ltd were close to $1.5 million.¹⁶

Consequently, the need for effective administrative sanctions today is of greater importance than ever. Administrative sanctions allow the regulator to apply a dual strategy of enforcing the law when needed and using persuasion to achieve compliance when appropriate. As will be illustrated later in the chapter, as an administrative sanction, the enforceable undertaking may be a perfect fit in the modern regulatory landscape for it has both these facets of persuasion and enforcement. The second part of this chapter briefly considers the origin and nature of enforceable undertakings. The remainder of the chapter examines the policy behind ASIC’s use of enforceable undertakings and reviews the content of the undertakings ASIC has entered into in the past decade.

3.2 The Origin of Enforceable Undertakings and their Introduction into ASIC’s Regulatory System

Enforceable undertakings came into existence in 1993 when this sanction became available to the ACCC through the introduction of s 87B into the Trade Practices Act.¹⁷ Before that date, it was quite common for the ACCC to decide not to take tough enforcement action against possible regulatory breaches on the basis that it

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¹⁷ With the passage of the Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth), the Trade Practices Act 1974 (Cth) is to be renamed the Competition and Consumer Act 2010 (Cth). The relevant section regarding enforceable undertaking in the Competition and Consumer Act 2010 (Cth) is s 218.
could achieve acceptable compliance from potential offenders through negotiation and settlement.\textsuperscript{18} As a consequence, administrative resolutions were extremely popular in cases of mergers.\textsuperscript{19}

It was, however, doubtful whether such administrative resolutions were legally enforceable.\textsuperscript{20} As a result, the Griffith (1989) and Cooney (1991) Committees recommended that the ACCC should be given statutory powers to accept undertakings which were legally enforceable. Accordingly, the enforceable undertaking provisions were incorporated into the regulatory system to legitimise and formalise the kinds of negotiated agreements which were already being entered into between the ACCC and alleged offenders.\textsuperscript{21} The sanction is an Australian creation.\textsuperscript{22} When s 87B was being introduced into the \textit{Trade Practices Act}, the then Commonwealth Attorney-General explained the purpose of the provision in his second reading speech, as follows:\textsuperscript{23}

\begin{quote}
It has proved efficient in some cases for the Commission to avoid prolonged litigation by accepting undertakings from businesses to cease particular conduct or to take
\end{quote}


\textsuperscript{19} Karen Yeung, \textit{The Public Enforcement of Australian Competition Law} (ACCC, 2001), 108.


\textsuperscript{22} In 2002, the ALRC found that enforceable undertakings were unique to Australia: ALRC, \textit{Principled Regulation: Federal Civil and Administrative Penalties in Australia}, Report No 95 (December 2002), [2.149]. Today, however, similar sanctions exist overseas: Marina Nehme, ‘Enforceable Undertakings in Australia and Beyond’ (2005) 18 \textit{Australian Journal of Corporate Law} 1.

action which will lessen the otherwise undesirable effects of their conduct. This approach has been used in appropriate cases for several years and has avoided considerable cost to both the Commission and the businesses concerned. At the same time the outcomes have been demonstrably advantageous to affected third parties and to consumers generally.

Recognizing the importance and desirability of affording the Commission a flexible approach to the resolution of trade practices matters, the Government has decided to provide legislative recognition of this practice. This will promote a greater public awareness of the range of options available in the administration and enforcement of the Act. By providing for the enforceability of undertakings, the scheme will remove the need to rely on means outside the Act to enforce undertakings that people have given, should this prove necessary.

The then chairman of the ACCC, Professor Allan Fels, also strongly supported the provision as a regulatory tool, stating that ‘legally enforceable undertakings … [have] made the Act both more effective and helped avoid court procedures’. 24 Further, the ACCC has noted that ‘the importance of s 87B is that it greatly increases the effectiveness of the administrative resolution approach as undertakings are ultimately enforceable in court’. 25


Due to the apparent success of the use of enforceable undertakings by the ACCC, in July 1998, ASIC was given the power to accept enforceable undertakings by the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth). Item 11 of Schedule 1 of this Act allowed ASIC to accept a written undertaking, which may then be enforced by a court if the court finds that the undertaking has been breached. The Explanatory Memorandum to the *Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998* (Cth) noted that under the proposed s 93A to be inserted by item 11, ASIC would be empowered to accept a written undertaking without first having to go to court. The provisions enabling ASIC to accept enforceable undertakings are today contained in ss 93AA (generally) and 93A (in relation to registered managed investment schemes) of the *ASIC Act*.

Section 93AA of the *ASIC Act* states:

1. ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under this Act.
2. The person may withdraw or vary the undertaking at any time, but only with ASIC’s consent.
3. If ASIC considers that the person who gave the undertaking has breached any of its terms, ASIC may apply to the Court for an order under subsection (4).

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26 The ACCC has accepted over 900 undertakings since the sanction was made available to it: ACCC, Undertakings register (s 87B), <http://www.accc.gov.au/content/index.phtml/itemId/6029>.

27 *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), Sch 1 item 11 amending the *ASIC Act* by inserting s 93AA.

28 Explanatory Memorandum, *Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998* (Cth), [5.40]. In fact it was s 93AA that was inserted into the *ASIC Act* at this time. Later that year the *Managed Investments Act 1998* (Cth), Sch 1 item 183 amended the *ASIC Act* by inserting Pt 3A and s 93A.

29 *ASIC Act*, ss 93AA and 93A.
(4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the person to comply with that term of the undertaking;

(b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

(c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate.

Due to the complexities of financial services law and managed investments, ASIC may accept an enforceable undertaking given by the responsible entity of a registered scheme under s 93A of the ASIC Act, which is similar in content to s 93AA. Both sections are similar in content to s 87B of the Trade Practices Act.

3.3 The Nature of the Enforceable Undertaking

The addition of enforceable undertakings to the sanctions available at ASIC’s disposal adds another layer to Braithwaite’s enforcement pyramid.\(^{30}\) It is apparent from looking at the text of ss 93AA and 93A of the ASIC Act and s 87B of the Trade Practices Act that the enforceable undertaking is an intermediate form of sanction.

\(^{30}\)Braithwaite’s enforcement pyramid may be found in Diagram 2.1.
As illustrated in Diagram 3.1, an enforceable undertaking is a sanction that is both more formal and more powerful than a simple administrative resolution seeking compliance, but does not yet carry the legal and financial severity of litigation, nor the publicity associated with protracted litigation.  

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31 This pyramid is based on Braithwaite’s enforcement pyramid.

32 Christine Parker, ‘Arm-Twisting, Auditing and Accountability: What regulators and compliance professionals should know about the use of enforceable undertakings to promote compliance’, (Presentation to the Compliance Institute, Wednesday 28 May 2003, Melbourne), 7.
The enforceable undertaking may be seen as forming a bridge between the strategies of persuasion and enforcement. On the one hand, the sanction is based on negotiation between the regulator and the alleged offender. Such negotiations may lead to the settlement of the matter though the acceptance of an enforceable undertaking. The use of persuasion over other enforcement strategies is often a more effective use of a regulator’s limited resources.\(^{33}\) In addition, the sanction can provide useful feedback to the alleged offender and the regulator, because the sanction aims to influence behaviour and encourage a culture of compliance.\(^{34}\)

On the other hand, if an enforceable undertaking is not complied with, the regulator may enforce the undertaking in court.\(^{35}\) The enforcement option gives the regulator an edge because such an option maximises the chances that an undertaking will be complied with. Rational people will be aware that non-compliance with an undertaking can lead to enforcement. This threat may diminish the likelihood that a promisor will not comply with the terms of his or her undertaking.\(^{36}\)


\(^{34}\) ASIC, *Regulatory Guide 100: Enforceable Undertakings* (March 2007), [1.3]; See also Brent Fiss and John Braithwaite, *Corporations, Crime and Accountability* (State University of New York Press, 1993), 92.

\(^{35}\) *ASIC Act*, ss 93AA(3) and 93A(3).

\(^{36}\) Braithwaite, above n 33, 118.
Although an enforceable undertaking has been seen to be a form of negotiated settlement that relies on strategies of both persuasion and enforcement, the introduction of the enforceable undertaking into the regulatory system has nevertheless raised questions in relation to the nature of such undertakings: Can an enforceable undertaking be treated in the same way as a contract? The question arises since, like a contract, an enforceable undertaking is an agreement, in this instance between a regulator and a regulated entity, and it cannot be entered into without the approval of both parties. The answer to the question was dealt with in respect of s 87B of the *Trade Practices Act*.

In *Australian Petroleum Pty Ltd v ACCC*,

Australian Petroleum Pty Ltd applied for review of the enforceable undertaking it had given to the ACCC and for the amendment of its terms. The ACCC argued that such a review was not within the court’s power since an enforceable undertaking is a contract.

The content of an undertaking is a matter of agreement … A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute; the validity and effect of the contract being determined … by the ordinary laws of contract … The action [resulting from entering into an enforceable undertaking] is contractual, not statutory.

According to the ACCC’s reasoning, since an enforceable undertaking is a contract, its terms cannot be varied without the approval of all relevant parties. Courts are

37 *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 143 ALR 381.

38 *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 143 ALR 381, 391.
usually reluctant to engage in the judicial review of contractual behaviour. As a consequence, review of an undertaking would not be possible. However, Lockhart J took the view that the power of the ACCC to accept an enforceable undertaking is not contractual. The authority really comes from s 87B of the Act and as a consequence it is statutory in nature. It is due to its statutory nature that the ACCC is able to enforce an undertaking in court in case of a breach of its terms. A breach of a court order in relation to that undertaking then constitutes contempt of court. Accordingly, the Court rejected the ACCC’s argument, finding that an enforceable undertaking cannot be defined as a contract. While there are no similar cases relating to enforceable undertakings entered into by ASIC, the same reasoning applies by analogy to ss 93AA and 93A of the ASIC Act due to their similarity to s 87B of the Trade Practices Act.

The ACCC and ASIC have each classified the enforceable undertaking as a form of settlement. However, an enforceable undertaking is a settlement that is special in nature because of its flexibility, its availability to the public and the ability of the regulator to enforce an undertaking in court. Enforceable undertakings are further distinguished from other forms of settlement by the fact that ASIC has issued clear guidelines and policies in relation to its use of enforceable undertakings.

3.4 Policy behind the Use of Enforceable Undertakings by ASIC

Until March 2007, Practice Note 69 set out ASIC’s approach to accepting undertakings under ss 93AA and 93A of the ASIC Act. Part A described the circumstances under which ASIC would accept enforceable undertakings, while Part B gave certain examples of acceptable and unacceptable terms in an enforceable

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39 ACCC, Annual Report 1995–96, 117; more recently, this was noted in ACCC, Annual Report 2006–07, iv; ASIC, above n 34, [1.1].
undertaking. Part C identified the consequences of a breach of the terms of an undertaking by the promisor, while Part D explained the circumstances under which ASIC would agree to vary or withdraw an enforceable undertaking.

In March 2007, Practice Note 69 was replaced by Regulatory Guide 100.\(^{40}\) The new guide takes into consideration Practice Note 69 and builds on it by responding to questions and problems raised when undertakings have been entered into in the past. The guide is divided into four sections. Section 1 covers what is an undertaking, Section 2 explains the circumstances under which ASIC will accept an undertaking, Section 3 covers the terms and terminology of enforceable undertakings and Section 4 explains what happens if an undertaking is breached.

ASIC’s use of enforceable undertakings has usually been consistent with the policies outlined first in Practice Note 69 and now in Regulatory Guide 100. The fact that this information is available to the regulated community enhances the transparency of enforceable undertakings because the regulated entity will become aware of the manner and instances in which the regulator may accept an enforceable undertaking. ASIC has in addition consistently ensured that there is uniformity in the structure of the undertakings it enters into. This structure is as follows:\(^ {41}\)

\(^{40}\) ASIC, above n 34.

\(^{41}\) This structure has generally been followed by ASIC even though there is no statutory requirement that undertakings should follow any particular structure or indeed even a consistent structure: see ASIC, Enforceable undertakings register, <http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Enforceable+Undertakings+Register?openDocument>. See also ASIC, above n 34, Table 4.
• Background: this section sets out details of the parties involved in the enforceable undertaking and of the alleged breach, and includes a description of the penalties available to ASIC in respect of such a breach.

• Acknowledgment by the alleged offender of ASIC’s concerns.

• Undertakings: this section specifies the undertakings that the promisor has offered and that ASIC has agreed to accept. For example, the alleged offender may undertake to stop the alleged contravention, implement a compliance program to prevent the future occurrence of similar breaches, and/or pay compensation to persons adversely affected by the alleged breach.

• Compliance and monitoring: a clause may specify the arrangements made by the promisor in relation to monitoring his or her compliance with the undertaking.

• Additional acknowledgments: the promisor acknowledges that ASIC may from time to time publicly refer to the undertaking and will make it available for public inspection on its register, and that the undertaking does not affect the rights and remedies in respect of any matter referred to in the undertaking available to ASIC or any other person.

• Signature of the parties: without the signature of the parties, the undertaking has no effect.

The fact that ASIC has applied this structure to most of the undertakings it has entered into enables regulated entities to know what to expect from an enforceable undertaking and this further enhances the transparency of the process of entering into an undertaking.
3.4.1 Considerations Taken into Account When Accepting an Undertaking

Enforceable undertakings are commonly entered into by companies and individuals seeking to avoid costly litigation. However, ASIC will not enter into an undertaking that does not offer a more effective regulatory outcome than could otherwise be achieved through other enforcement remedies available to it, namely non-negotiated administrative or civil action. For example, in the enforceable undertaking it entered into with Multiplex Ltd, ASIC stated that:

In considering whether to accept this enforceable undertaking ASIC has taken into account that the undertaking would provide a more appropriate regulatory outcome than a civil penalty proceeding.

In assessing whether an enforceable undertaking is a more effective regulatory outcome than other possible courses of action, Regulatory Guide 100 states that ASIC takes into account four critical considerations:

- What would be the position of consumers and investors whose interests have been or may be harmed by the suspected conduct?

An enforceable undertaking would have an effective regulatory outcome if it promoted public confidence in, and the integrity of, financial markets and corporate governance. For example, ASIC entered into an undertaking with Tower Superannuation Pty Ltd (‘Tower’) because the regulator suspected that

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42 ASIC, above n 34, [1.4]. The ACCC has also issued guidelines on its use of enforceable undertakings and will only enter into enforceable undertakings if they offer a better solution and outcome than other sanctions: ACCC, Section 87B of the Trade Practices Act: Guidelines on the Use of Enforceable Undertakings by the Australian Competition and Consumer Commission (September 2009), <http://www.accc.gov.au/content/index.phtml/itemId/263958>.

43 ASIC, Enforceable Undertaking: Multiplex Ltd, Document No 017 029 205 (20 December 2006).

44 ASIC, above n 34, [2.8], [2.9].
the company had committed a number of administrative errors in the calculation of members’ account balances. When ASIC accepted the undertaking with Tower, it ensured the protection of the interests of the members and the quick rectification of the account balance errors. The total compensation paid by the promisor was estimated to amount to $1 million.\footnote{ASIC, Enforceable Undertaking: Tower Superannuation Pty Ltd, Document No 017 029 143 (10 March 2005).}

- What would be the effect on the regulated person’s future conduct?
  An enforceable undertaking would have an effective regulatory outcome if it deterred the alleged offender from future instances of the conduct giving rise to the undertaking.

- What would be the effect on the regulated population as a whole?
  An enforceable undertaking would have an effective regulatory outcome if it promoted general deterrence by making the business community aware of the conduct and the consequences arising from engaging in that conduct.

- What would be the community benefit in regulatory outcomes being achieved as quickly and cost-effectively as possible?
  An enforceable undertaking would have an effective regulatory outcome if it provided an ongoing benefit by way of improved compliance programs. Community service works or projects, such as a number of promisors have agreed to undertake, may also provide an effective regulatory outcome. For example, in 2003, it was alleged that Automotive Financial Services Pty Ltd did not comply with legislation in relation to insurance contracts. The company promoted a product that should have been considered an insurance contract. In its undertaking, the company promised to contribute $20 000 to
be used by ASIC for researching, educating and promoting consumer awareness about their rights, including any risks in purchasing financial products offered by or through car dealers.\textsuperscript{46}

*Regulatory Guide 100* provides additional explanation of ASIC’s use of enforceable undertakings in relation to factors that the corporate regulator will consider in deciding whether an enforceable undertaking is appropriate in the circumstances of each case. These factors include the following:\textsuperscript{47}

- Was the alleged breach of the law inadvertent?
- Was the alleged breach a result of the conduct of one or more individual officers or employees of the company?
- What was the level of experience and seniority of the alleged offender or offenders?
- Has the alleged offender cooperated with ASIC, including in the provision of full information about the alleged breach?

Most undertakings accepted by ASIC include a clause acknowledging the fact that the promisor has cooperated with ASIC.

- Is the alleged offender prepared to publicly acknowledge ASIC’s concerns in relation of the conduct?

Most undertakings accepted by ASIC include a clause stating that the promisor acknowledges ASIC’s concerns.

\textsuperscript{46} ASIC, Enforceable Undertaking: Automotive Financial Services Pty Ltd, Document No 017 029 111 (25 September 2003).

\textsuperscript{47} ASIC, above n 34, [2.10].
• Will it achieve an effective outcome for those adversely affected by the alleged breach?

• Is the alleged offender likely to comply with the enforceable undertaking?

This last factor is an important consideration since ASIC’s monitoring of enforceable undertakings relies on self-regulation. It has not, however, prevented ASIC from entering into undertakings with repeat offenders. For example, in 2006 ASIC accepted an undertaking from Cash Now Pty Ltd and John Anthony Falting in relation to breaches of the fundraising provisions in the Corporations Act even though in 2003 the regulator had raised concerns that the promisors were involved in breaches of the same fundraising provisions.

However, ASIC has not only accepted enforceable undertakings as an alternative to litigation. A study of the enforceable undertakings accepted by ASIC over the past decade reveals that enforceable undertakings may also be entered into after the corporate regulator has commenced or even completed legal action.

3.4.2 During and after Court Proceedings

In certain cases, ASIC may agree to enter an enforceable undertaking after the commencement of court proceedings. The result of this is to annex the undertakings to the court proceedings. The undertakings do not interrupt the continuation of court proceedings.

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48 The monitoring of undertakings is discussed in Chapter 8.

49 In response to ASIC’s concerns in October 2003, Mr Falting and Cash Now Pty Ltd (at that time known as Cashnowau Pty Ltd) undertook to cease advertising and accepting funds until ‘full approval of a debenture program is approved by [ASIC]’. ASIC decided not to take any further action against the company. Around May 2005, ASIC became aware that the company was once again advertising debentures on its website: ASIC, Enforceable Undertaking: Cash Now Pty Ltd and John Anthony Falting, Document No 017 029 196 (20 April 2006), [4], [5].
proceedings. In other cases, ASIC may accept an enforceable undertaking after court proceedings have been completed. In *ASIC v Nomura International Plc*, the Federal Court made declarations that Nomura International Plc (‘Nomura’), in closing out its arbitrage position on 29 March 1996, had contravened ss 995, 998 and 1260 of the *Corporations Law* and s 52 of the *Trade Practices Act*. The judgment was followed by the acceptance of an enforceable undertaking which referred to the Court’s findings, and in which Nomura promised ASIC not to engage in the contravening action in the future. The undertaking was in no respect contradictory to the judgment.

On other occasions, ASIC has accepted enforceable undertakings in order to settle court proceedings. For example, in 2001, ASIC began proceedings against the trustee of the TWU Superannuation Fund, alleging that the trustee had engaged in misleading conduct in connection with the disability insurance cover available to members of the fund. These proceedings were settled by ASIC’s acceptance of an enforceable undertaking and the issuing of consent orders. The text of the enforceable undertaking required it to be read and interpreted together with the court orders.

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50 ASIC, Enforceable Undertaking: Landy DFK Securities Ltd, Document No 017 029 045 (1 July 2002), [1.5].


52 These are now different sections in the *Corporations Act*: ss 1041H, 1041A, 1041B and 1041C.

53 The reasons for judgment were annexed to the undertaking: ASIC, Enforceable Undertaking: Nomura International Plc, Document No 008 547 314 (16 February 1999), [1.3], [1.4].

54 ASIC, Enforceable Undertaking: TWU Nominees Pty Ltd as trustee for the TWU Superannuation Fund, Document No 008 547 507 (14 March 2001), [1.17], [1.18].
3.4.3 *In Conjunction with Administrative Appeal Tribunal Proceedings*

ASIC has entered into enforceable undertakings subsequent to its issuing banning orders the review of which is sought before the Administrative Appeals Tribunal (‘AAT’). In such cases, an enforceable undertaking is sometimes simply added to the decision of the AAT. For example, in 1998, ASIC commenced an investigation to determine whether Leigh Anthony Gardner had contravened a provision of the *Corporations Law* by creating a false or misleading appearance with respect to the market for, or the price of, shares in a certain company and, as a result of its investigation, in 1999 ASIC issued a banning order prohibiting Mr Gardner from doing an act as a representative of a dealer for a period of four years. Mr Gardner appealed for review of ASIC’s decision to the AAT. Subsequently, ASIC accepted an undertaking in which the promisor agreed to successfully complete a course in Securities Industry Law and Ethics and consented to an order of the AAT subjecting him to a banning order for a period of 12 months.\(^\text{55}\)

In other situations, the differences between ASIC and the alleged offender are resolved by the acceptance of an enforceable undertaking. In such instances, the effect of the enforceable undertaking is to stop the appeal to the AAT from proceeding. For example, in 1998, following an investigation, ASIC banned John Barron from acting as a securities dealer or investment adviser for a period of two years. Mr Barron disputed ASIC’s finding and appealed the banning decision to the AAT. The differences between Mr Barron and ASIC were resolved by the acceptance of an enforceable undertaking. Mr Barron promised that he would not, for a period of two years, deal with securities or investment advice, and in return, ASIC agreed to set

\(^{55}\) ASIC, Enforceable Undertaking: Leigh Anthony Gardner, Document No 008 547 410 (14 February 2000), [1.10].
aside its banning order. The banning order was replaced by a voluntary ban which, although for the same duration, may nevertheless be deemed to be a lighter sanction.  

3.5 Analysis of the Enforceable Undertakings Accepted by ASIC

From 1998 to 2008, ASIC accepted 286 undertakings. This number gives the impression that the enforceable undertaking is a popular sanction. However, as Diagram 3.2 illustrates, the number of undertakings ASIC has entered into has fluctuated over the years.

Diagram 3.2. ASIC’s use of enforceable undertakings

56 ASIC, Enforceable Undertaking: John Barron, Document No 008 547 393 (30 September 1999), [1.8]. For discussion of the differences to the promisor between a voluntary ban and a banning order see 5.5.

57 ASIC, above n 41.

58 ASIC, above n 41.
Explaining these fluctuations, Ms Jan Redfern, former ASIC Executive Director of Enforcement, observed that:\(^59\)

[T]here were more enforceable undertakings before 2004–05, before the creation of the Compliance Directorate. [Following] the creation of the Compliance Directorate, ASIC conducted surveillance of the market more closely and used a variety of remedies to ensure compliance. This meant there was less need for enforceable undertakings and a greater use of alternative remedies.

This statement is confirmed by the fact that the number of undertakings entered into by ASIC began to decline in 2000–01, the financial year during which ASIC’s operating structure was reorganised under seven national directorates.\(^60\) This number decreased even more in 2004 with the introduction of the Compliance Directorate.\(^61\) ASIC’s operating structure changed again on 1 September 2008, when four directorates were replaced by 20 outwardly focused ‘stakeholder and deterrence teams’ covering the financial economy.\(^62\) It will be interesting to observe if, in the years to come, a new strategy relating to the use of enforceable undertakings appears as a result of this structural change. In 2009, the number of enforceable undertakings

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\(^59\) Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).

\(^60\) The seven national directorates were as follows: Enforcement, Financial Services Regulation, Market Regulation and Policy, Consumer Protection, International and Regional Coordination, Public and Commercial Services, Infrastructure and Strategic Planning: see ASIC, *Annual Report, 2000–01*, 9, 14–15.

\(^61\) In 2004–05, ASIC’s seven national directorates were reorganised to become six directorates as follows: Enforcement, Consumer Protection, Compliance, Regulation, Operations, Finance: see ASIC, *Annual Report, 2004–05*, 13.

\(^62\) ASIC, *Annual Report 2007–08*, 8, 35. This is made up of 12 financial economy stakeholder teams focused on monitoring the market and ensuring compliance with the rules and developing policy initiatives, and eight specialised deterrence teams focused on the investigation and prosecution of serious misconduct. There are also real economy teams focused on stakeholder services and ASIC’s public register and registration functions: see ASIC, *Annual Report, 2008–09*, 58.
accepted by ASIC was consistent with the previous two years indicating that the change in ASIC’s operating structure has not had an impact on the use of enforceable undertakings.  

3.5.1 Who Has Entered into Undertakings with ASIC?

Analysis of the data from the past decade shows that of the enforceable undertakings entered into by ASIC during this period, 42.7% (122 enforceable undertakings) were made with companies, while 18.5% (53 enforceable undertakings) were made with companies and their directors, and 38.8% (111 enforceable undertakings) were made with individuals.

![Diagram 3.3. Alleged offenders entering into enforceable undertakings](image)

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Listed companies, unlisted public companies and proprietary companies all entered into undertakings with ASIC.

3.5.2 The Alleged Breaches That Have Been the Subject of an Undertaking

While the majority of the undertakings accepted by ASIC dealt with alleged breaches relating to financial services, a range of alleged offences may lead to an enforceable undertaking. For example, suspected contraventions may vary from concerns about the compliance programs present in a company to more serious offences such as breaches of authorised representatives’ duties and misleading advertisements.

Analysis of the enforceable undertakings entered into by ASIC since 1998 reveals several differences between the contraventions alleged against individuals and companies. While there is a certain consistency in the contraventions allegedly committed by individuals, this is not the case in relation to the breaches allegedly perpetrated by companies.

- Individuals: most of the enforceable undertakings entered into by individuals were in relation to alleged contraventions of authorised representatives’ duties. However, in 1998 the greatest number of breaches allegedly committed by individuals was in relation to directors’ duties. Since 2004, an increasing

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64 ‘Co’ refers to companies and ‘indiv’ refers to individuals; ASIC, above n 41.


66 This is the result of the broad formulation of ASIC Act, s 93AA: Australian Securities and Investments Commission v Edwards (2004) 51 ACSR 320, [16]; Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd (2003) 198 ALR 417, [55].

67 ASIC, above n 41.
number of the enforceable undertakings entered into by individuals have been in relation to breaches of auditors’ and liquidators’ duties.

- Companies: there is no real consistency in the alleged contraventions that may lead a company to enter into an enforceable undertaking with ASIC. Some of the most frequently occurring alleged contraventions include the following:
  - operating and managing an investment scheme without a licence;
  - carrying on a business of securities or investment advice without a licence;
  - managing an unregistered investment scheme;
  - failure to comply with the obligations and duties of a financial services licensee;
  - misleading and deceptive advertisement;
  - misleading statement in prospectus; and
  - non-compliance with continuous disclosure obligations.

3.5.3 The Particular Advantages of Undertakings in Achieving Effective Regulatory Outcomes

As noted in 3.4 above, in an undertaking the alleged offender promises to do or not do certain actions. The content of the undertaking will depend on both the gravity of the alleged contravention the subject of the undertaking and the situation of the promisor. The fact that each enforceable undertaking is tailored to the particular circumstances

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68 This category includes both undertakings entered into by companies and undertakings entered into by companies and their directors.
of a matter \(^{69}\) provides the corporate regulator with an opportunity to apply a problem solving approach to alleged contraventions of the law, allowing it to implement the most effective and efficient solution to deal with the alleged breach. \(^{70}\) This possibility is enhanced by the fact that an enforceable undertaking relies heavily on the cooperation that should exist between the regulator and the promisor.

From ASIC’s perspective, an enforceable undertaking has two main advantages over court action in particular:

- cost and time savings; and
- flexibility.

In ASIC’s *Annual Report 1997–98*, it was stated that one of its objectives for the following year was to continue ‘cost and efficiency initiatives’. \(^{71}\) The introduction of the sanction of enforceable undertaking in that year may be seen as being conducive to achieving that objective because the sanction allows the regulator to reach a speedy solution to alleged breaches of the law. ASIC’s *Annual Report 1998–99* reflects the way the regulator embraced this additional sanction, noting that enforceable undertakings ‘provide quicker, cheaper remedies than court proceedings, and the undertakings may involve any action to which the parties agree.’ \(^{72}\)

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\(^{69}\) See ASIC, above n 34, [2.16].

\(^{70}\) The problem solving approach was discussed in 2.7.


It has been suggested that an enforceable undertaking may enable the parties to reach a more flexible and arguably more appropriate resolution than court order, since an enforceable undertaking may contain promises that are beyond the court’s power.\footnote{Parker, above n 32, especially 15–19.}

In *ACCC v Woolworths (South Australia) Pty Ltd*\footnote{Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd (2003) 198 ALR 417.} Mansfield J noted the power of a statutory authority empowered by such a provision to accept an enforceable undertaking is more comprehensive than that of a court, which is subject to certain restraints.\footnote{Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd (2003) 198 ALR 417, [55]. Due to the similarity between s 87B of the *Trade Practices Act* and ss 93AA and 93A of the *ASIC Act*, courts’ judgments in relation to these sections are regularly cross-referenced, as recognised by Australian Securities and Investments Commission v Edwards (2004) 51 ACSR 320, [16].}

Since an enforceable undertaking is not confined to what a court might ordinarily order, such a sanction may also remedy legislative ‘gaps’. That this may be so becomes obvious when considering the goals sought to be achieved by an enforceable undertaking. These goals include the following:\footnote{ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994), 38. See also ASIC, above n 34, [2.3], [2.9]. As it is an administrative sanction, the goal of an enforceable undertaking is not to punish the alleged offender: Yeung, above n 19, 115. The same goals apply to the ACCC’s use of enforceable undertakings.}

- protection of the public;
- prevention of similar breaches in the future by changing the compliance culture of an organisation, for example, through the implementation of compliance programs; and
- corrective measures, such as compensation or corrective advertisement.
The achievement of such aims by an enforceable undertaking may not only help to fill any legislative ‘gaps’ that may exist, the enforceable undertaking may have a broader impact than a settlement might have done in the same circumstances. This is the case because the aims of a settlement usually relate to warning or cautioning firms and preventing future contraventions, but not to correcting the damage caused by the contravention nor necessarily to securing compensation to injured parties.77 A regulator may thus deem the enforceable undertaking to be more flexible than both court action and settlements.

3.5.4 The Promises Made in the Undertakings

The kinds of promises most commonly made in enforceable undertakings are that the alleged offender will:78

- stop committing the alleged offence;
- put a compliance program in place;
- agree to a voluntary self-ban;
- fulfil some education requirements;
- compensate affected parties;
- be involved in community service work or projects; and
- disclose the undertaking to a certain category of people.

77 Yeung, above n 19, 111.

78 ASIC, above n 41. The numbers of enforceable undertakings which contain these promises is discussed in Chapters 5 and 6.
These promises interact, as illustrated in Diagram 3.4, to ensure the achievement of the goals of the enforceable undertaking, which may include, for example, prevention, deterrence and corrective action.

Diagram 3.4. The interaction of the different promises in undertakings

Other promises, such as the deregistration of a company or the suspension or revocation of a licence, may also form part of an undertaking. However, these are used considerably less often than the promises mentioned above, and will not be
considered in this study. For the guidance of and to assist people drafting undertakings, ASIC has issued templates including sample terms for promises that are frequently included in undertakings.\textsuperscript{79}

3.5.5 \textit{Correspondence between Promises and Goals of Undertakings}

The goal behind an alleged offender’s promises to stop a particular conduct and to agree to a voluntary ban on his or her activities is, in theory, the protection of the public. Such promises ensure the protection of the public by deterring the promisor from committing the alleged breach again. The promises may also influence third parties, who will think twice before committing similar breaches, knowing that ASIC will take similar action against them in turn. The deterrent effect of enforceable undertakings has, however, been criticised. For example, in \textit{Re Hayes and Australian Securities and Investments Commission}\textsuperscript{80} the Hon R N J Purvis observed:\textsuperscript{81}

> An undertaking pays little regard, as I see, to the importance of personal and general deterrence when maintaining confidence in the securities industry and the structure established for its maintenance. I agree with the submission made in this regard on behalf of the Respondent namely “when a person is licensed as an authorised representative ASIC effectively endorses that person to the public as reliable, and a person in whom consumers can place trust and confidence. ASIC reviews this public aspect of the role as a serious matter relevant to the confidence of the market and

\textsuperscript{79} One template shows the format ASIC requires for all enforceable undertakings; the others include sample terms in relation to compliance programs, compensation and corrective advertisements: ASIC, ‘Enforceable Undertakings Templates’ (August 2007), <http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable+undertakings+templates?openDocument>.

\textsuperscript{80} Re Hayes and Australian Securities and Investments Commission (2006) 93 ALD 494.

\textsuperscript{81} Re Hayes and Australian Securities and Investments Commission (2006) 93 ALD 494, [73].
consumers generally. Being an authorised representative is a privilege not a right involving dealings with other people’s money. The obligations are personal ones under the Act. A voluntary enforceable undertaking fails to carry with it the suggestion that ASIC has found something wanting in the person’s performance.”

Responding to the above statement, a senior officer at ASIC has noted that while personal deterrence may be hard to achieve with an undertaking, general deterrence is not, ‘because an enforceable undertaking can set out principles for guidance in relation to compliance for others.’

It is important to note that not every alleged breach of the law leads to an enforceable undertaking. In the past, ASIC has rejected a number of proposed undertakings because it considered that the sanction in question was inappropriate to deal with the magnitude of the alleged contraventions. More recently, ASIC refused to accept an undertaking proposed by Duncan Howarth in relation to his alleged breaches of the financial services laws because it believed the undertaking offered would not provide any protection to the public.

The goal behind an alleged offender’s promises to implement a compliance program and to successfully complete an educational course is the prevention of future breaches of the law. Requiring the promisor to carry out such activities ensures that he or she is made aware of the law and is likely to implement safeguards in order to prevent the occurrence of similar breaches in the future. A survey conducted by

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82 Questionnaire completed by Jan Redfern, former ASIC Executive Director of Enforcement (face to Face meeting, 20 June 2008).

Chartered Secretaries Australia Ltd in relation to the use of infringement notices found that 69% of the people surveyed believed that the use of an enforceable undertaking which required the implementation of a compliance program was more effective in ensuring future compliance than an infringement notice.\textsuperscript{84}

The goal behind promises such as disclosure, the payment of compensation and the carrying out of community service works or projects is to correct the damage caused by the alleged breach.

For example, in 2002, ASIC was concerned that Mortgage and General Financial Services Pty Ltd, a licensed securities dealer, was selling products in contravention of its licence restrictions as well as contravening its obligations as a securities dealer by failing to properly train and supervise the representatives involved in selling certain financial products. ASIC entered into an enforceable undertaking with Mortgage and General Financial Services Pty Ltd in which the company undertook to stop sale of the product and to send letters to its clients notifying them of the enforceable undertaking and of their right to rescind their agreement with the company if they wished to do so. The company also promised to ensure that its representatives completed the necessary training and that its licence conditions were complied with through the establishment and implementation of certain compliance measures.\textsuperscript{85} The public was protected by the undertaking accepted by ASIC since the company stopped


\textsuperscript{85} ASIC, Enforceable Undertaking: Mortgage and General Financial Services Pty Ltd, Document No 017 029 060 (17 October 2002).
sale of the product which was the subject of the alleged breach. By publicising the undertaking to its clients and informing them of their rights, the company took action to correct the consequences of its alleged breach. The undertaking also sought to prevent future breaches of the company’s licence obligations from occurring through the establishment of compliance measures and staff training.

3.6 In Summary

The use of enforceable undertakings bridges the gap that exists between persuasion and enforcement strategies and promotes the use of a problem solving approach by the regulator. An enforceable undertaking is a harsher remedy than settlement as it may be enforced in court. However, it is a softer option than litigation because it does not usually require court involvement.

Enforceable undertakings are more transparent than settlements. ASIC has issued a regulatory guide and templates relating to its use of enforceable undertakings, enabling regulated entities to be aware of the circumstances in which ASIC will be willing to accept an undertaking, but the regulator has published no guidelines on its use of settlements.

ASIC has used enforceable undertakings in a number of different situations to achieve different goals. The promises included in an undertaking aim to protect the public, correct any wrong caused by the alleged breach and prevent similar breaches from occurring in the future. Some undertakings stand on their own while others are linked to court action initiated by ASIC, but ultimately, ASIC accepts an enforceable
undertaking when it considers the sanction provides a more effective regulatory outcome than other non-negotiated administrative or civil sanctions.

The next question to consider is how the promisor may view an enforceable undertaking. Chapter 4 will assess whether enforceable undertakings may be deemed as procedurally fair, and Chapter 5 will consider whether the promises given in an undertaking are reasonable.
Chapter 4: Enforceable Undertakings: Are They Procedurally Fair?

4.1 The Importance of Procedural Fairness

An enforceable undertaking is a special form of statutory settlement. One might expect that the legislation would provide a procedure to be followed by the regulator when entering into an undertaking. However, ss 93AA(1) and 93A(1) of the ASIC Act specify only that an undertaking accepted by ASIC must be in writing. The same is true in the case of enforceable undertakings entered into by the ACCC. Section 87B of the Trade Practices Act does not contain any information relating to the procedure to be followed before entering into an undertaking.

The lack of rules relating to the procedure to be followed when entering into an undertaking has been criticised. Some commentators have noted that this lack of standards may lead to arm-twisting and bullying by the regulator. From an administrative law perspective, it raises the question of whether the rules of procedural fairness are being complied with when ASIC accepts an enforceable

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1 See discussion at 1.3, 3.3.


undertaking. The procedural fairness of an undertaking is vital in instances where the terms of an undertaking have not been complied with, since if the procedure that led to the undertaking is deemed to have been unfair by the court, it is unlikely for the court to enforce the terms of the undertaking. This will mean that a breach of the undertaking will not have any consequences.

Procedural fairness is also crucial from the point of view of the promisor. From a psychological perspective, it is of the utmost importance for an enforceable undertaking to be perceived as fair and for it to have followed a determinable procedure. This is especially the case in instances where the cost to the promisor of complying with the undertaking they have entered into may run into millions of dollars. Any perceived lack of fairness may lead the promisor to resent the conduct of the regulator. This may in turn affect the manner in which the alleged offender will comply with the terms of the undertaking. In fact, any resentment may stop an undertaking from achieving one of its main aims, which is to change the compliance culture of an organisation. Such a change is only possible in instances where the

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4 ‘Procedural fairness’ is concerned with the procedures followed by a decision-maker. It does not deal with the actual outcome reached by a decision-maker but requires a fair and proper procedure to be used by the decision-maker when deciding on a particular matter. The notion of procedural fairness is discussed in more detail in 4.2.

5 In such a situation, ASIC may still decide to initiate proceedings against the original alleged breach of the law. However, this does not change the fact that the enforceable undertaking has lost some of its effectiveness: Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd (2003) 198 ALR 417, [43]; Australian Competition and Consumer Commission v Signature Security Group Pty Ltd (2003) ATPR ¶41–942, [38]. See further discussion at 9.4.1.


An enforceable undertaking may require a promisor to publish corrective advertisements or to refund customers affected by the alleged breach of the law, and whether or not such promises have been fulfilled is readily observable—but a change in an organisation’s compliance culture is not readily observable and cannot easily be measured. A promisor unhappy with the procedure that led to an undertaking may comply with the letter of the undertaking (for example, compliance with corrective advertisement and payment of compensation requirements) but not its spirit (changing behaviour of the organisation so that future breaches of the law do not occur).

Further, the use of an enforceable undertaking relies heavily on trust and compliance between ASIC and the alleged offender. Cooperation is a key element in the successful implementation of the terms of an undertaking. If such cooperation is non-existent, ASIC is unlikely to enter into an undertaking. For cooperation to continue after the acceptance of an undertaking, the promisor should believe that the regulator is treating him or her in a fair and just manner. A perceived lack of procedural fairness may lead to the creation of minimal compliance and this would mean that an enforceable undertaking would not achieve its goals, as characterised in Diagram 4.1.

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10 ASIC, *Regulatory Guide 100: Enforceable undertakings* (ASIC, March 2007), [2.4], [2.10].

11 Ibid, [2.10].

As may be seen, an apparent lack of procedural fairness may result in breaches of an undertaking, or compliance with merely the letter and not the spirit of the law. The latter scenario should be of particular concern to the regulator. For example, an alleged offender may agree in its undertaking to implement a compliance program. As noted in Chapter 3, the aim of such an implementation is to change the compliance

\[\text{Diagram 4.1. Outcome of an enforceable undertaking in case of lack or perceived lack of procedural fairness}^{13}\]

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13 For the purpose of this diagram, 'enforceable undertaking' is abbreviated to 'EU'.


15 ASIC, above n 10, [2.3].
culture of an organisation.\textsuperscript{16} However, if the promisor believes that the undertaking is not procedurally fair, it may introduce a compliance program without taking it seriously. In such an instance, the enforceable undertaking is not necessarily breached, since the promise to implement a compliance program has been fulfilled. ASIC is not able to react to the non-compliance with the spirit of the undertaking even though one of the aims of the undertaking has not been reached: the compliance culture of the organisation has not changed as a result of the undertaking. As a consequence, the enforceable undertaking’s effectiveness is reduced because one of its main aims is not realised. The situation may be different if procedural fairness was perceived to have been achieved, as illustrated in Diagram 4.2.

\begin{center}
\begin{tikzpicture}
    \node[rectangle, fill=blue!20, text=blue] (EU) at (0,0) {Acceptance of an EU + Presence of procedural fairness};
    \node[rectangle, fill=blue!20, text=blue] (improvement) at (2,0) {Improvement in the promisor’s cooperation};
    \node[rectangle, fill=blue!20, text=blue] (compliance) at (4,0) {Compliance with the letter as well as the spirit of the undertaking};
    \node[rectangle, fill=blue!20, text=blue] (eu more) at (2,-2) {EU more effective in preventing similar future breaches by the promisor};
    \node[rectangle, fill=blue!20, text=blue] (change) at (4,-2) {Change in the compliance culture of an organisation due to the enforceable undertaking};

    \path[->] (EU) edge (improvement);
    \path[->] (improvement) edge (compliance);
    \path[->] (compliance) edge (eu more);
    \path[->] (eu more) edge (change);
    \path[->] (change) edge (EU);
\end{tikzpicture}
\end{center}

\textbf{Diagram 4.2. Outcome of an enforceable undertaking in case of procedural fairness}\textsuperscript{17}


\textsuperscript{17} For the purpose of this diagram, ‘enforceable undertaking’ is abbreviated to ‘EU’.
The alleged offender’s perception that procedural fairness was afforded in an undertaking may lead to a different outcome than the one described in Diagram 4.1. Such perception improves the cooperation between the regulated entity and the regulator. The promisor may be more satisfied with the terms of the undertaking and this in turn may result in greater compliance. Accordingly, a change in the compliance culture of an organisation is more likely to be achieved.

Due to the importance of procedural fairness, the second part of this chapter briefly considers the concept of procedural fairness and determines the elements that must be present to achieve such fairness. The third part of the chapter assesses if such elements are present when an enforceable undertaking is being entered into. Ultimately, the aim of this chapter is to analyse whether an enforceable undertaking complies with procedural fairness from both an administrative law perspective and a psychological perspective.

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18 Procedural fairness reduces the anger that a regulated entity may feel from coming into contact with the regulator. Further, it influences their assessment of the legitimacy of the regulatory agency: Alex Piquero, Zenta Gomez-Smith and Lynn Langton, ‘Discerning Unfairness Where Others May Not: Low Self-Control and Unfair Sanction Perceptions’ (2004) 42 Criminology 699, 704.


20 Using research conducted in the field of psychology, the author assesses the manner in which the promisor may perceive the fairness of the procedure that leads to an enforceable undertaking.
4.2 Procedural Fairness and its Elements

The terms ‘procedural fairness’ and ‘natural justice’ are often used interchangeably. For instance, in *Forbes v New South Wales Trotting Club Ltd*21 Murphy J stated that ‘natural justice and fairness are different ways of expressing the concept or facets of the concept of due process’.22

However, procedural fairness may be deemed conceptually to be both broader and narrower than natural justice.23 Procedural fairness may be broader than the concept of natural justice because the notion of natural justice has traditionally related to procedures relating to ‘adjudication’.24 Lon Fuller defined adjudication as a ‘form of social ordering’, which is adversarial in nature and is distinct from mediation, 

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22 *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 276. Other examples may be found in *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 112 where Mason J used the terms ‘natural justice’ and ‘duty of fairness’ interchangeably, and *Salemi v MacKellar* (1977) 137 CLR 396, 418 where Gibbs J noted that he ‘would prefer to regard the duty to act fairly as simply flowing from the duty to observe the principles of natural justice’. Similarly, in England, it has been stated that ‘natural justice is but fairness writ large and juridically. It has been described as fair play in action’: *Furnell v Whangarei High Schools Board* [1973] AC 660, 679.

In other instances, use of the term ‘procedural fairness’ is preferred over the term ‘natural justice’: for example, *Kioa v Minister for Immigration and Ethnic Affairs (West)* (1985) 159 CLR 550, 601 where Wilson J noted that ‘I have spoken of the dictates of procedural fairness because in the context of administrative decisions I think that such a phrase is an apt description of what natural justice requires’; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 53 where Dawson J observed that ‘in recent years the trend has been to speak of procedural fairness rather than natural justice in order to give greater flexibility to the extent of the duty than is possible merely by reference to a curial model’. Similar comments have been made in England: for example, Lord Roskill noted that natural justice ‘perhaps may be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly’: *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, 414–15.


contracting, managerial direction and legislation. Procedural fairness, in contrast, extends beyond this scope and covers a wider range of decision-makers.

Similarly, procedural fairness may be considered to be narrower in scope than natural justice because procedural fairness does not have the same impact, reach and protections as natural justice. Its standards may be lower than the standards relating to natural justice. In certain circumstances, it may be easier to apply the standards of procedural fairness, which may vary from one situation to another. For example, in situations where administrative bodies are making determinations on issues that affect people’s legal rights, adjudicative models do not automatically apply and may be replaced by what some may deem to be watered-down benchmarks. Irrespective of these differences, this chapter will use the terms ‘procedural fairness’ and ‘natural


26 Aronson, Dyer and Groves, above n 24, 407; Ian Holloway, Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism (Ashgate, 2002), 211.


justice’ interchangeably. The following paragraphs consider the elements that constitute procedural fairness from an administrative law perspective and from a psychological perspective.

4.2.1 Criteria from an Administrative Law Perspective

The notion of natural justice forms an important part of the English common law. For instance, in Calvin’s Case Lord Coke noted:

[T]he law of nature is part of the law of England … [T]he law of nature is immutable.

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is lex oeterna, the moral law, called also the law of nature.

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29 The term ‘procedural fairness’ may, however, be preferable when dealing with administrative regulatory agencies because the term ‘natural justice’ is more associated with court procedures: Ombudsman Western Australia, Guidelines: Procedural Fairness (Natural Justice), <http://www.ombudsman.wa.gov.au/documents/guidelines/Procedural-fairness-Guidelines-30409.pdf>.

30 The high point of natural law and natural justice in the common law system was the fact that common law could trump statute law when the statute was against the right of natural justice. In Dr Bonham’s Case (1610) 8 Co Rep 113b, 118a; 77 ER 642, 652, the court noted that ‘it appears in our books that in many cases the common law will controul acts of parliament and sometimes adjudge them to the utterly void: for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law will controul it and adjudge such act to be void’. Similar comments were made in Day v Savadge (1614) Hob 85, 87; 80 ER 235, 237 and Forbes v Cochrane (1824) 2 B & C 448, 469–70; 107 ER 450, 458–9. However, it is important to note that these concepts can be traced to ancient times: Aristotle, Nicomachean Ethics (W D Ross trans, Clarendon Press, 2004), 76. See also Stephen Buckle, ‘Natural Law’ in Peter Singer (ed), A Companion to Ethics (1993), 162; John Salmond, ‘Law of Nature’ (1895) 11 Law Quarterly Review 121, 127; Kaikhosrov Irani, ‘The Ideal of Social justice in the Ancient World’ in Kaikhosrov Irani and Morris Silver (eds), Social Justice in the Ancient World (Greenwood Press, 1995), 6; Charles Brice, ‘Roman Aequitas and English Equity’ (1913–14) 2 Georgetown Law Journal 16, 18–19; Michael Zuckert, ‘Bringing Philosophy Down from the Heavens: Natural Right in the Roman Law’ (1989) 51(1) Review of Politics 70; A J McGregor, ‘The Law of Nature—Jus Naturale’ (1942) 59 South African Law Journal 343; Barry Nicholas, Introduction to Roman Law (Clarendon Press, 1962), 51; Henri Maine, Ancient Law (Dent, 1972), 27; Thomas Riha, ‘The Idea of Natural Law and the Moral Content of Economics’ (1998) 10 International Journal of Social Economics 1520.

31 Calvin’s Case (1608) 77 ER 377.

32 Calvin’s Case (1608) 77 ER 377, 391–2.
Similarly, Lord Mansfield observed in *Moses v Macferlan* that ‘in one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money’. Today, these ‘ties of natural justice’ refer to two traditionally-accepted limbs of natural justice:

- *Audi alteram partem*—the right to be heard; and
- *Nemo judex in causa sua*—the right to an unbiased decision.

While these are the more traditional strands of procedural fairness, the doctrine is one of common law and it is difficult to determine and quantify what constitutes procedural fairness in all circumstances. Accordingly, the courts have stressed the flexible character of procedural fairness, which may vary from one context to the next. For instance, in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* Kitto J observed that ‘what the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances’. Similar comments may be found in *Kioa v Minister for Immigration and Ethnic Affairs (West)*. However, this chapter focuses on the abovementioned two traditional limbs of natural justice.

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33 *Moses v Macferlan* (1760) 2 Burr. 1005; 97 ER 676.
34 *Moses v Macferlan* (1760) 2 Burr 1005, 1012; 97 ER 676, 681.
35 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475.
36 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504.
37 *Kioa v Minister for Immigration and Ethnic Affairs (West)* (1985) 159 CLR 550, 612. See also *National Companies and Securities Commission v News Corporation* (1984) 156 CLR 296, 311 where Gibbs CJ observed that ‘the authorities show that natural justice does not require the inflexible application of a fixed body of rules’; *Stollery v Greyhound Racing Control Board* (1973)
4.2.1.1 The Right to be Heard

The notion of entitlement to a hearing has been around for a long time. For instance, a passage in the Holy Bible entitled ‘God Questions Adam and Eve’ states:

But the LORD God called to the man, ‘Where are you?’ He answered, ‘I heard you in the garden and I was afraid because I was naked; so I hid.’ And He said, ‘Who told you that you were naked? Have you eaten from the tree that I commanded you not to eat from?’ The man said, ‘The Woman you put here with me – she gave me some fruit from the tree, and I ate it.’ Then the LORD God said to the woman, ‘What is this you have done?’ The woman said, ‘The serpent deceived me and I ate it.’

This passage has been referred to in a number of cases. For instance, Lord Fortescue declared the obligation to give a hearing in 1723 when he noted in Dr Bentley that:

The laws of God and man both give the party the opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such cases.

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128 CLR 509, 526 where Gibbs J noted that ‘the principles of natural justice are not rigid or technical’; Salemi v MacKellar (1977) 137 CLR 396, 419; Russell v Duke of Norfolk (1949) 1 All ER 109, 118. Similar comments have also been made by commentators. For example, Johnson stated that ‘the contents of natural justice range from a full blown trial into nothingness’: Graeme Johnson, ‘Natural Justice and Legitimate Expectation in Australia’ (1985) Federal Law Review 39, 71.

38 This part of the chapter will look at only some of the main points relating to the right to be heard. It will consider only the issues to be raised in 4.3 when assessing the procedural fairness of an enforceable undertaking. For more information on this topic see Head, above n 23, Ch 11; Aronson, Dyer and Groves, above n 24, Ch 8; Roger Douglas, Douglas and Jones’s Administrative Law (Federation Press, 6th ed, 2009), Ch 15.


40 Dr Bentley (1723) 1 Stra 557.

41 Dr Bentley (1723) 1 Stra 557, 567.
an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. … The same question was put to Eve also.

The right to be heard stems from the concept that a person should not be judged and condemned before he/she is allowed to explain his/her conduct. Even though the standards of procedural fairness may vary, the right to be heard is crucial to ensure the fairness of a decision. In *Russell v Duke of Norfolk*[^42] Tucker LJ noted:[^43]

> The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice, which have been used from time to time, but whatever standards are adopted, one essential element is that the person concerned should have a reasonable opportunity of presenting his case.

More recently, the importance of the right to be heard has been discussed in a number of cases including *Kioa v Minister for Immigration and Ethnic Affairs (West)*[^44] and *Bond v Australian Broadcasting Tribunal (No 2)*.[^45]

Before the decision in *Ridge v Baldwin*[^46] the courts had limited the application of natural justice to the exercise of powers classified as judicial and quasi-judicial, and

[^42]: *Russell v Duke of Norfolk* (1949) 1 All ER 109.
[^43]: *Russell v Duke of Norfolk* (1949) 1 All ER 109, 118.
[^45]: *Bond v Australian Broadcasting Tribunal (No 2)* (1988) 19 FCR 49.
The Court in *Ridge v Baldwin*, however, held that natural justice was relevant in instances where a decision merely affects the right of individuals, and the application of procedural fairness to administrative decision-making was begun. The fact that it is not possible to treat administrative decisions in the same manner as judicial decisions led to a variation of standards relating to the hearing rule.

Natural justice does not require the application of ‘fixed or technical rules’. The content of the hearing rule is very flexible and may vary from one situation to another. In instances where legislation is silent, the standards of the rule are established in reference to what seems appropriate given the context within which the decision is to be made. As a consequence, what constitutes a hearing may vary from a full court-style hearing to the mere submission of written responses. As Lord Reid noted in *Wiseman v Borneman*, the procedure should be sufficient to achieve

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47 See, for example, *James v Pope* [1931] SASR 441. See also Head, above n 23, 179.

48 *Ridge v Baldwin* [1964] AC 40, referring to *Cooper v Wandsworth Board of Works* (1863) 143 ER 414 as stating that natural justice is relevant in instances where a decision merely affects the right of individuals.


51 *Stollery v Greyhound Racing Control Board* (1973) 128 CLR 509, 517; *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs* 121 ALR 83, 89–90.

52 *Stollery v Greyhound Racing Control Board* (1973) 128 CLR 509, 517; *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs* 121 ALR 83, 89–90.

53 *Wiseman v Borneman* [1971] AC 297.
justice.\textsuperscript{54} However, for the hearing rule to apply properly, it must include a requirement that a person receives fair notice of the charges made against them.\textsuperscript{55} These two concepts, the nature of the hearing and fair notice, are discussed further below.

4.2.1.1.1 The Nature of the Hearing

Depending on the circumstances, a hearing may be conducted by way of written submissions, oral hearings or a combination of both. As noted earlier, the nature of the hearing relating to administrative decisions differs from the nature of the hearing relating to judicial decisions.\textsuperscript{56} In relation to administrative decision for example, some legislation may require oral hearings to take place. In other instances, the statute may be silent or may not define the type of hearing a person must be afforded. In such instances, the court may consider that an oral hearing is not required and the opportunity to make written submissions would be enough to fulfil the requirements of natural justice.\textsuperscript{57}

\textsuperscript{54} Wiseman v Borneman [1971] AC 297, 308.

\textsuperscript{55} Kioa v Minister for Immigration and Ethnic Affairs (West) (1985) 159 CLR 550, 629; VEAL v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88 where the court unanimously held that the content of the adverse letter should have been disclosed to the applicant. See also Lee Beng Tat, ‘The Company in the Garden of Eden: Natural Justice and the Company’ (1991) Singapore Journal of Legal Studies 126, 129; Aronson, Dyer and Groves, above n 24, 556; Douglas, above n 38, 564; Roger Douglas, Administrative Law (Lexis Nexis, 2\textsuperscript{nd} ed, 2004), 200.


Another issue that relates to hearings is whether the person is entitled to legal representation. Such representation has a number of benefits.\(^{58}\) Where for instance, a person is unlikely to be capable of representing himself or herself efficiently,\(^{59}\) or is unable to address legal questions or complex issues,\(^{60}\) then procedural fairness may require the person to be granted legal representation. However, the courts tend to readily dispense with requests for legal representation as being required to satisfy procedural fairness. For instance, in *Cains v Jenkins*\(^{61}\) the Full Federal Court declared that ‘there is no absolute right to representation even where livelihood is at stake’.\(^{62}\) Similarly, in *New South Wales v Canellis*\(^{63}\) the majority observed that ‘there is no authority for the proposition that the rules of procedural fairness extend to a requirement that legal representation be provided to a party at a trial, let alone a witness at an inquiry’.\(^{64}\)

\(^{58}\) Michael Hocken, ‘When is There a Right to Legal Representation Before a Statutory Body or Tribunal in Australia’ (1994) 24 *Queensland Law Society Journal* 241; Aronson, Dyer and Groves, above n 24, 599. See also *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, [69], where the court noted that ‘the lack of representation at the earlier stage of merits review is probably of greater significance in terms of its effects upon the eventual outcome’.


\(^{61}\) *Cains v Jenkins* (1979) 28 ALR 219.

\(^{62}\) *Cains v Jenkins* (1979) 28 ALR 219, 230.

\(^{63}\) *New South Wales v Canellis* (1994) 181 CLR 309.

\(^{64}\) *New South Wales v Canellis* (1994) 181 CLR 309, 330. However, the case referred to one exception (*Dietrich v R* (1992) 177 CLR 292) in which the High Court had noted that legal representation was required for fair criminal trials, especially when the court was dealing with serious offences. Certain considerations may support the view in *Cains v Jenkins* (1979) 28 ALR 219. For instance, legal representation may not be desired in informal and non-legalistic proceedings: *Enderby Town Football Club Ltd v Football Association Ltd* [1971] 1 Ch 591, 605; *R v Equal Opportunity Board; Ex parte Burns* [1985] VR 317, 325; *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486, 491; *Re Scott* (2001) 10 Tas SR 148, 151. Further, the absence of legal representation
The right to cross-examine witnesses has also been limited by the courts. In the absence of a statutory requirement to the contrary, the minimal requirement for a hearing may be set by the court as the right of the affected person to complete a written submission to address the issues raised by the person making the allegations. However, for such a submission to be possible the affected person must be aware of the allegations made against him or her, hence the following paragraph considers the importance of notice in administrative law.

4.2.1.1.2 Notice

For procedural fairness to apply, it is reasonable to expect that notice of the relevant allegations is sent to the affected person. This allows the person to become aware of any material information prejudicial to his or her case and provides them with an opportunity to respond to the allegation made. For instance, in Andrews v Mitchell Lord Halsbury stated that notice in the context of natural justice is ‘impossible to disregard’. Similarly, in R v Small Claims Tribunal; Ex parte Cameron Anderson J noted that ‘the rule that no man shall be condemned unless he has been given prior

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66 Russell v Duke of Norfolk [1949] 1 All ER 109, 118.


69 R v Small Claims Tribunal; Ex parte Cameron [1976] VR 427.
notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice’. 70

However, this principle has been tempered in a number of cases. For example, in Kioa v Minister for Immigration and Ethnic Affairs (West) 71 the Court observed that ‘where the circumstances are such that the purpose for which the power is conferred would be frustrated if notice were given …, the power may be exercised peremptorily without giving such notice to a person whose interests are likely to be affected’. 72

The content of the notice is very important for it provides the affected person a fair opportunity to respond to the allegation made, 73 however, due to the diversity of administrative decision-making, what constitutes sufficient notice may vary. 74 Usually, a crucial element of a notice is that it conveys to the affected person ‘with reasonable clarity’ the allegation being made. 75 It is also to be expected that a notice will provide the time, date and location of any hearing or the closing date for the lodgement of a written submission. 76

70 R v Small Claims Tribunal; Ex parte Cameron [1976] VR 427, 432.
73 Aronson, Dyer and Groves, above n 24, 558.
75 Gribbles Pathology (Vic) Pty Ltd v Cassidy (2002) 122 FCR 78, 104.
76 Hopkins v Smethwick Board of Health (1890) 24 QBD 712, 715. This was not the case in Graham v Baptist Union of NSW [2006] NSWSC 818 (Unreported, Young CJ in Eq, 16 August 2006), however, where it was held that the church had no obligation to tell the plaintiff the time and date of the hearing.
4.2.1.2 The Rule against Bias

Another central component of procedural justice is the rule against bias. An administrator or judge needs to approach a task with an open mind. Such an approach does not only imply freedom from actual bias but also freedom from perceived bias. To determine if perceived bias is present, the court would consider if justice was achieved from the perspective of a reasonable person and not necessarily from the perspective of the affected person. The rule against bias thus forbids decision-makers from exercising their power if they are ‘actually or ostensibly biased’.

However, as with the hearing rule, the operation of the rule against bias is flexible, and varies depending on the factual circumstances of the case. For instance, the standards imposed on judges are different from the standards imposed on administrators and tribunals. In situations where a person has been given the power

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77 This part of the chapter will look at only some of the main points relating to the rule against bias. It will consider only the issues to be raised in 4.3 when assessing the procedural fairness of an enforceable undertaking. For more information on this topic see Aronson, Dyer and Groves, above n 24, Ch 9; Douglas, above n 38, Ch 16.

78 R v Watson; Ex parte Armstrong (1976) 136 CLR 248; Stollery v Greyhound Racing Control Board (1972) 128 CLR 509. See also Head, above n 23, 204.

79 Bird v Volker (Unreported, Federal Court, Kiefel J, 20 October 1994); See also Laws v Australian Broadcasting Tribunal (1990) 170 CLR 70, where the court slightly modified the test.

80 Aronson, Dyer and Groves, above n 24, 655. See also Stollery v Greyhound Racing Control Board (1972) 128 CLR 509.


82 Century Metals and Mining NL v Yeomans (1989) 100 ALR 383, 416–17; Franklin v Minister of Town and Country Planning [1948] AC 87; Porter v Magill [2002] 2 AC 357, 466; Minister for Immigration and Multicultural Affairs; Ex parte Jia (2001) 205 CLR 507, 539.
to investigate and decide on a matter, the rule against bias will be even more diluted.\footnote{FAI Insurances Ltd v Winneke (1982) 151 CLR 342; Kioa v Minister for Immigration and Ethnic Affairs (West) (1985) 159 CLR 550; Stollery v Greyhound Racing Control Board (1972) 128 CLR 509.} For example, ASIC investigates possible contraventions of the \textit{Corporations Act} and may impose administrative sanctions on offenders when appropriate. In such instances, the rule against bias is accordingly diluted. Ultimately, the scope of the rule against bias differs in each instance.

### 4.2.2 Criteria from the Perspective of Regulated Entities

As noted in 4.1, from a psychological perspective, procedural fairness is of crucial importance because it may affect people’s perception of the fairness of an outcome.\footnote{Neil Vidmar, ‘Procedural Justice and Alternative Dispute Resolution’ and Axel Tschentscher, ‘The Function of Procedural Justice in Theories of Justice’ in Klaus Röhl and Stefan Machura (eds), \textit{Procedural Justice} (Ashgate, 1997), 121, 105.} Aristotle was one of the first people to discuss and analyse the concept of fairness. His work focused on fairness in the distribution of resources between individuals or ‘distributive justice’, rather than on procedural fairness.\footnote{Aristotle, above n 30.} Interest in fairness was renewed in the seventeenth century with John Locke’s writing about human rights\footnote{John Locke, \textit{An Essay Concerning Human Understanding} (Neeland Media LLC, 1994ed, first published 1669).} and Thomas Hobbes’ analysis of valid covenants.\footnote{Thomas Hobbes, \textit{Leviathan} (Edwin Curley (ed), Hackett Publishing, 1994; original work published 1668), 89–90.} John Stuart Mill further revised notions of fairness through his studies on utilitarianism.\footnote{John Mill, \textit{Utilitarianism and On Liberty} (Mark Warnick (ed), Blackwell Publishing, 2nd ed, 2004).} The approaches of all these philosophers, while not identical, share a common orientation in viewing fairness as a normative ideal.
More recent studies focused on the notion of fairness as perceived by individuals, especially in the area of distributive justice. Some of these studies briefly alluded to procedural fairness or what they referred to as ‘procedural justice’. For instance, Peter Blau noted that ‘the intervening mechanisms in social exchange are social norms of fairness’. Similarly, in 1976 Gerald Leventhal observed that, when deciding about the fairness of a decision, individuals do not just consider the outcome they ended up with but also the procedure that led to such an outcome. Morton Deutsch went one step further in observing that procedural fairness was an important source of fairness in social relationships. Although consideration of issues of fairness may be traced back to ancient times, the relevance of procedural fairness in the field of psychology only really became apparent in the 1970s when a number of researchers began to consider the impact that procedural fairness may have on affected parties. John Thibaut and Laurens Walker and philosophers such as John Rawls started connecting procedure with people’s perception of the fairness of an outcome. For instance, Rawls noted that ‘a fair

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89 ‘Procedural justice’ may be considered synonymous to ‘procedural fairness’, and this chapter uses the terms interchangeably: see Kees Van den Bos and Allan Lind, ‘Uncertainty Management by means of fairness judgements’ (2002) 34 Advances in Experimental Social Psychology 1, 8.


93 Procedural justice theories have their roots in three approaches: Thibaut and Walker’s theory of procedure, Leventhal’s justice judgment theory, and Lind and Tyler’s group value model. This chapter bases its criteria of procedural fairness on these studies. See further Maureen Ambrose and Anke Arnaud, ‘Are Procedural Justice and Distributive Justice Conceptually Distinct?’ in Jerald Greenberg and Jason Colquitt (eds), Handbook of Organizational Justice (Psychology Press, 2005), 59, 61.
procedure translates its fairness to the outcome only when it is actually carried out’.94

Further, ‘the idea of the original position is to set up a fair procedure so that any
principles agreed to will be just’.95

Thibaut and Walker studied the fairness of procedure in a legal setting, and compared
the satisfaction levels of people in an adversarial judicial system and a continental
judicial system. They found that adversarial judicial systems were deemed to be
fairer and more satisfactory than continental judicial systems because people believed
that in an adversarial system the judge played the role of a referee, whose task was to
allow both parties in a trial to fight a fair match.96 They also discovered that
permitting the parties to have a say in their legal dispute increased the perception of
the fairness of the verdict.97 Further research on procedural fairness was conducted,
especially after publication of Allan Lind and Tom Tyler’s literature review on the
topic.98

Leventhal proposed six criteria for assessing the fairness of a procedure: consistency,
bias suppression, accuracy, correctability, representation and ethicality.99 Some of the
major studies relating to procedural fairness have relied on a mixture of Leventhal’s

95 Ibid, 136.
98 Allan Lind and Tom Tyler, The Social Psychology of Procedural Justice (1988); Robert MacCoun,
‘Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness’ (2005) 1 Annual
Review of Law and Social Science 171, 172.
99 Gerald Leventhal, ‘What Should be Done with Equity Theory?’ in Kenneth Gergen, Martin
Greenberg and Richard Willis (eds), Social Exchange: Advances in Theory and Research (Plenum
Press, 1980), 27.
criteria and other considerations. For instance, Tyler used both these criteria and the work of Thibault and Walker when assessing the procedural fairness of judgments. Similarly, Toni Makkai and John Braithwaite based their criteria of procedural fairness on the work of both Leventhal and Tyler.

In the context of mediation, John Dworkin and William London assessed procedural fairness based on the criteria of ‘impartiality of the mediator, voluntary decisions by the parties, sufficient factual data on which to base decisions, participants’ understanding of both information and decisions, non-coercive negotiations, power balance, full financial disclosure, and access to independent legal counsel’. To assess perceptions that the regulated community may have of the procedural fairness of an enforceable undertaking, this chapter takes into account literature in the field of psychology that has largely impacted on procedural fairness and uses the following criteria:

- consistency;
- impartiality;


103 The predominant theories relating to procedural fairness in the field of psychology are listed in n 93. See further Tom Tyler (ed), Procedural Justice I (Ashgate, 2005); Tom Tyler (ed), Procedural Justice II (Ashgate, 2005); Kjell Törnblom and Riel Vermunt (eds), Distributive and Procedural Justice (Ashgate, 2007).

104 These criteria are among the ones most used in the literature and are drawn from the work of Leventhal and Tyler: see Leventhal, above n 99 and Tyler, above n 100. However, there is no consensus about the criteria that must be followed to achieve procedural fairness.
• correctness; and
• representation.

The following paragraphs examine these criteria and how they may overlap with the criteria used to measure procedural fairness from an administrative law perspective, discussed above. It will become apparent that the criteria establishing procedural fairness from a psychological perspective are richer than the criteria from an administrative law perspective, particularly when applied to administrative sanctions.

4.2.2.1 Consistency

Consistency is Leventhal’s first criterion in determining the perception that affected persons may have of the fairness of a procedure.\textsuperscript{105}

4.2.2.1.1 Different Interpretations

The consistency criterion may have different interpretations.\textsuperscript{106} It may refer to consistency in the application of a procedure across time, which ensures the stability of the procedure, at least over the short term.\textsuperscript{107} It may also refer to consistency in the application of the procedure across persons, implying that a similar procedure would be applied to all potentially affected persons.\textsuperscript{108} The latter interpretation of the consistency rule is very important in the domain of business regulation.\textsuperscript{109}

\textsuperscript{105} Leventhal, above n 99.
\textsuperscript{106} Tyler, above n 100, 111.
\textsuperscript{107} Leventhal, above n 99.
\textsuperscript{108} Ibid.
\textsuperscript{109} Makkai and Braithwaite, above n 101, 84.
4.2.2.1.2 Consistency in Administrative Law

Consistency in the application of the procedure across persons is also relevant in administrative law. For instance, in *Hamilton v Minister for Immigration*\(^{110}\) the Court considered the applicant was denied procedural fairness because she was not provided with the explanatory notes usually given to people filling out application forms. Beazley J stated that:\(^{111}\)

> [A]s a general rule, consistency of treatment of persons the subject of administrative action is of primary importance in good administration. … Where a decision-maker has introduced and formalised uniform procedures for persons the subject of the decision-making process, procedural fairness requires that in normal circumstances persons have equal access to those procedures.

Consistency helps to ensure the transparency of the process.\(^{112}\)

4.2.2.2 Impartiality

The ability to be impartial is directly linked to the successful implementation of a procedure that can prevent favouritism or external biases.\(^{113}\)

\(^{110}\) *Hamilton v Minister for Immigration* (1993) 35 ALD 205.

\(^{111}\) *Hamilton v Minister for Immigration* (1993) 35 ALD 205, 213.

\(^{112}\) Rawls, above n 94, 238.

\(^{113}\) Tyler, above n 100, 119.
4.2.2.1 Neutrality

There are a number of biases that may be taken into consideration when determining the procedural fairness of a decision. For example, Leventhal focuses on two types of bias. The first relates to the decision-maker’s interest in the outcome of a decision. From the perspective of the regulated entity, an individual is likely to believe that procedural fairness is violated when the person deciding on the matter has a personal interest. The second type of bias is apparent when a decision-maker relies on prior views rather than the evidence presented to him or her at the time the decision is made. Tyler established lack of bias by considering whether the treatment of persons affected by the decision was influenced by their ‘race, sex, age, nationality, or some other characteristic of them as a person’.

4.2.2.2 Overlap with Administrative Law

The rule against bias was discussed in 4.2.1.2 when the author considered procedural fairness from an administrative law perspective. However, as seen previously, the rule is diluted in the exercise of administrative power. The standard determining a lack of bias under administrative law is less exacting than that determined from a psychological perspective. The rule against bias in administrative law is a component of the impartiality rule as explained from the psychological perspective.

4.2.2.3 Correctability

The possibility that a regulatory decision may be reviewed and corrected is of great importance, as it provides some protection to offenders.

114 Leventhal, above n 99.
115 Tyler, above n 100, 112.
4.2.2.3.1 Interpretation

Correctability means that ‘opportunities must exist to modify and reverse decisions made at various points of the allocative process’.\textsuperscript{116} Tyler refers to this element as the right to complain about the unfairness of a procedure.\textsuperscript{117} In short, decisions should be able to be appealed, if unfair. Mill also noted that there is a need to have constitutional checks and balances to ensure the fairness of a decision.\textsuperscript{118}

4.2.2.3.2 Correctability in Administrative Law

The correctability of a decision is also important from an administrative law perspective.\textsuperscript{119} Administrative law includes a series of checks and balances to deal with unfair decisions. For example, the availability of merits review and judicial review provide an opportunity for the review of a decision especially when an aggrieved individual is faced with the possibility that an administrative authority has behaved unlawfully.\textsuperscript{120} It is the availability of these checks and balances in the context of enforceable undertakings that will be the measure of this criterion from a psychological perspective.

4.2.2.4 Representation

Representation may have different interpretations and is relevant to procedural fairness from both a psychological and an administrative law perspective.

\textsuperscript{116} Leventhal, above n 99.

\textsuperscript{117} Tyler, above n 100, 113.

\textsuperscript{118} Mill, above n 88, 89.


\textsuperscript{120} Douglas, above n 38, Chs 7, 19. Merits review and judicial review are discussed in 4.3.2.2.
4.2.2.4.1 Interpretation

Representation relates to a number of concepts. It may relate to the concept of control, which was divided by Thibaut and Walker into notions of ‘process control’ and ‘decision control’. Process control relates to the extent and nature of the control that the parties may have over the presentation of evidence. Decision control refers to the extent and nature of the affected person’s control over the making of the final decision.\textsuperscript{121} Leventhal combines these notions when he refers to ‘representation’.\textsuperscript{122} Lind and Tyler also stress the importance of control in noting that ‘the self-interest model suggests that people seek control over decisions because they are fundamentally concerned with their outcomes’.\textsuperscript{123} Russell Cropanzano, Michelle Kacmar and Dennis Bozeman refer to voice, due process and advance notice.\textsuperscript{124} The presence of voice in representation is very important to ensure the fairness of a decision. Mill, too, illustrated the relevance of this point, when he noted that ‘he who knows only his own side of the case, knows little of that’.\textsuperscript{125} Mill went one step further, in noting that the adjudicators should not only consider the interests of the disputants, but also that of the general public who may be impacted by the decision.\textsuperscript{126} Representation may also be linked to the presence of hearings.\textsuperscript{127}

\textsuperscript{121} Thibaut and Walker, above n 96.
\textsuperscript{122} Leventhal, above n 99, 29.
\textsuperscript{123} Lind and Tyler, above n 98, 222.
\textsuperscript{124} Russell Cropanzano, Michelle Kacmar and Dennis Bozeman, ‘Organizational Politics, Justice and Support’ in Russell Cropanzano and Michelle Kacmar (eds), Organizational Politics, Justice, and Support: Managing the Social Climate of the Workplace (Quorum Books, 1995), 2, 5.
\textsuperscript{125} Mill, above n 88, 115.
\textsuperscript{126} Ibid.
\textsuperscript{127} See 4.2.1.1.
4.2.2.4.2 Overlap with Administrative Law

As noted in 4.2.1.1, the right to be heard constitutes an important element of procedural fairness from an administrative law perspective. Further, this rule forms a component of representation. Once again, there is an overlap of the criteria measuring procedural fairness from the administrative law and psychological perspectives, this time in respect of the hearing rule and representation.

![Diagram 4.3. Overlap between the right to be heard in administrative law and representation from a psychological perspective](image)

However, as characterised by Diagram 4.3, representation from a psychological perspective is broader than the hearing rule. Further, representation requires a greater input from the alleged offender.

**4.2.3 In Brief**

In assessing the procedural fairness of an enforceable undertaking, the next part of this chapter will study procedural fairness from the perspectives of administrative law and of the alleged offender because ‘justice should not only be done, but should also
manifestly and undoubtedly be seen to be done’. The criteria considered above and summarised in Diagram 4.4 are central to determining the procedural fairness of an enforceable undertaking.

Diagram 4.4. Interaction of the different criteria

As illustrated in Diagram 4.4, the criteria that relate to procedural fairness in administrative law interact with and are relevant to the criteria of procedural fairness from the perspective of the alleged offender and vice versa. For this reason, the next

128 R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256, 257.
part of the chapter will consider hearings under the representation rule and the rule against bias under the impartiality rule.

### 4.3 The Extent of Procedural Fairness in Enforceable Undertakings

Before applying the procedural fairness criteria discussed in 4.2 above, it is necessary to consider whether under administrative law procedural fairness must be taken into account by ASIC when entering into an enforceable undertaking with an alleged offender. Under the common law, procedural fairness is a right to which every member of the public dealing with administrative or judicial authorities is entitled unless the governing legislation states otherwise. Accordingly, the relevant statute may extinguish, or may specify the content of, this right.

Neither of the key provisions ss 93AA and 93A of the ASIC Act contain any reference to procedural fairness. When enforcing the terms of an undertaking, however, the court takes into account the circumstances that led the promisor and the regulator to enter into the undertaking. As a consequence, it may be presumed that the regulator must take procedural fairness into consideration when an enforceable undertaking is entered into.

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129 Head, above 23, 174.


131 Local Government Board v Arlidge [1915] AC 120.

132 Based on the statute, then, ASIC must comply with procedural fairness during its investigation and hearing. However, the provisions in the ASIC Act that relate to enforceable undertakings do not require compliance with procedural fairness during the negotiations that may lead to an undertaking.

133 For example, in Australian Competition and Consumer Commission v Signature Security Group Pty Ltd (2003) ATPR ¶41–942, when enforcing the undertaking entered into by the ACCC and Signature, Stone J considered if the undertakings were properly given by the promisor and properly accepted by the ACCC. This point is discussed in more detail in 9.4.1.
The absence of any statutory procedure for entering into enforceable undertakings affords the regulator wide discretion in relation to the circumstances under which it may enter into an undertaking. Such discretion lessens the transparency of enforceable undertakings.\textsuperscript{134} To deal with such concerns, ASIC has issued guidelines in relation to its policy on the use of enforceable undertakings.\textsuperscript{135}

Different methods may be used to evaluate the extent of procedural fairness in enforceable undertakings from an administrative law perspective and a psychological perspective. For example, the evaluation might be based on data collected by one or more of the following techniques:

- a study of whether the law itself and official policies around the acceptance of enforceable undertakings require ASIC to be procedurally fair when accepting an undertaking and, if so, do they provide any guidance in relation to this matter;
- an examination of the general practices of the corporate regulator when accepting an undertaking, to assess whether the procedure behind the acceptance of an undertaking is fair;
- empirical research may be conducted to determine whether promisors perceive that the procedure that leads to an enforceable undertaking is fair.

Each technique contributes something to the data picture built up. However, it is important to note that while an assessment of the procedural fairness of enforceable

\textsuperscript{134} Zumbo, above n 2, 123.

\textsuperscript{135} These guidelines were discussed in 3.4 and will be referred to more detail in 4.3.4.
undertakings from a psychological perspective requires empirical evidence of actual practices surrounding the use of enforceable undertakings from the perspective of ASIC and of promisors to be completed, such empirical evidence is beyond the scope of this thesis. This chapter bases its evaluation of the procedural fairness of enforceable undertakings mainly on legal and official ASIC policy documents and statements. Mindful of this limitation, the following paragraphs assess the presence of procedural fairness based on the criteria discussed in 4.2 above.

4.3.1 Representation Rule

4.3.1.1 Administrative Law Perspective: The Right to be Heard

As noted in 4.2.1.1, in the absence of any statutory requirements, an administrative authority such as ASIC is required to fulfil only minimal requirements in order to comply with the hearing rule. Basically, the corporate regulator must give the affected party notice and a right to respond to the allegation in writing. In the case of an enforceable undertaking, this usually takes place since the alleged offender becomes aware of the allegation brought by ASIC either during ASIC’s investigation or during the hearing looking at the conduct of the regulated entity.

During the investigation or hearing, ASIC must comply with the rules of procedural fairness. In response to ASIC’s concerns, the alleged offender has the right to contact ASIC to discuss the possibility of entering into an enforceable undertaking. Similarly, ASIC may initiate such discussions with the alleged offender. The negotiations to enter into an enforceable undertaking would take place between the

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alleged offender and an officer of ASIC assigned to the investigation. It is hoped that by the end of such negotiations an ‘appropriate regulatory outcome’ will have been reached.\textsuperscript{137}

Thus the two main elements of the hearing rule—notice and the presentation of submissions—appear to be complied with because during the negotiations every party will have had an opportunity to present their point of view. As a result, from an administrative law perspective, the hearing rule is complied with.

4.3.1.2 Psychological Perspective

The representation rule from a psychological perspective includes, but is not limited to, the hearing rule. Additional considerations must be taken into account besides the fact that the hearing rule has been complied with when determining whether the representation rule has been fulfilled.

The fact that there are negotiations between the regulator and alleged offenders also helps to ensure that the parties are satisfied with the outcome of the undertaking. Alleged offenders are not only given the right to voice their concerns and opinions about the alleged conduct, they are also given the opportunity, \textit{in theory}, to play an active role in reaching a compromise with the regulator during the process of drafting the undertaking. ASIC has noted that it ‘will negotiate the terms of the undertaking with the promisor in order to arrive at an appropriate regulatory outcome’.\textsuperscript{138}

\textsuperscript{137} ASIC, above n 10, [1.7], [1.9].

\textsuperscript{138} Ibid, [1.9].
Further, even though ss 93AA and 93A of the ASIC Act are silent about the right of alleged offenders to legal representation during negotiations leading up to the entering into of enforceable undertakings, ASIC gives the alleged offender the right to have such representation. For instance, the corporate regulator has included in certain undertakings a clause noting that the alleged offender ‘has obtained legal advice in relation to the content and effect of this enforceable undertaking’. The presence of such a right ensures that alleged offenders are aware of their rights and of the implications that result from entering into an enforceable undertaking. It also provides them with some protection in their negotiations with the regulator.

4.3.1.3 Presence of Representation?

As a consequence, the procedure that leads to the acceptance of an enforceable undertaking seems to be fair with respect to representation both from an administrative law perspective and from the perspective of the promisor. However, in practice, there is a risk that the stronger party may influence the decision made by the weaker party. As the parties involved in the undertaking do not have equal bargaining power, there is a risk that the stronger party may bully the other into an undertaking.141


141 Yeung, above n 3, 117. In certain instances, the regulator may not allow the alleged offender to have a say in the negotiations. However, the alleged offender may still choose to enter into the undertaking because this sanction may be seen as the lesser of two evils: since an enforceable undertaking falls towards the bottom of Braithwaite’s pyramid (Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992), 35), the alleged offender may prefer it to the instigation of civil action against him or her. An example of an alleged offender choosing an undertaking as the lesser of two penalties may be seen in Donald and Australian Securities and Investments Commission (2001) 38 ACSR 10: in
4.3.2 Correctability Rule

Since a party aggrieved by the decision of an administrative authority would usually desire the opportunity to have that decision rectified, correctability is of great importance from the psychological perspective. In considering the application of the correctability rule to enforceable undertakings, three questions must be examined:

- Can an enforceable undertaking be varied?
- Are enforceable undertakings subject to merits review or judicial review?
- What are the consequences that may apply if an enforceable undertaking is breached?

4.3.2.1 Can an Undertaking be Varied?

Sections 93AA(2) and 93A(2) of the ASIC Act provide that the promisor ‘may withdraw or vary the undertaking at any time, but only with ASIC’s consent’. ASIC may therefore agree to the variation of an enforceable undertaking, when such a change is appropriate. ASIC usually accepts a request to vary an undertaking if:

- the variation will not alter the spirit of the original undertaking;
- compliance with the undertaking is subsequently found to be impractical; or

reviewing ASIC’s decision to ban Andrew William Donald from dealing with securities for four years, the AAT stood in the position of ASIC and decided that Mr Donald had a choice between entering into an enforceable undertaking or completing the banning order as originally made by ASIC, at [135]. The reality, however, is that the choice given by the tribunal is not a real choice: Mr Donald was asked to pick between an undertaking and a banning order. In normal cases, any reasonable person would pick the lesser penalty—in this instance, the undertaking—and Mr Donald did so. On 18 June 2001 the AAT set aside ASIC’s original decision and substituted a decision that ASIC accept an undertaking from Mr Donald on specified terms. For the circumstances surrounding the undertaking see ASIC, Enforceable Undertaking: Andrew William Donald, Document No 017 029 120 (22 April 2004); see also 5.5.

ASIC, above n 10, [3.13].
• there has been a material change in the circumstances which led to the undertaking being given.

For example, in 2000, ASIC accepted a variation of the undertaking given by CIBC World Markets Australia Ltd after the company observed that the task of complying with the undertaking it had given was very complex and as a result the company would not be able to meet the deadline specified in the undertaking. If there is agreement that the terms of an enforceable undertaking are no longer appropriate, the regulator may be willing to accept a variation of those terms.

Although enforceable undertakings may be varied, this requires the approval of the regulator, who has complete discretion in relation to this matter. Independent parties are not involved in the process. Therefore, it is important to consider whether, in addition to variation, merits review and/or judicial review of an enforceable undertaking is possible.

4.3.2.2 Are Undertakings Subject to Merits Review or Judicial Review?

Merits review and judicial review provide different protections to regulated entities. While judicial review is limited to determining if a decision was lawfully made, merits review allows the AAT to consider new evidence, which was not available to the original regulatory agency, in determining the ‘best’ or ‘preferable’ decision on


144 Attorney-General (NSW) v Quin (1990) 170 CLR 1, 36. See also Aronson, Dyer and Groves, above n 24, 19.
In terms of satisfying the correctability rule, therefore, it would appear preferable for an enforceable undertaking to be subject to both judicial review and merits review.

However, an enforceable undertaking is one of the lower levels of sanctions available to ASIC in Braithwaite’s enforcement pyramid as illustrated in Diagram 3.1. To require judicial review and merits review of ASIC’s decisions at this level to be available may cause the process of entering into an enforceable undertaking to become lengthier and more expensive, imposing a higher burden on ASIC when it decides to enter into an enforceable undertaking than may otherwise have been the case. This in turn may lead ASIC to prefer to rely on other administrative sanctions such as a banning order or revocation of licence or to instigate civil legal proceedings against the alleged offender. To provide for judicial and merits review of enforceable undertakings may also imply that the trust and confidence which are fundamental to the acceptance of an undertaking are missing. Further, an enforceable undertaking cannot be entered into without the agreement of both parties. This fact must be taken into account when deciding on the need for judicial or merits review.


146 Zumbo, above n 2, 124. However, the ALRC remains of the view that merits review of enforceable undertakings ‘is unnecessary’: ALRC, Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report No 95 (2002), [16.68]. ASIC is also opposed to such a proposal, and has stated that: ‘Any discussion or recommendation made with respect to administrative law review of the acceptance of an enforceable undertaking or decisions associated thereto must recognise the fact that it is an agreement voluntarily entered into by the promisor and the regulatory agency. ASIC is very concerned about any suggestion that an agreement to enter into, or the terms of, an undertaking should be subject to an administrative law challenge’: ALRC, Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report No 95 (2002), [23.54].

147 This would have negative consequences for both ASIC and alleged offenders, since to pursue an alleged offender through such sanctions would consume more of the regulator’s limited resources and increase the legal and financial severity of the penalty applied to the alleged offender: see 3.3.
an alleged offender is unhappy with the terms of the undertaking negotiated, the alleged offender may refuse to enter into the undertaking.\textsuperscript{148}

Ultimately, the significance of the availability of judicial review and merits review of enforceable undertakings in terms of their procedural fairness from a psychological perspective must be determined from the promisor’s point of view. Checks and balances must be in place for the promisor to perceive that the procedure relating to an undertaking is fair. As illustrated in Diagram 4.2, an enforceable undertaking will be more effective in changing the compliance culture of an organisation if procedural fairness is perceived by the promisor to have been achieved.

4.3.2.2.1 Merits Review

Section 244(2) of the \textit{ASIC Act} lists the decisions by ASIC that may be reviewed by the AAT. The acceptance or rejection of an enforceable undertaking is not one of those decisions. As a consequence, an enforceable undertaking is not subject to external merits review. However, s 43(1) of the \textit{Administrative Appeals Tribunal Act 1975} (Cth) provides that when the AAT is reviewing a decision (including decisions by ASIC which are subject to merits review, such as banning orders), it stands in the place of the regulator (in that instance, ASIC) and is empowered to exercise all the powers and discretions conferred by the relevant enactment on the regulator.\textsuperscript{149} Therefore, in instances where ASIC refuses to enter into an enforceable undertaking and decides to impose a banning order on a person, the banning order paves the way

\textsuperscript{148} However, as noted in footnote 141, the choice given to the promisor may not be a real choice after all.

for the affected person to apply indirectly, by challenging the banning order, for review of ASIC’s decision to refuse to enter into an enforceable undertaking.\textsuperscript{150}

In this circumstance, the AAT has power to review the rejection of the undertaking indirectly under the guise of looking at the banning order, and may also dictate the content of the undertaking to ASIC, since the decision of the AAT may stand as ASIC’s decision.\textsuperscript{151}

4.3.2.2.2 Judicial Review

As the Administrative Decisions (Judicial Review) Act 1977 (Cth) (‘ADJR Act’) applies to ‘a decision of an administrative character made … under enactment’,\textsuperscript{152} it is necessary to determine if an enforceable undertaking falls into this category. It is most likely that this is the case, since the Court in Australian Petroleum Pty Ltd v ACCC\textsuperscript{153} noted that a decision by the regulator to vary or withdraw an enforceable undertaking was reviewable under the ADJR Act.\textsuperscript{154} This implies that the regulator’s decision to accept or refuse to enter into an undertaking is also subject to judicial


\textsuperscript{152} ADJR Act, s 3(1). See also Australian Broadcasting Tribunal v Bond (1990) 94 ALR 11, 22.

\textsuperscript{153} Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission (1997) 143 ALR 381.

\textsuperscript{154} Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission (1997) 143 ALR 381, 394.
review, thus if an enforceable undertaking has not been entered into in compliance with natural justice, the promisor may apply for judicial review of ASIC’s decision. Similarly, the promisor may apply to the court to review conduct that relates to the regulator’s acceptance or refusal to enter into an undertaking. This seems to be confirmed by *BBC Hardware Ltd v Henneken*, where it was noted that the rejection of an enforceable undertaking by a regulator is a reviewable decision. Further, Mullins J stated that he had ‘determined the application on the basis of the law that governs the judicial review of a reviewable decision’.

4.3.2.3 What Are the Consequences That May Apply if an Undertaking is Breached?
As noted in Chapter 1, to breach an enforceable undertaking does not of itself constitute contempt of court and a promisor, who is unhappy with his or her undertaking, is not prevented thereby from ceasing to comply with it. In instances where a promisor does stop complying with an undertaking, the regulator has two

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156 *ADJR Act*, s 5(1)(a).

157 *ADJR Act*, s 6(1)(a).

158 *BBC Hardware Ltd v Henneken* [2006] QSC 149 (Unreported, Mullins J, 22 June 2006).

159 This decision was in relation to enforceable undertakings under the *Workplace Health and Safety Act 1995* (Qld), but is nevertheless an indication that enforceable undertakings are considered to be reviewable administrative decisions. See also Kristy Richardson, ‘Judicial Review of Enforceable Undertakings under the Workplace Health and Safety Act 1995’ (2007) 27 *Queensland Lawyer* 250; Richard Johnstone and Michelle King, ‘A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation’ (2008) *Australian Journal of Labour Law* 280.

160 *BBC Hardware Ltd v Henneken* [2006] QSC 149 (Unreported, Mullins J, 22 June 2006), [36].

161 See 1.1; see also 3.3.
main options available to it. It may initiate further negotiations with the promisor and this may lead to the variation of the undertaking,\textsuperscript{162} or it may enforce the undertaking in court.\textsuperscript{163} If the second option is chosen, the court will not automatically enforce the undertaking, but would consider the issue of procedural fairness and the appropriateness of the terms of the undertaking.\textsuperscript{164} This provides further protections to the promisor.

4.3.2.4 \textit{In Brief}

As may be seen, a number of factors provide protection to the promisor to ensure that procedural fairness is complied with when an enforceable undertaking is entered into. The fact that an enforceable undertaking is a settlement and the regulator and the promisor may vary it to ensure its relevance helps to ensure the fairness of the process. The lack of external merits review is not a major drawback and will not have a significant impact on the procedural fairness of an enforceable undertaking because of the availability of other protections.

Judicial review for instance is available to correct any undue coercion that may have led to the acceptance of an enforceable undertaking. Such review will, in short, focus on the quality of the negotiations. However, judicial review is a strategy of last resort and a question may arise as to whether judicial review is all that is needed to protect parties aggrieved by the sanction of enforceable undertaking? The answer may be yes, due to the fact that an undertaking is a negotiable sanction. Further, a person

\begin{footnotes}
\item[162] This is discussed in more detail in 9.2.
\item[163] \textit{ASIC Act}, ss 93AA(3), 93A(3).
\item[164] This is discussed in more detail in 9.4.
\end{footnotes}
who is unhappy with the terms of his or her undertaking may simply cease to comply with their undertaking and run the risk of being sued by ASIC for the breach. Therefore, an enforceable undertaking may be viewed as being procedurally fair from the point of view of the promisor in relation to its application of the criterion of correctability.

4.3.3 Impartiality Rule

4.3.3.1 Administrative Law Perspective: The Rule against Bias

As noted in Chapter 3, ASIC has a range of administrative sanctions at its disposal to deal with certain alleged breaches of the law. Some of these administrative sanctions include enforceable undertakings, banning orders, and suspension and revocation of licences. In many instances, ASIC investigates alleged breaches of the law and imposes sanctions without court intervention.

From an administrative law perspective, this means that the content of the rule against bias will be diluted when it is applied to determine the procedural fairness of ASIC’s administrative decisions. As a consequence, the regulator complies with the rule against bias as long as the investigation and the imposing of administrative sanctions are dealt with by different parties within the regulatory agency. Such a division appears to be followed in the case of enforceable undertakings, since the negotiations to enter into an enforceable undertaking are usually conducted by an officer assigned

165 ASIC may sue for the alleged breach that led to the enforceable undertaking or it may enforce the undertaking in court: *ASIC Act*, s 93AA(3).

166 See 3.1; ASIC, above n 10, [2.1]. See also discussion of administrative sanctions in 1.2.2.

to the investigation and the decision to accept or reject an undertaking is made by a senior executive in ASIC.\footnote{ASIC, above n 10, [1.7], [1.8].} As a result, from an administrative law perspective, the rule against bias is complied with.

4.3.3.2 Psychological Perspective

The fact that an enforceable undertaking is a compromise between the alleged offender and ASIC further diminishes the need to involve an independent party. In addition, the impartiality rule may not be very important from the point of view of promisors because they have, in theory, a say in deciding the terms of the undertaking.\footnote{Ibid, [1.9].} That an enforceable undertaking may be varied in certain circumstances makes this even more likely to be so. One concern that a promisor may have due to the lack of independent parties in the negotiations is that if ASIC rejects the offer to enter into an undertaking, the promisor cannot apply for merits review of the decision. However, judicial review is available and may lead to a review of the regulator’s conduct. From the perspective of the promisor, then, the presence of a third party, while beneficial, might be considered to prolong the process of entering into an undertaking and perhaps also to increase the cost of entering into an undertaking.

Nevertheless this does not mean that ASIC’s current system of entering into enforceable undertakings is perfect, for it would benefit from the involvement of independent parties. The author believes such involvement is beneficial and possible, and would not necessarily complicate the process of entering into an undertaking.
Other regulators involve independent parties in the process when accepting enforceable undertakings. For instance, the Queensland Department of Employment and Industrial Relations accepts enforceable undertakings under the *Workplace Health and Safety Act 1995* (Qld) and has ‘established a group of experts as an advisory panel’.

Each application [to enter into an enforceable undertaking] is reviewed by a three member panel. … For workplace health and safety applications the panel is made up of two industry representatives and the Executive Director of Workplace Health and Safety Queensland. [The panel considers] all facts before making a recommendation to the Chief Executive, who can accept or reject the application.

The Victorian Environment Protection Authority goes one step further. Its procedure for accepting an undertaking requires referral to that Authority’s internal Enforcement Review Panel and to an independent advisory panel. ASIC should consider the introduction of a similar involvement of independent parties. The involvement of an independent panel in the process of entering into enforceable undertakings is likely to lessen any perception of bias that may appear to a promisor when ASIC is the only party besides themselves involved in deciding on whether to accept or reject the undertakings they have offered during negotiations.

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4.3.4 Consistency Rule

Although the ASIC Act does not specify a procedure that the regulator must follow when entering into an enforceable undertaking, ASIC has issued a regulatory guide in relation to its use of enforceable undertakings. Regulatory Guide 100 states the following: 172

1.7 A person wishing to offer us an enforceable undertaking under ss 93A or 93AA (promisor) should first discuss it with an ASIC case officer assigned to the investigation.

1.8 Once the offer has been made and the terms of any undertakings discussed, the decision to accept or reject the offer is a formal decision made by a senior executive.

1.9 In the course of drafting the undertaking, we will negotiate the terms of the undertaking with the promisor in order to arrive at an appropriate regulatory outcome.

ASIC’s policy in relation to the use of enforceable undertakings was discussed in Chapter 3. 173 The application of published guidelines to its acceptance of undertakings assists not only with achieving consistency in the acceptance of undertakings, but also with the perception in the regulated community of such consistency. Moreover, the fact that only a small number of senior ASIC staff are authorised to enter into enforceable undertakings provides an additional measure of

172 ASIC, above n 10, [1.7]–[1.9].

173 See 3.4.
consistency. However, such consistency can be enhanced by adopting a system similar to the one relied on by the ACCC. When a contravention occurs, the ACCC’s enforcement committee is the one that decides on the enforcement action that has to be taken, including whether to accept an enforceable undertaking. Further, the chairman of the ACCC must sign off on all enforceable undertakings. Such centralisation of the enforcement mechanism is desired because it maximises consistency of treatment between different alleged offenders.

The corporate regulator has issued a series of guidelines and templates to ensure that the regulated community is aware of the factors ASIC considers in deciding whether an enforceable undertaking is appropriate to deal with an alleged breach of the law. This information is very useful as it would allow an alleged offender to apply for judicial review should the regulator fail to follow its own guidelines in relation to the negotiations that may lead to an enforceable undertaking.

### 4.4 In Summary

As seen in 4.3 above, it appears that procedural fairness is complied with both from an administrative law perspective and from the perspective of the promisor. Based on administrative law, procedural fairness is achieved because the hearing rule and the rule against bias are followed by ASIC when negotiating an enforceable undertaking.

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174 Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).


Further, this chapter has argued that if the representation, correctability, impartiality and consistency rules are complied with, the promisor is likely to perceive the process of negotiating an enforceable undertaking to be fair and accordingly should be more willing to fulfil his or her obligations as stated in the undertaking. These results are summarised in Diagram 4.5.
Diagram 4.5. Procedural fairness and its application to enforceable undertakings
From the information available to the public, it appears that the representation rule has been complied with and, in instances where this goal is not achieved because the negotiations were being dominated by one person (the stronger party), Diagram 4.5 illustrates that the remedy protecting the parties from such conduct is the presence of the correctability rule.

With respect to the correctability rule, the fact that an enforceable undertaking may be challenged in court provides protection to the promisor. The only weakness that may appear is the lack of merits review, but this is not a major issue since judicial review is possible. The introduction of merits review may be beneficial nevertheless. Similarly, a promisor who is unhappy with the terms as negotiated for his or her undertaking may refuse to enter into the undertaking or, in instances where the undertaking has been entered into, may stop complying with the terms of the undertaking.

The fact that the decision to accept or reject an enforceable undertaking is made by a person within ASIC other than the person conducting the investigation ensures that the rule against bias is complied with from an administrative law perspective. From the perspective of the promisor, the impartiality rule may be said to have been complied with through the availability of judicial review and application of the consistency rule: the same treatment for everyone. However, to ensure that the impartiality rule is always applied, it is beneficial to involve independent parties to ensure that the promisor perceives the process of accepting an undertaking as impartial.
The issuing of guidelines by ASIC in relation to the entering into and acceptance of enforceable undertakings ensures that the consistency rule is being complied with. If the guidelines are not followed, the alleged offender may apply for judicial review.

It seems that there are some checks and balances available to ensure that the process of entering into an enforceable undertaking is fair. However, further studies and interviews should be conducted to test and confirm the perceptions promisors actually have in relation to the procedural fairness of the process that may lead to an enforceable undertaking.
Chapter 5: Reasonable Undertakings?

5.1. The Importance of Reasonableness

One of the criticisms faced by settlements is that, due to the difference in the bargaining power of ASIC and the alleged offender, a settlement may include unfair and unreasonable terms.\(^1\) Since, as was noted in Chapter 1 and discussed in Chapter 3, an enforceable undertaking is a form of settlement,\(^2\) this criticism may equally be directed towards enforceable undertakings. As Gerard Nierenberg observed:\(^3\)

> Sometimes, when an opponent seems “on the run”, there is a temptation to push him as hard as possible. But that one extra push may be the one that breaks the camel’s back. Simply stated, one of the first lessons the negotiator must learn is when to stop … All parties to a negotiation should come out with some needs satisfied.

An alleged offender’s lack of satisfaction with the terms of an enforceable undertaking due to the unreasonableness of the promises made in the undertaking may defeat the purposes of the undertaking. Ultimately, if an enforceable undertaking is unreasonable, the promisor may resent the regulator. This would be problematic because an enforceable undertaking is based on cooperation. Resentment directly diminishes cooperation and may mean that the promisor will stop complying with an


\(^2\) See 1.1, 1.4, 3.3.

undertaking, or will only comply with the letter and not the spirit of the law. This can be risky as it may diminish the effectiveness of an undertaking.

The unreasonableness of, and lack of satisfaction in, the terms of an undertaking may be caused by the fact that an enforceable undertaking can be costly to implement and may cause a person to lose his or her job. However, irrespective of these harmful impacts, this sanction has fewer negative repercussions on the alleged offender than other penalties at ASIC’s disposal. In fact, in certain instances, an enforceable undertaking may be viewed as little more than a slap on the wrist. This is especially the case where an undertaking only requires the promisor to stop breaching the law without requiring him or her to take any further action to prevent future breaches of the law.

For example, when ASIC was concerned that Cash Now Pty Ltd and its director, John Anthony Falting, were not complying with the fundraising provisions in the legislation and were breaching ss 727 and 734 of the Corporations Act, the regulator

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4 A breach of an undertaking is not contempt of court. If the terms of the undertaking are not followed the regulator may enforce the undertaking in court: ASIC Act, ss 93AA(3), 93A(3).


6 For example, implementation of some of the promises given by Multiplex Ltd in the enforceable undertaking it entered into in 2006 will cost the company a minimum of $32 million (this being the amount of compensation the company promised to pay to affected third parties): ASIC, Enforceable Undertaking: Multiplex Ltd, Document No 017 029 205 (20 December 2006). This undertaking is discussed further in 6.2.

7 Voluntary ban is discussed in 5.5.

8 Section 727 of the Corporations Act provides that a person must not make an offer of securities that needs disclosure to investors unless a disclosure document has been lodged with ASIC.
entered into an undertaking with Cash Now Pty Ltd and Mr Falting in which the alleged offenders promised not to be involved in conduct that breaches those sections of the *Corporations Act*.\(^9\) The undertaking did not include any corrective advertisement nor did it require the company to take further steps to prevent similar breaches from occurring in the future.\(^11\)

The majority of the undertakings accepted by ASIC, however, require the promisor to fulfil a number of promises. Such promises may have positive and negative impacts on the alleged offender. Depending on which impact outweighs the other, the promisor may deem the undertaking to be reasonable or unreasonable.

From the perspective of the alleged offender, one of the main benefits of entering into an enforceable undertaking relates to the cost savings associated with the avoidance of a trial.\(^12\) This was noted by Multiplex Ltd after it entered into an undertaking with ASIC.\(^13\)

> The Board believes this agreement is the best outcome for all stakeholders given the enormous costs and management time and focus that would be required to defend

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\(^9\) Section 734 of the *Corporations Act* imposes certain restrictions on advertising, including advertising relating to fundraising, and publicity.

\(^10\) ASIC, Enforceable Undertaking: Cash Now Pty Ltd and John Anthony Falting, Document No 017 029 196 (20 April 2006).

\(^11\) This was the case even though Cash Now Pty Ltd was a repeat offender as noted in 3.4.


what would have been one of the most complex disclosure cases heard before the courts.

Another benefit is that entering into an enforceable undertaking is likely to resolve the matter of concern to the regulator in a more predictable, and faster, manner than litigation might. Additionally, while negotiations to enter into an undertaking take place, the alleged offender may continue to go about its business without major interruptions such as it might face if the matter were to go to court. Further, as an enforceable undertaking is shaped to deal with the alleged conduct, the promises in an undertaking are tailored to deal with the alleged contravention. This should diminish the likelihood of an undertaking having any unintended and undesirable consequences.

But such benefits are not enough to ensure that the promisor will perceive an undertaking to be reasonable since a regulated entity, as a rational actor, will desire to maximise its own utility. This chapter examines whether the most common promises included in enforceable undertakings may be considered to be reasonable undertakings. These promises are disclosure, the implementation of a compliance program, refund and voluntary ban.


17 That these are the most common undertakings given (as at 10 June 2009) may be seen when reading the undertakings listed in ASIC’s Enforceable undertakings register:
5.2. Disclosure

In a number of undertakings, the promisor has promised to disclose the undertaking to a certain category of the general public.\textsuperscript{18} Such disclosure will normally attract a degree of negative publicity. An example is the undertaking ASIC entered into with AMP Financial Planning Pty Ltd, which was widely reported on in the press.\textsuperscript{19} Such publicity differs from the publicity generated by either a negotiated settlement or a trial.\textsuperscript{20}

5.2.1. Disclosure in a Settlement v Disclosure in an Undertaking

As discussed in Chapter 3, ASIC has a number of sanctions at its disposal, including negotiated settlements.\textsuperscript{21} Negotiated settlements are usually entered into ‘in instances where an investigation was initiated by ASIC but the regulator discovers that the matter can be dealt with without going to court. The terms of the settlements are usually straightforward and they resolve the dispute quickly. The result of such

\footnotesize{\textsuperscript{18} Of the 286 enforceable undertakings accepted by ASIC between 1998 and 10 June 2009, 34.9\% have included a requirement to disclose the terms of the undertaking to a certain category of the public: ibid.}


\footnotesize{\textsuperscript{20} Yeung, above n 12, 110.}

\footnotesize{\textsuperscript{21} See 3.1.
settlements is to reach a short, sharp and effective solution in a short amount of time.\textsuperscript{22}

Negotiated settlements, however, do not usually attract the same level of publicity as enforceable undertakings. In the case of an undertaking, the content of the undertaking is available to the public. In 2000–01, ASIC created an internet register of all the enforceable undertakings that it had accepted. The full text of each undertaking is available to the public from ASIC’s website. This move ensures greater transparency in enforceable undertakings because alleged offenders would know what to expect from an undertaking.\textsuperscript{23}

Such disclosure is not available in the case of a settlement.\textsuperscript{24} For instance, in 2005–06, ASIC accepted 20 settlements.\textsuperscript{25} However, no register keeps a record of these settlements nor is there a statutory requirement that the details of these settlements be released to the public.

Consequently, a settlement generates less negative publicity than an undertaking. The lack of transparency that surrounds settlements is problematic, however, because it may reinforce a perception that the negotiated settlement is not adequately grounded

\textsuperscript{22} Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).

\textsuperscript{23} ASIC, \textit{Annual Report 2000–01}, 49. The transparency of undertakings is enhanced still further by other steps ASIC has taken to clarify the use of enforceable undertakings: see 3.4.

\textsuperscript{24} Karen Yeung, \textit{The Public Enforcement of Australian Competition Law} (ACCC, 2001), 108.

in fact and legal principle.\textsuperscript{26} Such a perception may cause the alleged offender to resent the regulator if he or she is unhappy with the terms of the settlement. This may in turn cause the alleged offender to stop complying with the terms of the settlement, or may encourage only minimal compliance.\textsuperscript{27}

By contrast, the terms of an enforceable undertaking and information relating to the alleged breach are available to the public. This enhances the transparency of an undertaking, which may diminish any doubt about the legitimacy of such a sanction. Further, the disclosure of the undertaking on ASIC’s website provides guidance to the regulated community on what to expect when entering into an undertaking.\textsuperscript{28} Accordingly, while an enforceable undertaking attracts more publicity than a settlement, it is a more transparent sanction and, consequently, the promisor may feel more comfortable with the use of an enforceable undertaking than with a settlement.

5.2.2. Disclosure in Litigation v Disclosure in an Undertaking

A trial attracts substantial negative publicity.\textsuperscript{29} This publicity may differ in kind as well as in volume from that generated by negotiated settlements and enforceable undertakings. For instance, in a media release following a settlement or enforceable undertaking, the allegations announced are usually less serious than the allegations that may have been made in a media release following the commencement of

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{26}] Yeung, above n 24, 92.
\item[\textsuperscript{27}] Bardach and Kagan, above n 5, 105.
\item[\textsuperscript{28}] ASIC, Regulatory Guide 100, Enforceable undertakings (ASIC, March 2007), [2.9]; ASIC, ‘ASIC stops misleading reverse mortgage advertising’, Media Release 06–093 (29 March 2006).
\end{itemize}
\end{footnotesize}
litigation. The language used in any media release by a regulatory agency may be the subject of negotiation in a settlement or enforceable undertaking and, accordingly, may be rendered less harmful to the alleged offender. This may be observed when comparing the media releases of a regulatory agency announcing the institution of court proceedings with the media releases of that agency following its acceptance of a settlement or enforceable undertaking.

For example, in 2000, the ACCC took price exploitation proceedings against Video Ezy Australasia Pty Ltd (‘Video Ezy’). The case ended with a settlement between the two parties. When comparing the media release that was issued after the initiation of litigation and the media release that followed the settlement, it is apparent that the terms used in the media release at settlement were far less harmful to Video Ezy than those in the release announcing the litigation. Table 5.1 illustrates the veracity of this statement by comparing the words used in each media release.

<table>
<thead>
<tr>
<th>The charge: ACCC considers Video Ezy ‘charged an unreasonably high price for ... new release videos in the majority of its corporately owned stores’.</th>
<th>ACCC ‘believes that it was reasonable for it to have pursued its concerns about the possibility of price exploitation’.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extent of charge: ACCC believes that ‘in 21 of its 33... stores, ... Video Ezy ... made representations ... that were likely to mislead customers’.</td>
<td>Video Ezy acknowledges that ‘it had made false and misleading representations ... at its Townsville, Queensland stores’.</td>
</tr>
</tbody>
</table>
| One of the allegations: ACCC considers that ‘the alleged representations were not the invention of junior staff ... , but ... the ... management’. | [This issue not commented on.]
| Goal: ACCC wants to ‘protect consumers’. | ACCC ‘believes the settlement provides significant redress to affected consumers’. |
| Remedies targeted by ACCC: reduction in price refunds disclosure of the result of the litigation to customers stop the offending action pecuniary penalty. | Remedies obtained in settlement: stop the offending action reduction in price compensation limited disclosure stop the offending action no pecuniary penalty. |

**Table 5.1. Comparison of ACCC press releases**

The adverse publicity that may be generated by an enforceable undertaking is less harmful to the regulated entity than the publicity generated by a trial. Aside from the language used, an enforceable undertaking diminishes the injury to an alleged offender’s reputation because it gives the regulatory agency only one occasion for a media release and media coverage on the content of the enforceable undertaking.

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31 Ibid.

32 Yeung, above n 12, 110.

33 Any undertaking accepted by ASIC may, however, be referred to by the regulator at any time. Undertakings usually note that ASIC ‘may from time to time publicly refer to this undertaking’; see, for example, ASIC, Enforceable Undertaking: PCI Equity Pty Ltd, Document No 017 029 212 (22 June 2007), [4.1.2].

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while a formal litigation may involve a series of newsworthy events such as the news created if a particular person goes to trial.\textsuperscript{34}

However, Don Watt found that ‘clearly a number of clients were taken aback at the nature and extent of the publicity which followed an undertaking’.\textsuperscript{35} Irrespective of this, even though enforceable undertakings may attract some publicity due to the availability of undertakings to the public, the publicity linked to an undertaking is corrective and not punitive in nature.

5.2.3. \textit{Corrective Nature of Disclosure in Undertakings}

Public approval both rewards and encourages desirable conduct and, within the business community, has traditionally been prized. By contrast, adverse publicity is highly valued by regulatory agencies because it can expose and police undesired behaviour. Where there has been a breach of the law, public notices are today considered essential because of the public warning they provide. Further, many companies have introduced substantial reforms in the wake of adverse publicity crises. Regulatory agencies tend to use publicity in the following ways:\textsuperscript{36}

\begin{itemize}
\item as a warning to stop a certain behaviour;
\item as a tool to educate the public of their rights and duties;
\item as a way of seeking witnesses to come forward;
\item as a way of advising victims of avenues of redress;
\end{itemize}

\begin{flushright}
\textsuperscript{34} Francis Rourke, \textit{Secrecy and Publicity: Dilemmas of Democracy} (John Hopkins Press, 1966), 114.

\textsuperscript{35} Don Watt, ‘Evaluation of the Use of s 87B Undertakings’ (1998) 13 \textit{Australian Competition and Consumer Commission Journal} 7, 12.

\textsuperscript{36} Brent Fisse and John Braithwaite, \textit{The Impact of Publicity on Corporate Offenders} (State University of New York Press, 1983), 1, 260.
\end{flushright}
• as a way to shame the offender; and
• as a sanction.

Businesses are particularly vulnerable to publicity that has a negative impact on their reputation.\(^{37}\) However, an enforceable undertaking does not aim to have such an impact because the sanction is not supposed to have a punitive nature. The disclosure requirement that may be included in an undertaking has to be corrective in nature.\(^{38}\) The use of disclosure in an undertaking is, therefore, supposed to undo the harm caused by the alleged offence. For instance, in situations where a person was allegedly involved in the issue of misleading disclosure documents, an enforceable undertaking may contain a clause that requires unequivocal corrective advertising which will reach the same target audience as the original campaign.\(^{39}\)

For example, in 2000, KAZ Computer Services Ltd allegedly omitted certain information from its offer information statement ('OIS'). ASIC entered into an undertaking with KAZ Computer Services Ltd, in which the alleged offender undertook not to issue or release the OIS. Should the OIS have already been issued or released to any person, the alleged offender undertook to issue a letter within 14 days notifying those persons who had received the OIS that the OIS was subject to an

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\(^{38}\) This is the case because an enforceable undertaking is an administrative sanction: ALRC, Compliance with the Trade Practices Act 1974, Report No 68 (1994), 38; Yeung, above n 24, 116.

undertaking. As a result, the disclosure of the undertaking to a certain category of people would only take place if some part of the public had already received the OIS. The purpose of the disclosure was to correct the misinformation of those people.

Certain steps are in place to ensure that the disclosure required by an enforceable undertaking does not become punitive in nature. When enforcing a disclosure requirement at ASIC’s request, the courts will check whether the corrective advertisement requirement is appropriate in the circumstances. In *ACCC v Signature Security Group Pty Ltd*, for example, it was pointed out that the advertisement requirement present in the undertaking was inappropriate. The Court also confirmed that the purpose of such disclosure is to protect the public interest, not to punish. Clearly then, the disclosure required in an enforceable undertaking is to protect the public by correcting the harm caused by the alleged breach.

While disclosure of the content of an undertaking may generate some negative publicity for the promisor, such publicity is not intended to shame or punish the alleged offender. Rather, the corrective nature of the publicity diminishes the harm and negative publicity that may result from the alleged breach. This is especially the case when compared with the publicity that may have been attracted as a result of a

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40 ASIC, Enforceable Undertaking: KAZ Computer Services Ltd, Document No 008 547 481 (9 November 2000), [2.1].


43 For more information see 9.4.3.3.
trial or the imposition of harsher sanctions. The corrective nature of the disclosure required by an undertaking means it is less likely that the promisor will consider an undertaking to be unreasonable because of such disclosure. The requirement for disclosure also enhances the transparency of the sanction.

5.3. Implementation and/or Review of Compliance Program

The promisor has been required to implement a compliance program or to review its existing compliance program in 23.8% of the enforceable undertakings accepted by ASIC. For the purposes of this chapter the term ‘compliance program’ is used to refer to the internal compliance structure of a company which deals with the organisation’s policies, procedures and actions. A compliance program, therefore, may be seen as a management system aimed at ensuring that the rules applicable to the corporation are complied with by the corporation. There are different types of compliance programs. Some are relatively simple, others are more complex. A compliance program may be created by the appointment of an officer who will ensure that the paperwork required for regulatory compliance purposes is completed. Other compliance programs may require the setting up of a compliance department with educational programs, advice and auditing functions and a computer system to keep track of legal requirements and whether they have been fulfilled. The single major drawback of any compliance program relates to the cost of its implementation; by

44 Pengilley, above n 30.

45 ASIC, above n 17. Sixty seven of the undertakings entered into between 1998 and 10 June 2009 that required the implementation or review of a compliance program were entered into by companies, while one undertaking with a similar requirement was entered into by an individual.

contrast, all compliance programs have a number of advantages for the companies implementing them.

5.3.1. Costs

The implementation of a compliance program or the review of an existing compliance program may be costly for the promisor.47 Such costs will vary depending on the size of the organisation that is implementing and/or reviewing its compliance program and the particular breach of the law that the compliance program is intended to deal with.

For instance, the ACCC has adopted four trade practices compliance program template undertakings which it uses when framing compliance program elements of undertakings under s 87B of the Trade Practices Act.48 The Level 1 and 2 templates require a company ‘to develop procedures for recording, storing and responding to trade practices complaints and to provide the ACCC with an outline of the complaints handling system’.49 Compliance programs based on these templates may be as simple as keeping a book or an excel spreadsheet for recording complaints or the actions taken.50 The Level 3 template is more complex, requiring a company ‘to ensure that its compliance program includes a complaints handling system capable of identifying,
classifying, storing and where necessary, referring internal and external trade practices complaints to the company’s compliance officer’. The Level 4 template further requires a company ‘to ensure that its compliance program includes a complaints handling system that is consistent with AS 4269 (though tailored to the company’s circumstances) and that staff and customers are made aware of the complaints handling system’. Whistleblower protection mechanisms must also be included in a Level 4 compliance program. Depending on the type of compliance program that must be implemented, the cost to the company will vary.

Similarly, some promises in enforceable undertakings accepted by ASIC only require the company to review its existing compliance program, while other promises require that such a review is carried out by an independent expert. Some reviews will entail continuous monitoring for a certain period of time, while others will require the creation of a new position in the company to monitor its compliance program. Each one of these promises will have different costs linked to it.

51 Ibid.
52 Ibid.
53 Ibid.
54 See, for example, ASIC, Enforceable Undertaking: Macquarie Investment Management Ltd, Document No 017 029 106 (8 September 2003).
55 See, for example, ASIC, Enforceable Undertaking: Garrisons Pty Ltd, Document No 017 029 005 (27 June 2001).
56 See, for example, ASIC, Enforceable Undertaking: Patersons Securities Ltd, Document No 017 029 204 (5 December 2006).
57 See, for example, ASIC, Enforceable Undertaking: Fortrend Securities Australia Pty Ltd, Document No 017 029 228 (24 November 2008).
Depending on the complexity of a compliance program, the cost of the program may be broken into the following two components:  

- costs associated with implementing or reviewing the compliance program;
- costs associated with maintaining the compliance program.

Each of these two stages of implementation and/or review and maintenance involves a separate set of costs. However, in most instances where ASIC has accepted an enforceable undertaking requiring the implementation or review of a compliance program, the businesses involved were already required to have systems in place to ensure compliance with the law. The majority of the undertakings in which the alleged offender promised to implement a compliance program relate to financial services. In a number of instances, ASIC was concerned that the alleged offender did not have adequate programs to ensure the training and supervision of its employees and authorised representatives. Such conduct constitutes a serious breach of the law by a financial services licensee, since s 912A(1)(f) of the Corporations Act imposes an obligation on financial services licensees to ‘ensure that its representatives are adequately trained, and are competent, to provide ... financial services.’

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59 ASIC, above n 17. In 57 of the 68 enforceable undertakings accepted by ASIC requiring the implementation or review of a compliance program, the alleged offenders were working in the financial services industry. See also Christine Parker and Olivia Conolly, ‘Is there a Duty to Implement a Corporate Compliance System in Australian Law’ (2002) 30 Australian Business Law Review 275, 275.

60 See, for example, ASIC, Enforceable Undertaking: American International Assurance Company (Australia) Ltd, Document No 017 029 191 (24 January 2006).
The breach of such a requirement may lead to the cancellation or suspension of the financial services licence, the consequences of which would be far more costly to the promisor than the implementation of a compliance program. For example, when ASIC believed that Fortrend Securities Australia Pty Ltd (‘Fortrend’), a financial services licensee, was breaching its duties as a licensee under ss 912A and 912D of the Corporations Act, ASIC cancelled Fortrend’s licence. Fortrend applied for review of ASIC’s decision and the AAT set aside the decision and ordered ASIC to enter into an enforceable undertaking with Fortrend. One of the promises the company made in the undertaking was that it would overhaul its compliance program. In such a situation, the cost of improving its compliance program must appear very reasonable when faced with the alternative: cancellation or suspension of its licence.

Further, to meet the general obligations of financial services licensees under s 912A of the Corporations Act, such an organisation should already have a compliance program. This means that the cost of introducing a compliance program or reviewing an existing compliance program is in fact embedded in the cost of running the business, and may imply that a requirement in an undertaking to implement, review and maintain a compliance program will not be considered a burdensome and unreasonable promise. In addition, the alternative sanctions that may apply for such a breach of licence obligations are more onerous.

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61 Corporations Act, s 915C.

62 ASIC, Enforceable Undertaking: Fortrend Securities Australia Pty Ltd, Document No 017 029 228 (24 November 2008).

63 Parker and Conolly, above n 59, 275.
5.3.2. Benefits

By monitoring corporate values and practices and acknowledging that some values and practices conflict with others, compliance programs may assist a business unit or a company’s top management to engage with regulators, the courts, the law, the media and the broader community in order to identify appropriate solutions for each instance of conflict. As noted above, a number of the undertakings accepted by ASIC requiring the implementation and/or review of a compliance program have dealt with alleged breaches of s 912A of the Corporations Act, especially the duty to ensure that the representatives of a financial services licensee are adequately trained and are competent to provide financial services.64 Other undertakings containing a promise to review or implement a compliance program have dealt with alleged misleading or deceptive conduct,65 while still others have related to a company’s alleged non-compliance with its continuous disclosure obligations.66

In all these instances, it is very important that companies put in place an effective compliance program so that their employees understand what is required of them. Compliance programs raise the awareness of employees and limit the likelihood of their engaging in prohibited conduct. If the company already has a compliance

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64 Of the enforceable undertakings accepted by ASIC that require the implementation of a compliance program, 34.3% relate to alleged breaches of s 912A: ASIC, above n 17.

65 Of the enforceable undertakings accepted by ASIC that require the implementation of a compliance program, 38.8% relate to possible misleading and deceptive conduct: ASIC, above n 17.

66 Of the enforceable undertakings accepted by ASIC that require the implementation of a compliance program, 11.9% relate to alleged breaches relating to continuous disclosure issues: ASIC, above n 17.
program, review of that program is essential especially in view of ASIC’s concerns. This would allow the company to detect and correct possible breaches of the law.67

Through compliance programs, companies may seek to achieve the following goals:68

• to create an awareness of the content of the law among the company’s employees;
• to enable the employees to detect behaviour which may result, or has already resulted, in contravention of the law, before the regulator takes any action to remedy the possible breach;
• to avoid the possibility of having to outlay significant costs in defending a prosecution or private action;
• to avoid any unfavourable publicity and disruption to business that may be caused by a prosecution or private action;
• to reduce the risk of incurring penalties and liability to pay damages for breach of the law; and
• to assist in a plea of mitigation where a penalty is to be imposed following conviction for a breach of the law.

These goals may be seen as self-serving, since the successful pursuit of each will be of benefit to a company. Braithwaite has observed that the business community will not follow the law unless it gets something in exchange.69 Companies wish to

67 Parker and Conolly, above n 59, 275.


69 Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, 1992), 36.
implement compliance programs because such programs may save them certain expenses, such as having to counter unfavourable publicity. In addition, a compliance program may improve the financial performance of a company in the long run. A 2008 report conducted by ITPolicycompliance.com reveals that those organisations that have embraced compliance programs and view such programs as a core principle in business have a higher profit than companies that have not done so.\textsuperscript{70}

Further, in 1979, the Federal Court began taking into consideration the extent to which a corporation has attempted to ensure its compliance with the law as an important factor in assessing the amount of criminal and civil penalties that should be applied in consequence of a breach of the law. By the 1990s, evidence of the willingness of a corporation to ensure an environment of cultural compliance had become a major factor in the assessment of penalties. Penalties will be larger if companies do not have a compliance culture in place.\textsuperscript{71}

For example, in \textit{Trade Practices Commission v TNT Australia Pty Ltd}\textsuperscript{72} the Court decreased the penalty because it believed that the defendant would comply with the law in the future. It was clearly stated that the court will take into consideration:\textsuperscript{73}


\textsuperscript{72} Trade Practices Commission v TNT Australia Pty Ltd (1995) ATPR \$41–375.

whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.

As a result, one of the reasons that a company may adopt a compliance program is to use it as a mitigating factor in future legal proceedings. But compliance programs are also important because they may prevent possible future breaches of the law, since corporate compliance programs may also be seen as management systems that aim to prevent, and where necessary, identify and respond to, breaches of laws, regulations, codes or organisational standards occurring in the organisation; promote a culture of compliance within the organisation; and assist the organisation in remaining or becoming a good corporate citizen.

Therefore, although an obligation in an undertaking to implement or review a compliance program may be onerous, an effective compliance program has a number of advantages that can exceed the burden imposed by the requirement to implement such a program. Rational actors would rather make such a promise than be exposed to the harsher sanctions that might be applied for similar breaches of the law. A compliance program also benefits the company in the longer term by diminishing the likelihood of similar breaches in the future.

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74 Parker, above n 46, 17.
5.4. Refund

The promisor has been required to compensate victims of the alleged breach for the losses they may have suffered in 29.7% of the enforceable undertakings accepted by ASIC. For example, in 2008, Energetique Pty Ltd received investments totalling $120 000 from four investors in return for shares in the company. However, the investors were not issued any shares in the company nor did Energetique Pty Ltd lodge a disclosure document with ASIC about its fundraising activities. ASIC suspected that such conduct was in breach of ss 113(3), 727 and 734 of the Corporations Act and entered into an enforceable undertaking with the company. In the undertaking, Energetique Pty Ltd promised to repay to the investors the money paid to it for investment in the company.

In another example, in 2000, National Mutual Health Insurance Pty Ltd entered into an undertaking with ASIC in relation to its alleged involvement in a series of misleading advertisements. As a consequence of the undertaking, the alleged offender promised to stop broadcasting the misleading advertisements, to disclose the undertakings to its clients, and to refund any sum paid to it by a person who had taken out health insurance with the company in the period when the misleading advertisements had been broadcast who requested in writing a cancellation of cover on the basis of having been misled by the advertisements.

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75 For the purpose of this thesis the terms ‘compensation’, ‘refund’ and ‘indemnification’ are used interchangeably.

76 ASIC, above n 17.

77 ASIC, Enforceable undertaking: Energetique Pty Ltd, Document No 017 029 226 (11 November 2008).

As may be seen, the requirement to refund is corrective in nature and, under the circumstances surrounding an enforceable undertaking, is a fair promise that allows victims of the alleged breach to be compensated for their losses. Although a refund requirement in an undertaking may seem burdensome to the promisor at first glance because some enforceable undertakings may require the promisor to pay millions of dollars in compensation to people who have been affected by the alleged breach, such a promise may nevertheless be deemed reasonable from the promisor’s perspective because it provides certain benefits to the alleged offender.

Because the compensation requirement in an undertaking is corrective in nature, it will only be introduced in an undertaking when the alleged conduct of the promisor has impacted negatively on persons outside the company. The payment of compensation to victims of an alleged breach may prevent the initiation of private lawsuits by parties affected by the breach because they have already been compensated for some of their loss. This means that in accepting an undertaking an alleged offender would pay fewer legal costs since, on the one hand, ASIC would not initiate legal action in relation to the alleged breach and, on the other hand, victims

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79 For example, Multiplex Ltd promised to pay $32 million to those people affected by an alleged breach of the law: ASIC, Enforceable Undertaking: Multiplex Ltd, Document No 017 029 205 (20 December 2006).

80 This compensation does not prevent the victims of the alleged breach or members of the general public from taking further action against the promisor because the basic principles of the rule of law allow individuals to enforce their rights in cases of breach of the law: Onus v Alcoa of Australia Ltd (1981) 149 CLR 27, 35; P Dawson Nominees Pty Ltd v Multiplex Ltd (2007) 242 ALR 111.

81 An enforceable undertaking may be an alternative to the initiation of court proceedings; see, for example, ASIC, Enforceable Undertaking: Express Loans and Finance Pty Ltd, Document No 017 029 114 (29 October 2003), [1.14].
of the alleged breach who have been compensated for their loss are also unlikely to start legal action against the alleged offender.

Further, an enforceable undertaking accepted by ASIC is unlikely to include an admission of liability. A number of undertakings include statements to the effect, for example, that the promisor ‘does not agree with all aspects of ASIC’s concerns’ or ‘does not admit that there has been any contravention of any law. Other undertakings may contain statements such as the following:

[The promisor] acknowledges ASIC’s concerns set out in this Undertaking, but does not concede the contraventions of the Corporations Law, or the ASX Business Rules, set out in Paragraphs 1.3 to 1.8. [The promisor] does not concede that, in the circumstances, ASIC would be entitled to exercise the powers referred to in Paragraphs 1.9 and 1.10.

In a number of other undertakings, promisors simply acknowledge the regulator’s concerns, and nothing more. Thus, even if legal action were to be commenced by the victim of an alleged breach following the entering into of an enforceable undertaking by the alleged offender, the lack of admission of liability in the undertaking means that a victim affected by the alleged breach or a member of the general public may not

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82 See, for example, ASIC, Enforceable Undertaking: Patersons Securities Ltd, Document No 017 029 204 (5 December 2006), [6.1].

83 See, for example, ASIC, Enforceable Undertaking: Multiplex Ltd, Document No 017 029 205 (20 December 2006), [1.19].

84 See, for example, ASIC, Enforceable Undertaking: Anthony Casey Wilson, Document No 008 547 508 (21 March 2001), [1.12].
use the existence of the undertaking as proof that the promisor has breached the law. The lack of admission of liability in undertakings may, therefore, limit the likelihood that further actions may be initiated by the victims of the alleged breach.

Since the refund requirement in the undertaking is corrective in nature and may prevent the initiation of private actions by third parties, the promise to refund may be perceived as reasonable from the point of view of the promisor.

5.5. Voluntary Ban

Of the enforceable undertakings accepted by ASIC, 73.9% of the undertakings entered into by individuals include a promise that the individual will:

- stop dealing with securities, financial services and/or investment advice, in instances where the individual has allegedly contravened his or her duties as an authorised representative of an Australian financial services licensee;
- stop managing a company, in instances where the individual has allegedly breached his or her duties as a director; or
- stop acting as an auditor, liquidator or receiver of a company.

The duration of such voluntary bans vary from one undertaking to the next depending on the alleged conduct of the promisor. A number of such undertakings additionally

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85 For discussion on the use of enforceable undertakings in trials see 6.5.

86 ASIC, above n 17. The author has divided enforceable undertakings into three categories: enforceable undertakings accepted by individuals, enforceable undertakings accepted by companies, and enforceable undertakings accepted by companies and their officers. The figure of 73.9% only takes into account enforceable undertakings entered into by individuals, and not enforceable undertakings entered into by companies and their officers.
state that the individual may work again in the industry once he or she has successfully completed an educational course.  

The promise of voluntary ban has negative repercussions on alleged offenders as it means a loss of livelihood. By itself, this outcome may be viewed as unreasonable by the promisor. However, the promise is not intended to be punitive in nature; rather, its aim is the protection of the public. For example, in 1998, Michael Anthony Casey allegedly failed to act efficiently in the performance of his duties as the holder of a dealer’s licence. In an undertaking Mr Casey acknowledged ASIC’s concerns that he was careless and inefficient in the advice given by him in the particular instance. He agreed to refrain from acting as a representative of a dealer or investment advisor for two months and to satisfactorily complete an educational course. ASIC acknowledged in accepting the undertakings and having regard to the action taken against Mr Casey by his employer that the sanction was appropriate, as it had no reason to believe that Mr Casey would not comply with the requirements of his job in the future.

In spite of the loss of livelihood, agreeing to a voluntary ban has fewer negative repercussions for a promisor than the alternative sanction of being made the subject of a banning order. For example when, in 2003, Michael Bradley Curtis allegedly breached his duties as a financial products advisor causing approximately $190 000 of

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87 See, for example, ASIC, Enforceable Undertaking: Robert Marusco, Document No 008 457 094 (10 January 2003), [3.1].

88 This is the case because an enforceable undertaking is an administrative sanction. Administrative sanctions cannot have a punitive nature: ALRC, above n 38, 38.

89 ASIC, Enforceable Undertaking: Michael Anthony Casey, Document No 008 547 357 (9 July 1999), [2.3].
losses to third parties, as well as paying compensation to the affected parties, in an
undertaking Mr Curtis agreed to a voluntary ban of four years and to successfully
complete an educational course before working again in the industry. ASIC agreed to
accept these undertakings as an alternative to the exercise of its power to make an
order banning or disqualifying a person from providing financial services under s
920A of the *Corporations Act*.\(^{90}\)

Some of the differences between a voluntary ban and a banning order include the
following:

- The promisor, in an undertaking, while agreeing to the voluntary ban does not
necessarily admit that he or she has contravened the law. Accordingly, an
enforceable undertaking deals with what remains merely an alleged offence,
while the imposition of a banning order leaves no doubt that a contravention
has taken place.

- An enforceable undertaking attracts less negative publicity than a banning
order. ASIC keeps a register of all banned and disqualified people, but this
register is not required to include the names of people who have agreed to a
voluntary ban.\(^{91}\) Even though enforceable undertakings are available to the

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\(^{90}\) ASIC, Enforceable Undertaking: Michael Bradley Curtis, Document No 018 457 141 (18 February
2003), [1.9].

\(^{91}\) Since April 2001 the United Kingdom has also had a sanction called an ‘enforceable undertaking’,
where the alleged offender undertakes to do or not do certain things. The United Kingdom
Secretary of State may accept enforceable undertakings in relation to the disqualification of alleged
offenders from managing a company. This type of voluntary disqualification is very popular and
early indications suggest that 75% of cases are now concluded by way of such enforceable
undertakings: Pearson, *Draft Company Directors Disqualification (Northern Ireland) Order 2002
and Draft Insolvency (Northern Ireland) Order 2002*, <http://www.parliament.the-stationery-
office.co.uk/pa/cm200203/cmstand/deleg2/st021210/21210s02.htm>. Unlike in Australia,
however, in the United Kingdom the names of people who have agreed to a voluntary ban are
recorded in the register of disqualification orders. This makes it easier for the public in the United
Kingdom to discover whether or not a person is entitled to manage a company: see The Insolvency
public, without actually reading the undertakings it may be difficult for third parties to discover who has agreed to a voluntary ban. By contrast, if a banning order has been imposed, a third party needs only to type the name of the person in question into the register of banned and disqualified people to discover if that person has been banned or not.  

Since a voluntary ban has fewer negative repercussions for a promisor than other sanctions that may be imposed by the regulator, an alleged offender may nevertheless

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For a recent development in relation to banning orders see XQZT and Australian Securities and Investments Commission [2009] AATA 669 (Unreported, Handley, 4 September 2009) in which the AAT decided that, until the review of ASIC’s decision to forbid a Sydney man known as XQZT from providing financial services for a period of four years was completed, ASIC should be prevented from publishing his name or details of his conduct. ASIC appealed to the Federal Court, challenging the AAT’s power to prohibit it from fulfilling its duty to publicise its bans as set out in the Corporations Act. In Australian Securities and Investments Commission v Administrative Appeals Tribunal [2009] FCAFC 185 (Unreported, Moore, Downes and Jagot JJ, 23 December 2009), the Full Bench of the Federal Court criticised the AAT for failing to consider the protection of investors when it suppressed the identity of the man, stating that ‘If the banning order is not disclosed, but subsequently upheld, is not the investor entitled to complain that all the circumstances should have been made public?’ The decision of Mr Handley to order a stay of XQZT’s ban and prohibit ASIC from publicising it pending the AAT’s review had not given enough weight to a requirement in the Administrative Appeals Tribunal Act 1975 (Cth) that he consider ‘the interests of any persons who may be affected’ by his orders. However, ASIC’s attempt to overturn the suppression order failed because the Court unanimously found the AAT had the power to make it, but the outcome may have been different if ASIC had brought a case claiming the AAT had misused its power: see Elisabeth Sexton, ‘Full Bench to Rule on Banned Directors’ Rights to Anonymity’, Sydney Morning Herald (Online), 8 October 2009, <http://www.smh.com.au/business/full-bench-to-rule-on-banned-directors-rights-to-anonymity-20091007-gn5h.html>; Elisabeth Sexton, ‘Secrecy failed to protect investors: judges’, Sydney Morning Herald (Online), 24 December 2009, <http://www.smh.com.au/business/secrecy-failed-to-protect-investors-judges-20091223-ldd7.html>.

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view enforceable undertakings that include such a promise as reasonable. This is especially likely to be the case in instances where the alleged conduct may have caused financial losses to third parties. For example, in 2003, ASIC accepted an undertaking from Jean Jacques Pierre Georges Blandin De Chalain, whose alleged contravention had caused one of his clients to lose approximately $120,000. Mr Blandin voluntarily undertook not to deal with securities and/or provide investment advice for a period of ten years due to the gravity of his offence.93

Alleged offenders appear to prefer entering into an enforceable undertaking that includes a voluntary ban to having a banning order imposed against them. For example, towards the end of trading on 29 May 1998, Andrew William Donald, a dealer’s representative with ABN AMRO Equity Australia Ltd, caused a fluctuation of the price of certain shares. The trading that resulted in the price increase was not genuine. As a result of Mr Donald’s action, ASIC imposed a banning order on Mr Donald on 20 July 1999 because it considered that his infraction lay at the more serious end of the scale. Mr Donald had proposed instead to enter into an enforceable undertaking, but ASIC did not believe that sanction was appropriate. On 5 August 1999, Mr Donald applied to the AAT for review of ASIC’s decision to ban him from dealing with securities for four years. Ultimately, the AAT noted that imposing a banning order was punitive in nature and decided that an enforceable undertaking that included a voluntary ban was more appropriate under the circumstances.94


94 Re Donald and Australian Securities and Investments Commission (2001) 64 ALD 717. This decision was confirmed by the Federal Court: Australian Securities and Investments Commission v Donald (2003) 136 FCR 7. See also ASIC, Enforceable Undertaking: Andrew William Donald, Document No 017 029 120 (22 April 2004).
5.6. In Summary

A number of different promises may be included in an enforceable undertaking. The most common promises are the disclosure of the alleged conduct, the implementation or review of compliance programs, the payment of compensation for victims of the alleged breach, and voluntary bans. Since such promises may be costly to alleged offenders, there is a risk that promisors may view these promises as unreasonable and repressive. Further, even though each undertaking is the result of a compromise between the regulatory agency and the promisor, there is a danger that the regulator may impose harsh and unreasonable promises in the undertakings because the regulator is in a stronger position than the promisor.

The author has found that this is unlikely to be the case since the promises in an undertaking are tailored to the alleged breach and are corrective in nature. Therefore, while they may have some negative repercussions, they are less harmful to the promisor than other sanctions available to ASIC. For example, voluntary bans have fewer stigmas attached to them than the issue of a banning order. In addition, promises such as the implementation of a compliance program may provide certain benefits to the promisor and may prevent similar breaches from occurring in the future. The promises included in undertakings have been shown to be reasonable. This means that there is a higher likelihood that promisors will comply with them.
Chapter 6: Enforceable Undertakings:  
A Vehicle for Justice for Third Parties?

6.1 The Wide Impact of Enforceable Undertakings

An enforceable undertaking may impact a number of people. First and most obviously, the sanction has a direct impact on the alleged offender, in ways such as have been discussed in Chapter 5. Second, as illustrated in Diagram 6.1, the content of an enforceable undertaking is the result of negotiations between the alleged offender and the corporate regulator, ASIC.

Diagram 6.1. Parties involved in negotiations that may lead to an enforceable undertaking

However, more people than merely those involved in such negotiations may be affected by the promisor’s alleged breach of the law, as illustrated in Diagram 6.2.

\[1\] The EU in the diagram stands for enforceable undertaking.
Although there is no statutory requirement that the regulator take into account the interests of third parties, ASIC considers the effect that the undertaking has on the regulated population or business community as a whole and the position of consumers and investors whose interests have been or may be harmed by the suspected conduct to be ‘critical considerations.’ Additionally, one of the factors contributing to ASIC’s decision that an enforceable undertaking is appropriate in the circumstances of any case is whether an enforceable undertaking will ‘achieve an effective outcome for those who have been adversely affected by the conduct or compliance failure’. Such a result is possible because an enforceable undertaking may contain more

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2 ASIC, Regulatory Guide 100: Enforceable Undertakings (March 2007), [2.8]. This was noted in 3.4.1.

3 Ibid, [2.10] and, in relation to the latter consideration, see also [2.11].
comprehensive and flexible terms than a court order, which is subject to certain restrictions.\footnote{Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd (2003) 198 ALR 417, [55].}

A single enforceable undertaking may achieve a range of outcomes. The remedy provides ASIC with the opportunity to tailor the promises contained in it to take into account and respond to the needs of third parties. Accordingly, an enforceable undertaking may provide its own brand of justice by both addressing the alleged breach and protecting the interests of investors.

The second part of this chapter provides an illustration of an enforceable undertaking protecting the interests of third parties affected by the alleged breach. The third and fourth parts of the chapter consider in more depth the way different promises that are corrective in nature may have a positive impact on victims of the alleged breach and the business community generally. The fifth part of the chapter assesses whether an enforceable undertaking in any way affects the rights of victims of the alleged breach and the business community.

### 6.2 Case Study: An Undertaking Protecting Victims of an Alleged Breach

One example that illustrates how an enforceable undertaking may achieve a range of outcomes is the undertaking ASIC entered into with Multiplex Ltd (‘Multiplex’) in 2006. In 2005, ASIC became concerned that Multiplex had breached the continuous disclosure rules concerning a material change in the profit forecast relating to its contract to construct the Wembley National Stadium project in London (‘Wembley
project’). As a consequence of ASIC’s investigation into the matter, Multiplex entered into an enforceable undertaking in which it promised to compensate the investors for their loss and to engage an external consultant to review Multiplex’s disclosure policies and procedures in order to reduce the possibility of a similar breach occurring again.\textsuperscript{5}

The enforceable undertaking dealt with the results of the alleged breach by compelling Multiplex to pay $32 million to those people affected by the alleged breach.\textsuperscript{6} The undertaking acknowledged the commitment made by the Roberts family, a major shareholder in Multiplex, to indemnify the Multiplex Group up to $50 million in respect of losses incurred on the Wembley project, and resulted in the acceleration of the payment of the $50 million from June 2007 to 22 December 2006.\textsuperscript{7} The undertaking protected the public through a quick resolution of the problem. It also had a preventive effect by ensuring that Multiplex’s compliance program improved, thus guarding against future breaches.

In the media release accompanying the undertaking, Mr Jeffrey Lucy, then Chairman of ASIC, stated that the enforceable undertaking provided ‘a swift and fair result that balances the regulatory imperatives, the interests of investors and acknowledges the willingness of Multiplex to offer a constructive response to the regulator’s concerns’.\textsuperscript{8} Victims of the alleged breach benefited, to a certain extent, from the enforceable

\textsuperscript{5} ASIC, Enforceable Undertaking: Multiplex Ltd, Document No 017 029 205 (20 December 2006), [2.1]–[2.8].

\textsuperscript{6} Ibid, [2.2].

\textsuperscript{7} Ibid, [1.21].

\textsuperscript{8} ASIC, ‘ASIC Accepts an Enforceable Undertaking from the Multiplex Group’, Media Release 06–443 (20 December 2006).
undertaking entered into with Multiplex. The enforceable undertaking was nevertheless criticised by some commentators, who characterised ASIC’s action as disappointing. It was perceived that the use of such a sanction discriminated against all existing shareholders by providing different protections to different people.  

This criticism does not seem to take into account the fact that an enforceable undertaking has definite advantages over other sanctions that may be available to the regulator. For instance an enforceable undertaking, unlike an infringement notice, attempts to correct the action of the promisor. Further, continuous disclosure actions are usually complex, lengthy and expensive. For example, in January 2006, shareholders filed a class action against Telstra Corp Ltd (‘Telstra’) alleging that the company had not complied with its continuous disclosure obligations. On 13 December 2007, the plaintiffs accepted a $5 million settlement of which $1.25 million was paid to the plaintiffs’ lawyers. The undertaking ASIC entered into with Multiplex provided more benefits to the misled investors than were achieved in the Telstra case.

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11 Ibid, 112–34.


6.3 Protecting the Interests of Victims of an Alleged Breach

The term ‘victims of an alleged breach’ refers to third parties who have been directly or indirectly affected by the alleged conduct of the offender and includes those who may have suffered a financial loss as a result of the alleged breach. Of the promises made by an alleged offender in an undertaking, it is usually the following promises that could affect such victims:

- disclosure of the alleged breach;
- compensation; and
- community service obligations.

These promises have certain benefits because they aim to correct the action of the promisor.

6.3.1 Disclosure

As noted in Chapter 5, all enforceable undertakings accepted by ASIC are required to be made available to the public. Additionally, when the conduct that led to an enforceable undertaking has caused harm or misled certain members of the public, the enforceable undertaking ensures that victims of the alleged breach are made aware of the conduct of the promisor. Table 6.1 illustrates the total number and percentages of enforceable undertakings over the past decade that have required specific disclosure to the victims of an alleged breach.

14 See 5.2.1. For example, s 93A(6) of the ASIC Act states that ASIC must make an enforceable undertaking available to a person who asks for it.
<table>
<thead>
<tr>
<th>Year</th>
<th>Disclosure of the undertaking to the victims of the alleged offence</th>
<th>Number of enforceable undertakings accepted during the year</th>
<th>Percentage of enforceable undertakings that contain a requirement to disclose the undertaking to the victims of the alleged breach</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>2</td>
<td>13</td>
<td>15.4%</td>
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<td>11</td>
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<td>31.2%</td>
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<td>34</td>
<td>35.3%</td>
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<tr>
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</tr>
<tr>
<td>2008</td>
<td>3</td>
<td>9</td>
<td>33.3%</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>286</td>
<td>34.9%</td>
</tr>
</tbody>
</table>

Table 6.1. Disclosure to victims of the alleged breach

decade the promisor has had to disclose the content of the undertaking to their clients or consumers. Further, the number of undertakings that contain such a promise has fluctuated over the years. For example, only 28.6% of the undertakings entered into by ASIC in 2007 included such an obligation. Such fluctuations are to be expected because a disclosure requirement should only be included in an undertaking when the disclosure is corrective in nature.\(^\text{16}\) This may be challenging because the corporate regulator could use corrective advertisement to achieve a number of other goals, such as shaming and punishment;\(^\text{17}\) however, the use of disclosure in undertakings must centre on corrective action.

When accepting an undertaking that contains a promise of disclosure to the community, ASIC must weigh the promise carefully. For instance, Tamberlin J stated that:\(^\text{18}\)

> In any matter concerning corrective advertising the timing of such corrective advertising is of course important, ... There is no principle that any particular period is appropriate as a point beyond which corrective advertising is not warranted. In the context of advertising it is necessary to examine the nature, extent and intensity of the advertising and the media in which it has been released with a view to deciding whether there could reasonably be any current misapprehension as a result of the advertisements.


\(^{17}\) See 5.2.3.

\(^{18}\) *Australian Competition and Consumer Commission v On Clinic Aust Pty Ltd* (1996) 35 IPR 635, 640.
Tamberlin J further stated that ‘corrective advertising is intended to dispel incorrect or false impressions which may have been created as a result of deceptive or misleading conduct. It is not intended to be punitive’.  

Disclosure of an enforceable undertaking to the victims of the alleged breach allows an affected person to take private action if he or she believes they have not recovered the totality of their losses through the provisions made by the undertaking. For example, in 2002 Freehold International Pty Ltd and Optioneer Systems Pty Ltd entered into an undertaking in which the promisors agreed to inform their clients of the content of the undertaking. The letter sent to their clients as required by the undertaking clearly stated that the clients could rescind the agreements they had made with Freehold International Pty Ltd and that they should consult a lawyer for more information on their rights. As may be seen, corrective advertisement targets the category of people subject to the alleged conduct. Such an audience will vary in size depending on the alleged conduct of the promisor.

Another example may be found in the undertaking ASIC entered into with A and A Gillon Pty Ltd in 2003 after the company had provided financial product advice through its SharePro website without a financial services licence. The company promised not to offer financial product advice and to refund its customers. It also undertook to disclose the content and terms of its undertakings on the SharePro

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20 This is discussed in more detail in 6.5 below.

21 ASIC, Enforceable Undertaking: Freehold International Pty Ltd and Optioneer Systems Pty Ltd, Document No 017 029 027 (14 February 2002), [2.2], Attachment A.
website. The required publicity targeted the parties that may have seen the advertisement on the SharePro website.

Similarly, in 2003, National Investment Institute Pty Ltd, Henry Kaye, Novasource Consulting Pty Ltd and Alan Meagher (‘the parties’) entered into an enforceable undertaking with ASIC after the parties had promoted mezzanine finance seminars in a brochure and a number of major Australian newspapers. ASIC considered that the parties were engaging in misleading and deceptive conduct in connection to their supply and promotion of certain financial services. It further considered that they were carrying on a financial services business without a licence and had issued a brochure containing misleading information. ASIC commenced civil proceedings in the Federal Court which were resolved when ASIC accepted undertakings offered by the parties, including that the promisors would issue a letter offering a refund in certain circumstances to all persons who had attended their seminars. The promisors also undertook to publish information about the content of the undertaking in The Australian, The Australian Financial Review and a major daily newspaper circulating in the capital cities of each Australian State and Territory.

In each of these examples, the mode of disclosure of the terms of the undertaking was the same as the mode of advertisement used by the alleged offender. This ensures that the people targeted by the alleged offender receive notification of the terms of the undertaken.

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undertaking. The types of suspected offences that led to a requirement of disclosure to the victims of the alleged breach are set out in Table 6.2.\textsuperscript{24}

<table>
<thead>
<tr>
<th>Alleged offence that led to a disclosure requirement in the undertakings</th>
<th>Total number of undertakings requiring disclosure to victims of the alleged offence</th>
<th>Percentage of undertakings requiring disclosures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach of duties as director, authorised representative or licensee</td>
<td>8</td>
<td>8%</td>
</tr>
<tr>
<td>Dealing with securities or financial services without licence</td>
<td>10</td>
<td>10%</td>
</tr>
<tr>
<td>Fundraising or investment offer in breach of the law / breach of disclosure provisions</td>
<td>22</td>
<td>22%</td>
</tr>
<tr>
<td>Dealing with unregistered managed investment schemes</td>
<td>8</td>
<td>8%</td>
</tr>
<tr>
<td>Misleading advertisement / information / advice / conduct</td>
<td>42</td>
<td>42%</td>
</tr>
<tr>
<td>Other miscellaneous offences</td>
<td>10</td>
<td>10%</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100%</td>
</tr>
</tbody>
</table>

Table 6.2. Matters where ASIC required the promisor to disclose the undertaking to victims of the alleged offence\textsuperscript{25}

\textsuperscript{24} ASIC, above n 15.

\textsuperscript{25} Ibid.
Over the past decade, the most common areas where disclosure was a requirement in an enforceable undertaking were:

- issuing securities without complying with the disclosure requirement under the law; and
- misleading and deceptive conduct.

As illustrated by Table 6.2, 64% of the undertakings that contain disclosure requirements fall into these two categories.

For example, in 2000 ASIC entered into an undertaking with Peel River Vineyards Ltd, after the company’s prospectus allegedly omitted certain information required by the *Corporations Law* or otherwise contained misleading information. In the undertaking, the alleged offender promised not to issue or release the prospectus. Should the prospectus have already been issued or released to any person, the company undertook to issue a letter within 14 days notifying the people who had received the prospectus that the prospectus was subject to an undertaking.26 As a result, the disclosure of the undertaking to a certain category of people would only take place if some part of the public had already received the prospectus and, accordingly, the requirement served to correct the misinformation of those people.

In 2005, ASIC was concerned that advertising relating to the fuel saving benefit of the Coles Myer Source MasterCard was misleading. As a consequence, it entered into an enforceable undertaking with Coles Myer Ltd in which the alleged offender promised

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26 ASIC, Enforceable Undertaking: Peel River Vineyards Ltd, Document No 008 547 479 (18 October 2000).
to remove and review its advertising material and to notify all cardholders who had acquired and activated a Coles Myer Source MasterCard in the time period in question of the enforceable undertaking and of their right to cancel the cards. 27

In these instances where ASIC was concerned that information was misleading, the people affected were advised of the alleged breach. Similarly, when in 2002 Arif Fareed allegedly breached his duties as a securities dealer by failing to disclose the commission he was taking from his clients, Mr Fareed entered into an undertaking with ASIC which required him to advise his clients of the content of the undertaking. 28

While disclosure provides information to the victims of the alleged breach, other promises, such as compensation, provide more protection to the parties affected by the promisor’s conduct by allowing victims of the alleged breach to recover financial losses they may have suffered as a result of the alleged contravention. 29

6.3.2 Compensation 30

An enforceable undertaking may require compensation to be paid to consumers or clients of alleged offenders affected by the alleged breach. Of the 286 enforceable undertakings accepted by ASIC in the past decade, 85 required the promisor to provide refunds to a certain category of people. Such refunds are required when third

27 ASIC, Enforceable Undertaking: Coles Myer Ltd, Document No 017 029 178 (7 October 2005).
29 ASIC, above n 15.
30 For the purpose of this thesis the terms ‘compensation’, ‘refund’ and ‘indemnification’ are used interchangeably.
Parties have suffered a financial loss due to the alleged actions of the promisor. The areas in which this requirement has arisen are set out in Table 6.3.\footnote{ASIC, above n 15.}

<table>
<thead>
<tr>
<th>Alleged offence that led to a compensation requirement in the undertakings</th>
<th>Total number of undertakings requiring compensation to victims of alleged offence</th>
<th>Percentage of undertakings requiring compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach of duties as director, authorised representative or licensee</td>
<td>6</td>
<td>7.1%</td>
</tr>
<tr>
<td>Dealing with securities or financial services without licence</td>
<td>5</td>
<td>5.9%</td>
</tr>
<tr>
<td>Fundraising or investment offer in breach of the law / breach of disclosure provisions</td>
<td>24</td>
<td>28.2%</td>
</tr>
<tr>
<td>Dealing with unregistered managed investment schemes</td>
<td>6</td>
<td>7.1%</td>
</tr>
<tr>
<td>Misleading advertisement / information / advice / conduct</td>
<td>31</td>
<td>36.5%</td>
</tr>
<tr>
<td>Other miscellaneous offences</td>
<td>13</td>
<td>15.2%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>85</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Table 6.3. Matters where ASIC required the promisor to pay compensation to victims of the alleged offence\footnote{ASIC, above n 15.}
As illustrated by Table 6.3, 64.7% of the undertakings that contain a promise to pay compensation relate to two alleged offences:

- misleading advertisement; and
- breaches of the law in relation to fundraising and disclosure provisions.

For example, in 2007, ASIC was concerned that PCI Equity Pty Ltd was breaching its Australian financial services licence conditions and was not complying with its duties as a financial services licensee. The alleged conduct affected 47 retail clients who had been issued units in a trust operated by the company in contravention of the financial services licence conditions. ASIC entered into an enforceable undertaking with PCI Equity Pty Ltd in which the company promised to disclose the conduct to the victims of the alleged breach and to provide refunds to these retail clients to compensate them for any loss they may have suffered.\(^{33}\)

In addition, throughout the last decade ASIC has accepted enforceable undertakings focusing on the needs of the victims of the alleged breach to supplement court orders. For example, in 2005 the corporate regulator was concerned that First Capital Financial Planning Pty Ltd provided defective advice to 177 clients by directing them to move their superannuation investments from First State Super Superannuation Scheme to Wealthtrac Personal Super Plan, Matrix Super Master Trust, Navigator Personal Retirement Plan or FC One Retirement Builder. As a result, ASIC initiated proceedings in the Supreme Court of New South Wales. The defendant agreed to resolve the proceedings by consenting to declarations and injunctions made by the Supreme Court. First Capital Financial Planning Pty Ltd also entered into an

\(^{33}\) ASIC, Enforceable Undertaking: PCI Equity Pty Ltd, Document No 017 029 212 (22 June 2007).
enforceable undertaking with ASIC, in which it undertook to indemnify the clients for any losses they may have suffered due to the transfer of funds that took place.\(^{34}\)

A promise of compensation in an enforceable undertaking gives an affected consumer, client or investor a quick way to recover his or her losses without having to go to court and pay court expenses. This is especially useful when the amount that the victim is entitled to is small and does not justify the commencement of litigation.

### 6.3.3 Community Service Obligations

Enforceable undertakings may not only lead to disclosure of the undertaking to affected parties, they may contain promises to promote community awareness of the law and of the range of rights to which individuals are entitled. The ACCC guidelines on the use of enforceable undertakings describe such promises within an undertaking as ‘community service remedies’.\(^{35}\)

Section 12GLA of the *ASIC Act* provides that the court may, on application by ASIC, make a community service order in relation to a person who has engaged in contravening conduct.\(^{36}\) The same section defines a community service order as:\(^{37}\)

\[
\text{an order directing the person to perform a service that:}
\]

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\(^{36}\) *ASIC Act*, s 12GLA(1), (2).

\(^{37}\) *ASIC Act*, s 12GLA(4).
(a) is specified in the order; and

(b) relates to the conduct;

for the benefit of the community or a section of the community.

This definition makes it clear that the work must benefit the community.

However, the ALRC report into compliance with the Trade Practices Act (1994) considered that community service orders may in certain instances be seen as a punitive penalty inflicted on an offender.\(^{38}\) It recommended that a court should have the power to issue community service orders only after considering three matters:\(^{39}\)

- whether any damage has been suffered by the community as a whole as a result of the contravention;
- whether there is a reasonable relation between the community service order and the nature of the damage suffered by the community; and
- whether there is reasonable proportionality between the maximum cost of the community services and the damage caused by the contravention to the community.

Given that an enforceable undertaking may impose community service obligations on the promisor, the author recommends that these same three issues should be taken into consideration by ASIC when deciding the content of the undertaking. The appropriateness of the use of community service obligations in undertakings entered into by ASIC will depend upon their proper characterisation. If they may be


\(^{39}\) Ibid, 113-114.
characterised as corrective action, rather than having a punitive purpose and effect, they would appear to be acceptable because this would comply with the proper purposes of administrative penalties. Further, it is unlikely that Parliament would have intended the provisions of the legislation relating to undertakings to be used for a punitive purpose. ASIC appears to have been very cautious in including community service obligations in undertakings, with only 3.8% of the undertakings studied for the purpose of this thesis containing such a requirement. All of these promises are able to be characterised as corrective in nature. Usually ASIC has included such a promise in instances where the alleged conduct may have had a widespread negative effect. In such cases, the undertaking may have contained a requirement to implement a community service work or project to protect the affected community through education.

For example, in 2000, the Combined Insurance Company of America (‘Combined’) sold insurance policies to members of certain Aboriginal communities that allegedly were not appropriate for the needs and circumstances of persons living in those communities. Combined entered into an undertaking with ASIC, promising to implement a complaints handling process and to improve its staff education and compliance programs. Combined also promised to contribute $40 000 to ASIC to assist in the preparation of educative materials in relation to insurance to be made available to indigenous consumers. The community that was misled by the conduct of the promisor would be educated and, as a consequence, be made less vulnerable to similar ploys.

Yeung, above n 16, 123.

Another undertaking including a community service requirement was entered into by Fintrack Financial Services (Aust) Pty Ltd and Fintrack Pty Ltd in 2003. The promisors, who had allegedly misled the public through a series of advertisements on television and radio as well as through the publication of misleading statements in brochures and on the company website, undertook to pay $15 000 to ASIC to be used for consumer education or similar programs in relation to the finance and mortgage broking industry.\textsuperscript{42}

These community service promises included in enforceable undertakings impacted the affected community positively because the promises were aimed at the protection of the affected community. They ensured the education of the community on certain issues and thereby reduced the likelihood of people falling victim to similar contraventions in the future.\textsuperscript{43} Such education may also be provided to businesses in a similar industry to the alleged offender.

6.4 Businesses in a Similar Industry

As noted in 3.4.1, ASIC’s Regulatory Guide 100 states that ASIC will accept an enforceable undertaking when such a sanction may result in a more effective regulatory outcome than other sanctions at ASIC’s disposal. One of the factors ASIC takes into consideration when deciding whether an enforceable undertaking would result in a better outcome than other penalties is the effect that the enforceable

\textsuperscript{42} ASIC, Enforceable Undertaking: Fintrack Financial Services (Aust) Pty Ltd and Fintrack Pty Ltd, Document No 017 029 105 (3 September 2003).

\textsuperscript{43} ALRC, above n 38, 111.
undertaking may have on the regulated population. An enforceable undertaking may promote general deterrence by making the business community aware of the alleged conduct and the consequences that may arise from engaging in such conduct.

For instance, in 2006, ASIC accepted an enforceable undertaking from Transcomm Credit Co-operative Ltd (‘Transcomm’) after the regulator’s investigation found the credit union’s advertising material featured claims about its reverse mortgage product that were misleading and deceptive. In the undertaking, Transcomm made promises relating to disclosure, corrective action and implementing a compliance program. In the media release accompanying the undertaking, ASIC used the opportunity created by its action against the credit union in relation to the misleading promotion of its reverse mortgage product to ‘[call] on all reverse mortgage providers to ensure that their advertising material is clear and accurate’. Jeremy Cooper, then ASIC’s Deputy Chairman, stated that:

ASIC will continue to keep a close eye on the promotion of reverse mortgages and will be particularly vigilant, as in this case, where the product has some features that have the potential to harm consumers which are either not disclosed or misrepresented.

44 ASIC, above n 2, [2.8].
45 Ibid, [2.9].
46 ASIC, Enforceable Undertaking: Transcomm Credit Co-operative Ltd, Document No 017 029 194 (28 March 2006).
In 2004, ASIC accepted an enforceable undertaking from UniSuper Ltd, the trustee of the UniSuper Fund, following an investigation that found that UniSuper Ltd had failed to provide member statements to UniSuper Fund members in receipt of temporary incapacity and permanent disablement benefits, as required by the 
Superannuation Industry (Supervision) Act 1993 (Cth), for the reporting period 1 July 1998 to 30 June 2002. Furthermore, other problems appeared with UniSuper Ltd’s complaints handling system. Mark Steward, then ASIC’s Deputy Executive Director of Enforcement, observed that the enforceable undertaking ‘sends a strong message to the superannuation industry that ASIC views superannuation disclosure and complaints handling obligations seriously’. 

Enforceable undertakings may also be educative in nature, in clarifying to the relevant industry the expectations of the regulator. Industries will know what is and what is not acceptable. For example, in 1998 ASIC was concerned that Michael Anthony Casey had allegedly failed to act efficiently in the performance of his duties as the holder of a dealer’s licence. In 1999, Mr Casey entered into an undertaking with ASIC in which he agreed to refrain from acting as a representative of a dealer or investment advisor for two months and to fulfil certain educational requirements. He also promised to cooperate with ASIC and the Australian Securities Exchange Ltd (at that time, the Australian Stock Exchange) in the preparation and presentation of seminars in Sydney and Melbourne which would consider issues of law, practice and procedure relevant to acting as a designed trading representative and would be open to


all designated trading representatives.\textsuperscript{50} This type of presentation educates designated trading representatives about their duties and obligations. Businesses in the same or a similar industry to a promisor may change their practices as a result of an enforceable undertaking that had targeted an industry rival.

Similarly, in 2000 ASIC accepted an enforceable undertaking with Connelly Temple Ltd, the trustee of a public offer superannuation fund, following concerns that information in the customer information brochures used by the company to promote certain products was misleading.\textsuperscript{51} In the media release accompanying the undertaking Allen Turton, then ASIC’s New South Wales Director Enforcement, stated that:\textsuperscript{52}

\begin{quote}
Insurance companies need to make sure that their customer information brochures are clear, carefully defined and avoid use of industry jargon and technical terms which may mean different things to different consumers.
\end{quote}

This sets a standard and provides guidance to the regulated community about their obligations under the law.

\section*{6.5 Rights of the Victims to Sue}

As stated in Chapter 5, the corrective action that an enforceable undertaking provides does not prevent the victims of the alleged breach or members of the general public from taking further action against the promisor because the basic principles of the rule.

\begin{itemize}
\item \textsuperscript{50} ASIC, Enforceable Undertaking: Michael Anthony Casey, Document No 008 547 357 (9 July 1999).
\item \textsuperscript{51} ASIC, Enforceable Undertaking: Connelly Temple Ltd, Document No 008 547 440 (10 May 2000).
\item \textsuperscript{52} ASIC, ‘ASIC Accepts Enforceable Undertaking from Wollongong Insurance Company’, Media Release 00/210 (10 May 2000).
\end{itemize}
of law allow individuals to enforce their rights in cases of breach of the law. Enforceable undertakings accepted by ASIC usually contain the following statement to this effect:

This undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.

An example of victims of an alleged breach of the law taking further action against a promisor is that even though in 2006 ASIC entered into an enforceable undertaking with Multiplex that provided for a refund to affected investors, a number of investors subsequently decided to initiate an action against Multiplex alleging failure to comply with the disclosure requirements and misleading conduct.

In *Ironbridge Capital Pty Ltd v ACCC*, the Court confirmed that an enforceable undertaking does not affect the rights of third parties. To protect their interests, third parties may still seek the remedies available to them under the law.

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54 See, for example, ASIC, Enforceable Undertaking: David William Wolstencroft, Document No 017 029 213 (24 October 2007), [4.1.2] (b).


57 *Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission* (2005) ATPR ¶42–082. Even though this case relates to the variation of an enforceable undertaking by the ACCC, it may apply equally to ASIC due to the similarity of ss 93AA and 93A of the *ASIC Act* with s 87B of the *Trade Practices Act*; see 3.2. As noted in 3.5.3, court judgments in relation to ss 93A and 93AA of *ASIC Act* and s 87B of the *Trade Practices Act* are regularly cross-referenced.

Further, even when ASIC enters into an enforceable undertaking as a supplement to court proceedings between the regulator and the alleged offender, those proceedings do not prevent third parties from initiating private lawsuits. This is based on the principle of *res judicata*, that judgments are only binding between the parties to the particular issue in the litigation. However, may an enforceable undertaking be used as evidence in a lawsuit?

### 6.5.1 May an Undertaking be Used as Evidence in Court?

The majority of enforceable undertakings do not contain an admission of liability, which means that they cannot be used as proof that the promisor has breached the law.\(^{59}\) Even in a case where a promisor has admitted to breaking the law, however, opinions differ over whether a third party affected by the promisor’s conduct should be able to use the admission as conclusive evidence of a breach of the law. It may be argued that the resolution of a civil dispute by either judgment or negotiated agreement will only bind the parties to it and not third parties, and statements made during the negotiation phase may be protected by negotiation or settlement privilege.\(^{60}\) In a similar vein, at common law the decision of *Hollington v F Hewthorn & Co Ltd*\(^ {61}\) indicates that evidence of a conviction is not admissible in other civil proceedings to prove the facts underlying the judgment.\(^{62}\) In short, a

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\(^{59}\) This was discussed in 5.4.

\(^{60}\) This point is discussed in more detail in 6.5.3.

\(^{61}\) *Hollington v F Hewthorn & Co Ltd* [1943] 1 KB 587.

\(^{62}\) *Hollington v F Hewthorn & Co Ltd* [1943] 1 KB 587.
judgment is not conclusive against the entire world in relation to the questions raised.\footnote{John Heydon, \textit{Cross On Evidence} (7th ed, 2004), 221. In Australia, \textit{Saffron v Federal Commissioner of Taxation} (1991) 102 ALR 19 illustrates the fact that even when a person has been convicted after a trial, they may still be able to canvass the issue of their guilt and innocence. See also \textit{Rogers v R} (1994) 123 ALR 417.}

The rule in \textit{Hollington v F Hewthorn & Co Ltd} has been heavily criticised by the ALRC,\footnote{ALRC, \textit{Evidence}, Interim Report No 26 (1985), Vol 1.} which considered that a conviction is ‘the result of the judicial procedure, designed over centuries to put the material needed to make a correct decision before the court which has a legal duty to form an accurate opinion on the question at hand’ and as such deserves recognition as ‘evidence of high probative value’ that the person was guilty.\footnote{Ibid, 209.} The ALRC further noted that to exclude evidence of convictions is illogical and may lead to an injustice where, as in \textit{Hollington v F Hewthorn & Co Ltd}, a key witness dies after having given the relevant evidence in earlier proceedings. In such an instance, if evidence of the conviction is not admitted, the plaintiff may have to abandon his or her action. The ALRC also found that the reasoning in \textit{Hollington v F Hewthorn & Co Ltd} was flawed and subject to criticism.\footnote{Ibid, 209. A more detailed look at \textit{Hollington v F Hewthorn & Co Ltd} [1943] 1 KB 587 is beyond the scope of this thesis.} The rule has been abolished in civil and criminal trials in England.\footnote{The rule in \textit{Hollington v F Hewthorn & Co Ltd} [1943] 1 KB 587 was abolished by statute in England for civil proceedings by s 11 of the \textit{Civil Evidence Act 1968} (UK) and in criminal proceedings by ss 74 and 75 of the \textit{Police and Criminal Evidence Act 1984} (UK).}

In Australia, s 91(1) of the \textit{Evidence Act 1995} (Cth) (‘Evidence Act’) provides that evidence of a decision or judgment, or of a finding of fact, in a proceeding is not
admissible to prove some fact that was in issue in that proceeding. Section 92 of the 
Evidence Act lists the exceptions to s 91, for instance, s 91(2) does not prevent the 
admission or use of evidence in a civil proceeding of a party’s conviction.68

However, an enforceable undertaking is an administrative sanction and does not form 
part of any criminal proceeding. It is not equivalent to a conviction.69 The rule in 
Hollington v F Hewthorn & Co Ltd and ss 91 and 92 of the Evidence Act have no 
effect on the use of enforceable undertakings in civil trials.

Further, s 83 of the Trade Practices Act provides that a finding of fact made in certain 
proceedings under the Act is admissible as prima facie evidence of the fact in civil 
proceedings. This provision is designed to make it easier for individual applicants to 
prove their case against a respondent against whom the ACCC or another party has 
successfully brought proceedings.70 All that is required to rely on the relevant facts is 
a copy of the findings sealed by the court which made the finding. However, the 
provision does not appear to have been used much in practice71 and is unlikely to 
apply in the case of an enforceable undertaking. In ACCC v Monza Imports Pty Ltd,72 
allegations made by the ACCC’s statement of claim had been admitted by the

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68 Evidence Act, s 92(2).
69 ASIC Act, ss 93AA and 93A; Trade Practices Act, s 87B.
70 Russell Miller, Miller’s Annotated Trade Practices Act (Thomson Lawbook, 28th ed, 2007), 904.
71 Peter Waight and Charles Williams, Evidence: Commentary and Materials (Lawbook, 7th ed, 2006), 376. Section 83 was used successfully, however, in Hubbards Pty Ltd v Simpson Ltd (1982) 60 FLR 430. This case was in relation to an action for damages based on breaches of the resale price maintenance provisions in the Trade Practices Act. Lockhart J found that the findings of fact made in a previous prosecution of the respondent by the Trade Practices Commission would be treated as prima facie evidence in the case by virtue of the application of s 83.
respondent as part of a consent resolution of the matter. However, Carr J declined to make findings of fact for the purpose of s 83 because such facts were not established by evidence presented to the Court. He considered a finding of fact meant ‘a finding made after a hearing’.\(^{73}\)

Other provisions in the \textit{Evidence Act} may shed some light on whether an admission in an enforceable undertaking may be used by third parties in legal proceedings. Part 3.4 of the \textit{Evidence Act} governs admissions and the extent to which they are admissible as exceptions to the hearsay rule and the opinion rule. Section 81(1) of the \textit{Evidence Act} states that ‘the hearsay rule and the opinion rule do not apply to evidence of an admission’. But s 82 provides that:

\begin{quote}
Section 81 does not prevent the application of the hearsay rule to evidence of an admission unless:

(a) it is given by a person who saw, heard or otherwise perceived the admission being made; or

(b) it is a document in which the admission is made.
\end{quote}

An enforceable undertaking is a document in which an admission of liability may, in certain cases, be made. Accordingly, it falls under one of the categories in s 82 and may, therefore, be admitted into evidence in relevant proceedings for the purpose of establishing the truth of what is asserted in the enforceable undertaking.

\(^{73}\) \textit{Australian Competition and Consumer Commission v Monza Imports Pty Ltd} (2001) ATPR ¶41–843, [25].
A court has discretion to exclude evidence under s 135 of the *Evidence Act*, which provides that:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

Evidence may be unfairly prejudicial to a party if it is used in a manner ‘logically unconnected with the issues in the case’. 74  Evidence may be misleading or confusing where there is a danger that evidence of minimal probative value will be given much more significance by the tribunal of fact than it deserves, 75 or if it may distort a situation by providing only part of the relevant picture. 76 Evidence may cause or result in an undue waste of time if the admission has minimal probative value and may add complexity without assisting in the resolution of the facts. Evidence of an admission made in an enforceable undertaking may be challenged on these grounds by the promisor (when sued by a third party).

In addition to the issue of admissibility is the issue of weight to be given to admissions in enforceable undertakings when a court is evaluating the evidence.


76 Hughes Aircraft Systems International v Airservices Australia (No 3) (1997) 146 ALR 1.
Parties who entered into an enforceable undertaking may have plausible explanations for their conduct consistent with their innocence. Karen Yeung observed that:\footnote{ALRC, Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report No 95 (2002), [16.104].}

Given the private and opaque nature of the bargaining process, unlike court proceedings, I would be inclined to argue that the giving of enforceable undertakings should not constitute conclusive evidence of admission of a violation. On the same basis I would not be in favour of treating admissions in enforceable undertakings as conclusive evidence of a violation. They might, however, be properly admissible in third party proceedings, provided they are not regarded as conclusive evidence of a violation.

Further, the promisor may argue that his or her admission of liability in the undertaking was obtained by the regulator through misrepresentation. He or she may also claim that they only agreed to the terms of the enforceable undertaking because of pressure from the regulator and the cost of potential litigation. It has been suggested that, since a trial may be avoided by entering into an enforceable undertaking, the ACCC and ASIC may use duress to induce an alleged offender to accept an enforceable undertaking. The ACCC has been criticised, for example, for using this remedy to bully or ‘arm-twist’ alleged offenders into complying with its directives and to extract unreasonable and unjustifiable terms.\footnote{Christine Parker, ‘Arm-Twisting, Auditing and Accountability: What Regulators and Compliance Professionals Should Know About the Use of Enforceable Undertakings to Promote Compliance’ (Presentation to the Australian Compliance Institute, Wednesday 28 May 2003, Melbourne), <http://cccp.anu.edu.au/Parker_ACI_2805031.pdf>.
}

In 1995 a Senate Inquiry observed that there was some evidence that ASIC may also have a tendency to
act in such a way. As a result, the manner in which an enforceable undertaking has been entered into may be taken into consideration by the court when admitting certain evidence that derives from that enforceable undertaking.

6.5.2 Impact of Breach of an Undertaking on Third Parties

If the promisor breaches an enforceable undertaking, a third party affected by the breach cannot attempt to enforce the undertaking in court. Section 93AA(3) of the ASIC Act provides that:

If ASIC considers that the person who gave the undertaking has breached any of its terms, ASIC may apply to the Court for an order under subsection (4).

Section 87B(3) of the Trade Practices Act is similar in content. As a consequence, only the regulator may commence proceedings to enforce an undertaking. The Court in Ironbridge Capital Pty Ltd v ACCC confirmed that:

Only the Commission can accept an undertaking under section 87B and only the Commission may bring proceedings to enforce an undertaking under section 87B.

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80 This is likely to be the case because when there has been a breach of an enforceable undertaking, the court does not directly enforce the undertaking and may take into consideration the circumstances that led to the undertaking being entered into, for example. See further 9.4.1.

81 The provision in s 93A(3) of the ASIC Act is similar to s 93AA(3) of the ASIC Act.


Nonetheless, certain parties affected by an enforceable undertaking have attempted to use a breach of the undertaking to help their case indirectly. For instance, in *Dresna Pty Ltd v Misu Nominees Pty Ltd*,[^84] Dresna Pty Ltd (‘Dresna’) had attempted to purchase a Franklins store at Mentone. While an agreement was reached between the parties for the sale of the store, the sale did not occur due to the fact that the landlord of the Mentone store, Misu Nominees Pty Ltd, did not consent to an assignment of the lease to the applicant. The store was later sold to Coles. Pursuant to s 87B of the *Trade Practices Act*, an enforceable undertaking had been given to the ACCC by Franklins and its parent company, Dairy Farm Management Services Ltd, that it would sell a number of stores to independent retailers and would obtain the consent of the ACCC before selling any stores to Woolworths or Coles. Dresna did not sue for breach of the enforceable undertaking but lodged an application for leave to amend its statement of claim, seeking to plead, among other things, that a breach of the enforceable undertaking by Franklins constituted the ‘unlawful means’ for the tort of conspiracy by unlawful means.

Weinberg J was unable to accept this contention, holding that:[^85]

> It would be inappropriate, in those circumstances, to permit [s 87B] to be invoked indirectly as the ‘unlawful means’ for the tort of conspiracy. To interpret the section in that way would be to give it greater scope in the area of private rights than the legislature intended.

[^84]: *Dresna Pty Ltd v Misu Nominees Pty Ltd* (2004) ATPR (Digest) ¶46–245.

Dresna applied for leave to appeal this decision. Faced with the same grounds, Jacobson J rejected the application for leave, noting that a breach of an enforceable undertaking does not amount to a contravention of a statute. Nor does it amount to a breach of contract. An enforceable undertaking is ‘an administrative arrangement sanctioned by the statute’ and only the ACCC may take action in the case of a breach of its terms. Kiefel and Marshall JJ, however, held that it was arguable that a breach of s 87B could constitute ‘unlawful means’ for the tort of conspiracy and gave leave for the appeal to proceed. The matter was settled between the parties in 2005. It may be concluded that the courts may be open to allowing an applicant to use a breach of an enforceable undertaking to their advantage in some actions, such as conspiracy to commit a tort.

In another example, Perpetual Plantations of Australia Pty Ltd (‘Perpetual Plantations’), Donald Brownlie Fleming and Dee Dee Fleming entered into an enforceable undertaking with ASIC in 2003. The undertaking referred, among other things, to an investors’ agreement and the rights of those investors under an investment scheme. On 19 March 2004, Perpetual Plantations granted a mortgage to Robier Holdings Pty Ltd (‘Robier’). The mortgage was later transferred to Thunder Enterprises Ltd (‘Thunder’) but the charge in favour of Robier was not transferred. On 8 June 2005, the Federal Court made an order to wind up the investment scheme. The receivers of Perpetual Plantations wished to sell certain lands owned by Perpetual


87 ASIC, Enforceable Undertakings: Perpetual Plantations of Australia Pty Ltd, Mr Donald Brownlie Fleming and Mrs Dee Dee Fleming (formerly Margaret Dianne Fleming), Document Nos 017 029 077, 017 029 078, 017 029 079 (10 February 2003).
Plantations. The plaintiffs in *Thompson v Albarran*, the scheme, were worried that the sale of the land would result in the disbursement of Robier or Thunder, which could put the amount received for the sale beyond the reach of the investors. They sought an injunction to stop the disbursement of the amount received for the sale of land until the Court had determined whether they had a claim to a proprietary interest in the land. White J issued the injunction, finding there was a serious question to be tried as to whether the interests of the plaintiffs may prevail against the interests of Robier and Thunder. White J referred to the enforceable undertaking, noting that the content of the undertaking was available on ASIC’s website and that, as a consequence, Robier had notice of its content in relation to the investors’ rights. Even though the enforceable undertaking did not explicitly indicate that any individual had an interest in the land, a reading of the undertaking did raise a line of enquiry about the existence of such interests.

Accordingly, the presence of an enforceable undertaking may be very useful to a third party affected by the alleged conduct of the promisor. Such a party may use the enforceable undertaking indirectly to assist them in proceedings brought against the alleged offender.

### 6.5.3 Use of Information Collected by ASIC in Proceedings

During negotiations attempting to reach a settlement in relation to a dispute, the parties involved in the negotiations frequently make statements ‘without prejudice’. Where this has occurred, the statements made during the negotiation phase cannot be

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89 *Thompson v Albarran* [2006] SASC 76 (Unreported, White J, 3 March 2006), [28]. See also ASIC, above n 87.
put in evidence without the consent of both parties, due to the joint privilege that arises.\(^90\) As an enforceable undertaking is a form of settlement, all communications between the regulator and the promisor that aim to settle their differences out of court may be subject to this negotiation or settlement privilege. However, the privilege does not extend to any investigation by ASIC or the ACCC into the alleged breaches of the law before the negotiations commenced.

As a consequence, the evidence gathered during an investigation conducted by ASIC and the ACCC (which subsequently led to an enforceable undertaking) may indirectly help the case of a victim of the alleged breach. For instance, as noted in 6.2, in 2005 ASIC entered into an enforceable undertaking with Multiplex because the regulator’s investigation, commenced on 22 February 2005, indicated that Multiplex had breached the continuous disclosure rules.\(^91\)

In *P Dawson Nominees Pty Ltd v Multiplex Ltd*,\(^92\) P Dawson Nominees Pty Ltd (‘Dawson’) wished to take action against Multiplex in relation to the losses it suffered due to the alleged breach of the continuous disclosure provisions. In preparation for the trial, Dawson lodged an application for the issue of a subpoena requiring the production by ASIC of the following documents:\(^93\)

- a copy of documents provided by Multiplex to ASIC in the course of the investigation that led to the enforceable undertaking:

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\(^90\) Heydon, above n 63, 857; *Evidence Act*, s 131. Such a rule is also followed in the United States: *Federal Rule of Evidence* (US), Rule 408.

\(^91\) ASIC, Enforceable Undertaking: Multiplex Ltd, Document No 017 029 205 (20 December 2006).

\(^92\) *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 64 ACSR 53.

\(^93\) *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 64 ACSR 53, [10].
• a transcript of examination of all persons examined by ASIC during the course of the investigation;

• a copy of all signed or sworn statements from witnesses obtained by ASIC during the course of the investigation; and

• a copy of any external consultant report that was provided to ASIC by Multiplex in compliance with the terms of the undertaking.

Dawson wished to use ASIC’s investigation as possible supporting evidence of a breach of the continuous disclosure provisions by Multiplex. Multiplex opposed the issue of such a subpoena, arguing that the subpoena would have no ‘legitimate forensic purpose’ and would result in an abuse of process because it would be used as a ‘substitute for discovery’ and some of the required documents were irrelevant to the proceedings. Heerey J noted that a subpoena may be directed to a non-party prior to trial. He considered that there was a ‘general utility’ in both parties accessing ASIC’s documents in that it would provide all parties with information that would help them to make informed decisions in relation to the future conduct of the proceeding. Accordingly, the Court ordered that the applicant had leave to issue a subpoena duces tecum directed to ASIC. Further objections to the production of some of the documents were subsequently made by both ASIC and Multiplex.94

ASIC contested the production of certain documents on the ground of public interest immunity privilege and Multiplex opposed it on the ground of legal professional privilege. Section 25(1) of the ASIC Act provides that:

ASIC may give a copy of a written record of the examination, or such a copy together with a copy of any related book, to a person’s lawyer if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related.

ASIC thus has discretionary powers in relation to the disclosure of such documents to third parties. In the Multiplex case, ASIC wished to restrict the inspection of its documents because it had obtained the documents using its coercive powers and the subpoena was being used for an inappropriate purpose.

ASIC’s claim was heard in camera in the absence of all parties to the proceedings. Goldberg J rejected ASIC’s claim that the relevant documents and transcript were protected from production for inspection on the ground of public interest immunity privilege. His Honour noted that the parties affected by the transcript were going to be given an opportunity to make submissions as to whether there were any grounds on which the production of the transcript might be rejected. In relation to the rest of the claim, the matter was postponed.

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95 No further information was provided in the judgment because the information and the reasoning of the judge were held to be confidential. Light was shed on the matter when the decision of Goldberg J was contested.

In *ASIC v P Dawson Nominees Pty Ltd*, it became apparent that the information ASIC wished to suppress was in relation to the identity of informers in the case. Heerey, Moore and Tracey JJ observed that the fact that the identity of the informers was known within Multiplex by a number of senior people did not remove the need to protect the identity of the informers. The Court noted that it must ‘decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its function should not be denied access to relevant evidence’. The Court observed that there is an undeniable public interest in the protection of the identity of informers and its task was to balance this need with other public interest needs such as any disadvantage Dawson may have if it did not access those documents. Heerey, Moore and Tracey JJ found that the documents in question were not important enough to the litigation to lead to the disclosure of the identity of the informers. Basically, the Court applied the general public interest immunity principle relating to informers to protect the identity of these people. Such a move is significant because it reinforces the protection that must be given to whistleblowers. In white collar crime, whistleblowing plays an important role in discovering breaches of the law.

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99 For further developments in the Multiplex litigation see *P Dawson Nominees Pty Ltd v Australian Securities and Investments Commission (No 2)* (2009) 255 ALR 466; *P Dawson Nominees Pty Ltd v Australian Securities and Investments Commission (No 3)* [2009] FCA 779 (Unreported, Goldberg J, 23 July 2009) in which the Court noted at [13] that ‘the protection of the identity of an informer or informers to ASIC from disclosure is a legitimate and accepted basis upon which to object to the protection and inspection of documents on the ground of [public interest immunity]’; *P Dawson Nominees Pty Ltd v Australian Securities and Investments Commission (No 4)* [2009] FCA 1502 (Unreported, Goldberg J, 15 December 2009).
In short, investigations conducted by the regulator that have subsequently led to an enforceable undertaking may be disclosed to third parties when they bring proceedings against the alleged offender. However, the access to such information is rightly restricted by the court in relation to certain matters, such as the disclosure of the informer’s identity or other issues of public interest immunity including relationships with governments, including foreign governments and foreign regulatory bodies.\(^{100}\) In such instances the court balances the different interests before deciding whether to grant access.

Further, legal professional privilege protects any confidential communications between lawyers and their clients from disclosure when the dominate purpose of such communication is to seek or give legal advice (‘advice privilege’) or prepare for actual or contemplated litigation (‘litigation privilege’).\(^{101}\) In the context of an enforceable undertaking, the parties to the negotiations leading up to the enforceable undertaking are likely to have received legal advice. Such advice would be covered by the advice privilege and as a result would not be accessible to third parties.\(^{102}\)

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\(^{100}\) For instance, ASIC may obtain information from foreign regulators such as government bodies and private regulatory bodies dealing with financial services or exchange. Such information may be protected by public interest immunity. It is generally recognised that public interest immunity is not a closed category: Aboriginal Sacred Sites Protection Authority v Maurice (1986) 65 ALR 247.

\(^{101}\) Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 192 ALR 561, 564.

\(^{102}\) In recent years, communications between in-house counsel and the client have been subject to close scrutiny by the court. It has become common for private claims to be challenged on the basis that the in-house counsel providing the advice is beholden to the employer and as a consequence is not in a position to provide independent legal advice. For instance, in Telstra Corp Ltd v Minister for Communications, Information Technology and the Arts (No 2) [2007] FCA 1445 (Unreported,
However, would communications not able to be categorised as legal advice between lawyers and their clients in the lead up to an enforceable undertaking be covered by the litigation privilege?

In *Rich v ASIC*, the Court observed that the litigation privilege may apply beyond the judicial procedure. However, more recently, a distinction seems to have developed between adversarial and inquisitorial (investigatory) proceedings. The author believes the abolition of such a distinction is desirable because any type of communication between lawyers and their clients that has as its dominant purpose to prepare for actual or contemplated participation in a decision-making process involving executive power should be covered by legal professional privilege. Such information should not be available to third parties.

### 6.6 In Summary

When an alleged breach of the law has affected a number of people, ASIC is willing to take the necessary steps to correct the action of the alleged offender. As a consequence, an enforceable undertaking may deliver a better remedy to that of the

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Graham J, 12 September 2007), Telstra’s claim for legal professional privilege was refused on the basis that its in-house lawyer lacked the requisite measure of independence, Graham J considering that the legal advice was compromised by virtue of the nature of the lawyer’s employment relationship with Telstra.


court\textsuperscript{107} because it allows victims to be compensated for their losses without being required to initiate private proceedings.\textsuperscript{108}

At least 29.7\% of the enforceable undertakings accepted by ASIC in the past decade had a direct impact on the victims of the alleged breach. The enforceable undertaking played a role in protecting their rights when those rights had been harmed. Compensation gives the victims of the alleged breach quick solutions by correcting the damage that was caused. Promises made by the alleged offender to disclose an enforceable undertaking to a certain category of the public and to undertake community service work or projects may advise third parties of the occurrence of the alleged breach and inform them of their rights under the law through education. This enables the parties affected to take court action if needed.

Accordingly, an enforceable undertaking provides its own justice to victims of the alleged breach and affords these people some protection. Further, it warns and educates businesses about potential breaches of the law while at the same time playing a deterrence role. An enforceable undertaking may be perceived as a vital sanction in the regulator’s arsenal because it introduces into the regulatory system a certain level of justice to third parties who in order to obtain such justice would otherwise have to resort to costly and lengthy private actions.

\textsuperscript{107} ASIC, above n 2, [1.4].

\textsuperscript{108} Ibid, [2.3].
Chapter 7 : Enforceable Undertaking:  
A Restorative Sanction?

7.1 Enforceable Undertaking and its Link to Restorative Justice

As was illustrated in Chapter 6, an enforceable undertaking is more than just a settlement between the regulator and the alleged offender: it is also a vehicle for justice to third parties. In Chapter 2 restorative justice was described as the ‘process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implication in the future’. At first glance an enforceable undertaking seems to fall within this definition because of the corrective action that is embedded in the sanction. For example, Parker has argued that enforceable undertakings ‘demonstrate a promising potential restorative justice option within a suite of regulatory enforcement strategies’. However, to what extent can an undertaking be considered to be restorative in nature?

In order to answer this question, the second part of this chapter considers the elements that must be present for a sanction to be restorative. To determine whether the sanction of enforceable undertaking is restorative in nature, the third part of the chapter examines whether these elements are present in the enforceable undertaking.

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7.2 The Elements of Restorative Justice

On the premise that ‘crime is more than lawbreaking; it also causes injuries to victims, communities and even to offenders’, Daniel Van Ness proposed that the basis of restorative justice might be found in the following three core principles:

- the reparation of harm;
- the involvement of stakeholders—victims, offenders and the community—in the justice process; and
- community and government cooperation.

The first principle addresses the final outcome of restorative justice, while the second and third principles encompass the procedure that must be followed to reach this final outcome. Although there is no consensus on what constitute the elements of restorative justice, this chapter will measure the restorative nature of the sanction of enforceable undertaking using the criteria established by Van Ness.

7.2.1 The Reparation of Harm

Justice is not concerned just with punishment but also the healing of victims, offenders and communities that have suffered from a breach of the law. Repairs and amendments which redress the imbalance created when the contravention occurred may be viewed as the ultimate aim of restorative justice. However, the words

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4 Ibid.

5 Ibid, 7–12.

‘healing’ and ‘reparation’ go beyond restitution: it is the goal of restorative justice also to ‘restore’ emotional injuries.\(^7\) There are four main modes of reparation that are relevant in this context and these constitute the four values of the first principle of restorative justice. For the purposes of this chapter, they are:\(^8\)

- **Changed behaviour**—the offender agrees not to breach the law again. Further, he or she takes steps to ensure that the breach will not recur in the future.
- **Restitution**—this is the most common method of reparation. It involves compensating the victims for the loss they have suffered.
- **Repentance**—a genuine apology, for example, may demonstrate the repentance of the offender. Such repentance plays an important role in making amends for it is an acknowledgment of the wrongdoing.
- **Generosity**—the offender agrees to go one step beyond restitution. This may be characterised, for instance, by the willingness of the offender to do voluntary work for an agency selected by the victim.\(^9\)

These four values allow for the reintegration of the victim and the offender into the community.\(^10\)


\(^9\) Roche noted that the reason why certain people are able to be generous is because they are aware of the ordinary legal limits of remedies that may be imposed on them: Declan Roche, *Accountability in Restorative Justice* (Oxford University Press, 2003), 219.

\(^10\) Ibid.
7.2.2 The Involvement of Stakeholders in the Justice Process

Since the harm caused by the offender cannot be assessed in a vacuum, restitution cannot take place in the absence of those who have been affected by the offence.\(^{11}\) The second principle of ‘stakeholder involvement’ in restorative justice thus gives victims, offenders and the community the opportunity to be actively involved in the justice process at an early stage. However, this does not mean that the affected parties have to participate in person in the restorative justice process. The willingness of these stakeholders to be actively involved in the process may vary depending on the circumstances of each case. This variation ultimately affects the degree of healing that will take place, because ideally all stakeholders should participate in the process to fully achieve the goals of the first principle.\(^{12}\)

A breach of the law is traditionally considered as involving two stakeholders: the government and the offender. Restorative justice adds two additional stakeholders to this equation: the victims and the community.\(^{13}\) Including the offender, government, victim and community provides these different stakeholders with the opportunity to be involved in the justice process. Van Ness considered that the presence of three key values must be assessed when determining if such inclusion exists:\(^{14}\)

- Acceptance of alternative approaches—the willingness to accept new approaches to deal with the consequences of an offence demonstrates that any invitation to participate is genuine.

\(^{11}\) Bazemore and O’Brien, above n 6, 43.

\(^{12}\) Bazemore and Walgrave, above n 7, 55.

\(^{13}\) Howard Zehr, The Little Book of Restorative Justice (Good Books, 2002), 13.

\(^{14}\) Van Ness, above n 3, 6.
- Acknowledgment of interests—the interests of the victim, offender and community are taken into consideration when dealing with the breach.

- Invitation to participate—the person responsible for the restorative justice process invites the affected parties to participate in the process. This may result in a meeting between the parties and an agreement that is specifically tailored to their situation.\textsuperscript{15}

Excluding all the stakeholders—except to the extent required to determine the guilt of the offender—prevents the restorative process from taking place.\textsuperscript{16}

### 7.2.3 Community and Government Cooperation

Restorative justice involves an ongoing discussion with the community. Accordingly, the community plays an extensive role in restorative justice.\textsuperscript{17} However, what is meant by the community? The term ‘community’ can have different meanings and interpretations because the concept is very subjective.\textsuperscript{18} Lode Walgrave, for example, considered the notion of community is ‘a mirage of what we are craving for in the


\textsuperscript{16} Van Ness, above n 15, 132–3.


desert of fragmentation and individualism, but which we cannot really make concrete’. 19

Community may describe localities, such as the place where an offender grew up. 20 Community may also be viewed as a ‘place in which people know and care for one another’. 21 However, the notion of community is not just a place. 22 The definition may be broadened and considered as a ‘web of affect-laden relationships among a group of individuals … and a measure of commitment to a set of shared values’. 23 John Braithwaite described community as a set of ‘dense networks of individual interdependencies with strong cultural commitment to mutuality of obligations’. 24

Community may also be viewed as ‘a feeling, a perception of connectedness’ and ‘a sense of community’. 25 In certain situations, community is described as an extension of both the offender and the victim. For example, in group conferencing, both the

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19 Walgrave, above n 17, 75.
20 Ibid.
25 McCold and Wachtel, above n 22.
offender and the victims are supported by a ‘community of care’.\textsuperscript{26} Community can also be considered as a tool, since it may provide the ‘adequate social context needed for good restorative practices through reintegration and shaming’.\textsuperscript{27}

Further, the community may be viewed as a third party that has its own stake in the justice process. Besides the victims that have been directly affected by the breach, the community may be a secondary victim.\textsuperscript{28} Finally, the community may be perceived as a non-governmental actor that responds to crime, victims and offenders.\textsuperscript{29} It is this last interpretation that is considered in this chapter.

The third principle of restorative justice deals with the tension that exists between the community and government.\textsuperscript{30} According to Van Ness, while the government is responsible for preserving a ‘just order’, the community is responsible for establishing a ‘just peace’.\textsuperscript{31} Thus, due to the existing limitations on the role of government in its response to contraventions of the law, the community is expected to play a critical role in the government’s response to crime.\textsuperscript{32}

\begin{itemize}
\item\textsuperscript{26} John Braithwaite and Kathleen Daly, ‘Masculinities, Violence and Communitarian Control’ in Tim Newburn and Elizabeth Stanko (eds), \textit{Just Boys Doing Business?} (Routledge, 1994), 195–6.
\item\textsuperscript{27} Walgrave, above n 17, 75.
\item\textsuperscript{30} Bazemore and Walgrave, above n 7, 55.
\item\textsuperscript{32} Bazemore and O’Brien, above n 6, 43.
\end{itemize}
The principle of community and government cooperation defines the structural configuration that is needed to achieve this result. It requires the presence of two values:  

- The policies of regulatory agencies must take the community’s involvement in the justice process into account. Government–community cooperation must be fluid and dynamic in keeping with the nature of society itself. Through greater communication between regulatory agencies and the community, this may be achieved. Such communication might take the form of conferences or a direct involvement of the community, for example, through the creation of panels to be consulted when a regulatory agency imposes an administrative sanction. Basically, the judicial system or sanction must be orientated toward supporting the community’s ownership of restorative justice processes.

- The capacity of the community to respond to contraventions of the law must be enhanced. This may be achieved by educating the community about laws that may affect them. Such education enables the community to be protected and equipped with the tools necessary to deal with breaches of the law.

Accordingly, a change to government policy taking the community into consideration is necessary to fulfil this principle. Such a restorative orientation creates an

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33 Ibid, 43; Van Ness, above n 15, 138–43.

opportunity for the regulator to contribute to the main aim of the justice theory to protect and to promote the dominion of all citizens.\(^{35}\)

### 7.3 Applying the Elements of Restorative Justice to Enforceable Undertakings

Table 7.1 summarises the values that are the basis of each of Van Ness’s principles of restorative justice.

<table>
<thead>
<tr>
<th>First Principle: Reparation of harm</th>
<th>Second Principle: Stakeholder involvement</th>
<th>Third Principle: Community and government cooperation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Changed behaviour</td>
<td>Acceptance of alternative approaches</td>
<td>Role of agency oriented towards supporting community ownership of restorative justice process</td>
</tr>
<tr>
<td>Restitution</td>
<td>Acknowledgment of interests</td>
<td>Increasing the ability of the community to deal with the harm</td>
</tr>
<tr>
<td>Repentance</td>
<td>Invitation</td>
<td></td>
</tr>
<tr>
<td>Generosity</td>
<td></td>
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</tr>
</tbody>
</table>

**Table 7.1. The principles and values of restorative justice**

For the purpose of this chapter, it is accepted that these principles and their values are the main components of restorative justice. Their presence would imply that an enforceable undertaking might be considered a fully restorative remedy. If none of

\(^{35}\) Walgrave, above n 18, 145.
the principles are present, the sanction may not be deemed to be restorative. However, there are degrees of restorative justice. If some of the principles and their values are present, enforceable undertakings will be moderately or minimally restorative. All depends on the number of values that are present.

The author considers that all the principles and values of restorative justice mentioned have equal importance and, therefore, should have equal weighting in an assessment of whether the enforceable undertaking is a restorative sanction. Each principle and value is considered separately to determine if it is present in the enforceable undertaking. After each principle has been assessed, a conclusion may be reached as to whether or not the enforceable undertaking can be considered a restorative sanction.

### 7.3.1 The Reparation of Harm

There is no statutory requirement obliging ASIC to consider the interests of victims of an alleged breach of the law.\(^{36}\) However, ASIC does take into account the interests of these stakeholders, since it intends that an enforceable undertaking will achieve ‘an effective outcome for those who have been adversely affected by the conduct or compliance failure’.\(^ {37}\) Before accepting the terms of an enforceable undertaking, therefore, the corporate regulator considers the effect that the undertakings may have on the promisor and on the victims of the alleged breach.\(^ {38}\) The following paragraphs

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\(^{36}\) This was discussed in 6.1.

\(^{37}\) ASIC, *Regulatory Guide 100, Enforceable undertakings* (ASIC, March 2007), [2.10].

\(^{38}\) Ibid, [2.8].
consider the extent to which this first principle of restorative justice is reflected in enforceable undertakings.

7.3.1.1 Change of Behaviour

One of the aims of an enforceable undertaking is to prevent the promisor from committing similar breaches in the future. An enforceable undertaking may contain one or both of two promises that may achieve this goal. These promises are:

- the implementation of a compliance program;\(^{39}\) and
- education.\(^{40}\)

As noted in Chapter 5, the implementation of a compliance program in an organisation allows employees, including the senior management of the organisation, to understand what is required of them.\(^{41}\) It raises their awareness and limits the likelihood of their engaging in prohibited conduct.\(^{42}\)

In 2004, ASIC entered into an enforceable undertaking with Capital Intelligence Ltd because the corporate regulator suspected that the company was breaching the conditions of its financial services licence and was involved in misleading and

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\(^{39}\) Such a promise is included in 38.3% of the enforceable undertakings entered into between companies and ASIC (this percentage includes undertakings entered into by companies and their officers) between 1998 and 2008: ASIC, Enforceable undertakings register, <http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Enforceable+Undertakings+Register?openDocument>.

\(^{40}\) Such a promise is included in 46.8% of all undertakings entered into by individuals (this percentage does not include undertakings entered into by companies and their officers) between 1998 and 2008: ASIC, above n 39.

\(^{41}\) See 5.3.2.

deceptive conduct. One of the promises included in the undertaking was that the company would implement a compliance program that aimed to ensure that the company complied with its licence conditions. The compliance program also focused on the development of the awareness of authorised representatives of their duties and responsibilities, for example, the authorised representatives of Capital Intelligence Ltd were required to complete an appropriate training course.\(^{43}\)

Compliance programs may play a major role in changing behaviours because implementing such a promise may lead an organisation to acknowledge that some corporate beliefs and practices conflict with desired beliefs and practices. They appeal to the business unit, top management, regulators and broader democratic communities to find a solution for the conflict in each circumstance.\(^{44}\)

Similarly, an education component is usually included in an enforceable undertaking when an individual has allegedly breached his or her director’s duties or financial services licence requirements or if the person has been dealing with financial services without a licence. In 46.8% of the enforceable undertakings\(^ {45}\) requiring an alleged offender to promise not to manage a company or deal with securities, financial services and/or investment advice, ASIC required the promisor to complete a course during or at the end of the period of voluntary ban. Only when the promisor has

\(^{43}\) ASIC, Enforceable Undertaking: Capital Intelligence Ltd, Document No 017 029 136 (11 October 2004).


\(^{45}\) ASIC, above n 39.
fulfilled the education requirement can he or she again manage a company or deal with securities and/or investment advice.

A classic example of this is the enforceable undertaking entered into between ASIC and Robert Marusco where Mr Marusco agreed to a voluntary ban for breach of his duties as a director. The duration of the voluntary ban was of 12 month provided he fulfilled the education requirement. His ban would be indefinite if he does not complete the Securities Institute of Australia Diploma of Financial Markets, Managed Investments stream or an equivalent of the course.46

Education ensures that the individual is informed of his or her duties and obligations. It is a preventive measure. It also protects the public and helps reintegrate the promisor into the community.47 Through education, a change of behaviour is likely to occur and the chances of the individual repeating the alleged offence are reduced. Additionally, the promisor becomes better equipped to deal with similar situations in the future.

When it is appropriate, an enforceable undertaking contains promises that may change the behaviour of the alleged offender. This implies that the value of ‘changed behaviour’ is present in this remedy.

46 ASIC, Enforceable Undertaking: Robert Marusco, Document No 008 457 094 (10 January 2003), [3.2].

47 Donald v Australian Securities and Investments Commission (2001) 38 ACSR 10, [128].
7.3.1.2 Restitution

Consumers or clients of alleged offenders are also protected when an enforceable undertaking is entered into, since an undertaking may require compensation to be paid to the people affected by the alleged breach. As noted in Chapter 6, 29.7% of the enforceable undertakings entered into by ASIC from 1998 to 2008 required the promisor to compensate the victims of the alleged breach. For example, in 2000, National Mutual Health Insurance Pty Ltd accepted an undertaking in relation to its involvement in a series of misleading advertisements. It promised to stop broadcasting the misleading advertisements, to disclose the undertakings to its clients and to refund them on request.\textsuperscript{48}

A minority of undertakings have also provided an opportunity to victims of an alleged breach to rescind their contract with the promisor. For example, in 2001, ASIC suspected that Dymatech Pty Ltd and Geoffrey Newton Day were involved in misleading and deceptive conduct relating to the sale of certain financial products. As a consequence, ASIC entered into an enforceable undertaking with the alleged offenders. In the undertaking the promisors promised, among other things, to provide their clients with written advice that they could rescind their subscription agreements within four weeks of the date of the advice by sending a notice to the company.\textsuperscript{49}

The right of victims of an alleged breach to be able to rescind their contract with the promisor and/or to be compensated for their losses in an enforceable undertaking


\textsuperscript{49} ASIC, Enforceable Undertaking: Dymatech Pty Ltd and Geoffrey Newton Day, Document No 008 547 502 (7 February 2001), [2.4].
gives aggrieved parties a quick way to recover their losses without going to court and paying court expenses.  It redresses the harm caused by the alleged conduct of the promisor.

Further, when more than one party is affected by the alleged conduct, the enforceable undertaking usually includes a promise to disclose the alleged conduct and the enforceable undertaking to the affected parties. However, such disclosure is used carefully by regulators in the case of an enforceable undertaking because the effect of corrective advertisement must not be punitive. Such a disclosure requirement in an undertaking may only be corrective in nature.  It usually reaches the same target audience as the original campaign. Of the enforceable undertakings accepted by ASIC between 1998 and 2008, 34.9% have included a requirement to disclose its terms to a certain category of the public.

Disclosure, payment of compensation and the opportunity to rescind ultimately heals the victims of the alleged breach and renders the promisor accountable for his or her actions. As a consequence, the value of restitution may be considered to be present in the sanction.

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52 This was discussed in Chapters 5 and 6.

53 If an undertaking targets everyone (both those people affected by the breach and those unaffected by the breach), the enforceable undertaking may have a punitive purpose, and using the sanction in such a way would be inappropriate.
7.3.1.3 Repentance

An apology may be viewed as merely a symbolic gesture. In fact, it plays an important role in the process of reparation. Even if a victim has been fully indemnified for their loss, he or she may remain emotionally dissatisfied and not fully restored, particularly if the offender continues to be hostile.\(^54\) The fact that the offender shows repentance and expresses a willingness to respect the rules can restore victims and communities.\(^55\)

Since an enforceable undertaking requires ASIC and the alleged offender to come together to reach a settlement, the sanction cannot be imposed in instances where the promisor is not willing to rectify his or her conduct. Further, ASIC is unlikely to enter into an enforceable undertaking if the alleged offender does not cooperate or denies liability.\(^56\)

However, the fact that an enforceable undertaking requires the consent of both parties is not by itself enough to consider that this remedy fulfils the value of repentance because coercion and lack of apology may limit the restorative nature of the sanction. For instance, the process of entering into an enforceable undertaking has been subject to criticism in the past. Karen Yeung observed that the private nature of the


\(^{55}\) Walgrave, above n 18, 139.

\(^{56}\) ASIC, above n 37, [2.10].
negotiations in an enforceable undertaking may lead to ‘arm-twisting’ by the more powerful party.\textsuperscript{[57]}

Such coerciveness may limit the restorative effect of an enforceable undertaking. Paul McCold considered that any form of coerciveness would cause restorative justice to go ‘back to being a theory of retributivism’.\textsuperscript{[58]} However, Lode Walgrave notes that restorative justice includes voluntary processes as well as coercive ones:\textsuperscript{[59]}

> Even if offenders do not originally freely accept a restorative action, they may in the long term understand the sanctions in a constructive way. That will increase their chances of being reaccepted by the community more than a retributive action. This seems even to be true also in comparison with rehabilitation measures.

He observes that the voluntary process will have a higher restorative value since it is voluntary and reflects the willingness of the offender to heal the victims of the alleged breach.\textsuperscript{[60]}

\textsuperscript{[57]} Karen Yeung, \textit{The Public Enforcement of Australian Competition Law} (ACCC, 2001), Ch 5. For example, the ACCC was criticised for using enforceable undertakings to bully or arm-twist businesses into complying with its directives and to extract unjustified and expansive promises from the alleged offenders, and similar criticism may also apply to ASIC: see Christine Parker, ‘Arm-Twisting, Auditing and Accountability: What Regulators and Compliance Professionals Should Know about the Use of Enforceable Undertakings to Promote Compliance’. (Presentation to the Australian Compliance Institute, 28 May 2002), 15. For discussion of the procedural fairness of enforceable undertakings see Chapter 4.

\textsuperscript{[58]} McCold, above n 28, 378.


\textsuperscript{[60]} Ibid.
The ACCC has responded to the concerns identified in research conducted by Parker in relation to its enforcement work\(^{61}\) by taking preventive measures in relation to a number of issues raised in the study.\(^{62}\) In addition, both the ACCC and ASIC are willing to vary an enforceable undertaking when needed.\(^{63}\) This lessens any possible abuse of the system and demonstrates the regulator’s flexibility when dealing with regulated entities. Further, when enforcing an undertaking, the court will take into account the process that led to the settlement.\(^{64}\) These factors limit the likelihood of coercion and help to ensure that an enforceable undertaking is entered into voluntarily.

However, as noted in Chapter 5, while an alleged offender may publicly acknowledge ASIC’s concerns in relation to the alleged conduct, the regulator does not require the promisor to admit that a breach of the law has actually occurred.\(^{65}\) The promisor’s implied rejection of liability may have a negative impact on the restorative nature of an enforceable undertaking.

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\(^{61}\) The ACCC commissioned Parker’s research (in 2000–02) through the Regulatory Institutions Network in order to ascertain whether its approach had been/is appropriate, to point out actual and potential problems, and overall to make recommendations to improve its regulatory practice. Christine Parker, ‘Regulator-required corporate compliance program audits’ (2003) 25 *Law and Policy* 221.

\(^{62}\) Louise Sylvan, ACCC Deputy Chair, ‘Future Proofing—working with the ACCC’ (Presentation to the Australian Compliance Institute, Melbourne, 1 September 2005), <http://www.accc.gov.au/content/item.phtml?itemId=706591&nodeId=a5b95d899226cb9db64fcb45b4674b0f&fn=20050901%20ACI.pdf>.


\(^{64}\) This is discussed in 9.4.1.

\(^{65}\) See 5.4.
7.3.1.4 Generosity

The terms of an enforceable undertaking may go beyond restitution. The flexibility of the sanction allows the promises included in the undertaking to be more comprehensive than that of the court which is subject to certain restraints.\(^{66}\) As noted above, an enforceable undertaking impacts promisors by improving their behaviour and changing their compliance culture. Promisors may even become involved in community service as a result of an enforceable undertaking. Undertakings may, for example, include promises to promote community awareness of the law and consumer rights.\(^{67}\) For instance, in 1999, Suncorp Metway Insurance Ltd was allegedly involved in misleading or deceptive advertisement. The company entered into an enforceable undertaking with ASIC in which it promised to assist public education by creating a link on its website allowing consumers to visit a page on ASIC’s website for the purpose of advising consumers about issues relevant to the purchase of financial products, with a particular emphasis on issues relevant to electronic commerce.\(^{68}\)

However, the flexibility of the promises that may be included in an undertaking is reduced because such promises have to be connected to the alleged conduct of the promisor. If they are not related to the alleged breach, the validity of the undertaking may be challenged due to the fact that, as an administrative sanction, an enforceable

\(^{66}\) *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 417, [55].

\(^{67}\) See 6.3.3.

\(^{68}\) ASIC, Enforceable Undertaking, Suncorp Metway Insurance Ltd, Document No 008 547 385 (30 August 1999), [2.7].
undertaking cannot have a punitive nature. If certain promises, such as the
implementation of a compliance program or the initiation of community services, go
beyond the alleged conduct, they may be perceived as punitive in nature. Further, if
the terms of an undertaking are not related to the alleged offence, a court is unlikely to
enforce them. Due to the fact that an undertaking cannot go beyond the alleged
breach, therefore, the scope for the application of this value in enforceable
undertakings is limited.

7.3.1.5 Assessment
An enforceable undertaking attempts to repair the harm that was caused by the alleged
conduct. It provides an opportunity for the alleged offender to modify his or her
behaviour. In cases where parties have suffered a financial loss due to the alleged
conduct of the promisor, the undertaking will contain promises such as disclosure and
compensation to remedy the injustice that has taken place.

The negotiations that result in an undertaking manifest the willingness of the promisor
to face the consequences of the alleged breach. But repentance of the promisor is
limited, since an enforceable undertaking does not require an apology. It is unlikely
that an apology would be included in an undertaking, because entering into an
undertaking does not imply that the promisor did in fact breach the law: it simply
means that ASIC has concerns that the law is not being complied with. As a result, a

69 This is discussed in detail in 9.4.3.3.
70 It is also unlikely that Parliament would have intended the enforceable undertakings provisions in the
legislation to be used for a punitive purpose: see Yeung, above n 57, 123.
71 This is discussed in 9.4.3.1.
72 However, it is possible that the promisor has entered into an undertaking to escape more drastic
consequences. An enforceable undertaking may simply be the lesser of two evils.
victim affected by the breach of an undertaking or a member of the general public cannot use an undertaking as proof that the promisor has breached the law. Admission of guilt and an apology may put the promisor in a vulnerable situation, and thus an apology is unlikely ever to be included as a standard term in an enforceable undertaking accepted by ASIC.

The last value, generosity, is present in enforceable undertakings to a certain extent through promises such as those relating to community services. But such generosity is limited to actions that can be linked to the original conduct. This limitation may not be lifted, as any attempt by ASIC to do so may invalidate an enforceable undertaking. The limitations that exist around the values of repentance and generosity are unlikely to be remedied in the context of an enforceable undertaking.

In summary, the presence of the values of changed behaviour and restitution and the limited presence of repentance and generosity means that an enforceable undertaking is moderately restorative in relation to the first principle of restorative justice.

### 7.3.2 Stakeholder Involvement

Stakeholder involvement would require the participation of the victims and the community, as well as the alleged offender and ASIC, in the process that leads to entering into an enforceable undertaking. The following paragraphs consider whether the three values related to this second principle are present in enforceable undertakings.

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73 In case of an apology the promisor will be in a vulnerable situation because the enforceable undertaking could be used by victims of the alleged breach in a private lawsuit: see 6.5.
7.3.2.1 Acceptance of Alternative Approaches

Due to the fact that there are no legal limitations on ASIC’s power to accept an undertaking (other than the limitations imposed by ss 93AA and 93A of the ASIC Act and the implied prohibition in the Australian Constitution on regulatory agencies imposing punishment), an enforceable undertaking is a very flexible remedy that allows the regulator to be creative when responding to certain alleged contraventions. Further, as illustrated in Chapter 3, an enforceable undertaking may be entered into as a result of court proceedings. In such instances, the undertaking may supplement the remedies imposed by the court. The flexibility of an enforceable undertaking means that the value of ‘acceptance of alternative approaches’ is present.

7.3.2.2 Acknowledgment of Interests of Other People

When entering into an undertaking, ASIC considers the ‘position of consumers and investors whose interests have been or may be harmed by the suspected conduct.’ Further, an enforceable undertaking compensates the victims for any losses they have suffered. Additionally, unlike criminal sanctions, which aim to punish the offender, an enforceable undertaking attempts to modify the culture of the alleged offender with the aim of preventing the alleged breach from recurring in the future.

Consequently, the fact that the promises given in an enforceable undertaking take into account the interests of the promisor and the interests of parties who may have been

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74 Parker, above n 2, 236.


76 ASIC, above n 37, [2.8].

77 Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).
affected by the alleged conduct means that the value of ‘acknowledgment of interests of other people’ is present.

7.3.2.3 Invitation

The value of ‘invitation’ in relation to enforceable undertakings has two aspects. On the one hand, in all instances an enforceable undertaking is the result of communication and cooperation between the alleged offender and ASIC.\(^\text{78}\) The terms of the undertaking are, in theory, agreed after a series of negotiations between these two parties.\(^\text{79}\) As a result, at one level, there is an invitation issued by ASIC to the alleged offender to decide the manner in which the matter is going to be dealt with.\(^\text{80}\) Such participation allows the promisor to understand why certain promises have to be made. Further, the promisor must agree that the promises are acceptable. This provides some accountability to the process.\(^\text{81}\)

On the other hand, the ASIC Act does not guarantee the representation of the interests of third parties in the process of negotiating the terms of an undertaking.\(^\text{82}\) ASIC is not required to consult with third parties in relation to the terms of an enforceable undertaking.\(^\text{83}\) However, damage caused by an alleged breach cannot be calculated in

\(^{78}\) ASIC, above n 37, [2.10].

\(^{79}\) Ibid, [1.9].

\(^{80}\) Bazemore and O’Brien, above n 6, 32.


\(^{82}\) Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission (2005) ATPR ¶42–082, [87].

\(^{83}\) ASIC Act, ss 93AA and 93A.
a vacuum. For this reason, before entering into an enforceable undertaking, ASIC will consider the effect that the undertakings may have on the victims of the alleged offender and on the community. This may take the form of consultation with the victims and result in an outcome that protects their rights. In regard to this matter Ms Jan Redfern, formerly ASIC’s Executive Director of Enforcement, stated that the regulator:

engages in internal consultation with other areas of ASIC when drafting enforceable undertakings. These other areas—such as Consumer Protection, Compliance, etc—have a greater understanding of the particular issues that affected parties will be concerned with because they have greater interaction with these individuals. So while consultation with specific affected parties does not generally occur in relation to enforceable undertakings, undertakings have been discussed with areas of ASIC who have practical knowledge and experience on what is of concern to the public and affected parties generally.

As a result of ASIC’s restructure in the second half of 2008, the regulator no longer has a Consumer Protection Directorate and a Compliance Directorate. Nonetheless, ASIC continues to consult internally with various stakeholder teams that have interfaced with the affected parties. Such consultations are very useful in helping to formulate the terms of enforceable undertakings and in maximising the likelihood that the promises given will take into account the position of the victims and the

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84 ASIC, above n 37, [2.8].

85 Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).

86 Update by ASIC to the information provided in interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008). As to the organisational structure of ASIC since 1 September 2008 see 3.5.
community in which the alleged breach occurred. They help, for example, in calculating the amount of compensation that should be paid to indemnify the victims. Thus, even though ASIC does not contact every consumer that may have suffered a loss due to the alleged conduct, a broader communication with the community usually takes place. This means that there is a moderate level of communication between ASIC and affected parties.

7.3.2.4 Assessment and Suggestions

An enforceable undertaking is a form of settlement between ASIC and an alleged offender. It is one of a range of remedies that can be used by the corporate regulator to address an alleged breach of the law. It is a tool that provides immense flexibility in dealing with an alleged offence because it allows the regulator to adapt the promises in the enforceable undertaking to different scenarios. Accordingly, ASIC is embracing alternative approaches to dealing with certain breaches of the law.

Further, the terms of an enforceable undertaking acknowledge the interests of promisors and affected parties. While ASIC does not necessarily meet the victims and communities that have been affected by the alleged conduct, before accepting an undertaking ASIC consults with different groups to assess the impact of the alleged breach. However, since the negotiations that result in an enforceable undertaking are private, the victims may not be aware of the discussions taking place between the alleged offender and ASIC until the undertaking is entered into. This aspect limits the restorative nature of an enforceable undertaking.
One way to allow more communication between the regulator and victims of an alleged breach involves incorporating certain features of a sanction available in the United States: the consent decree. This remedy is similar to an enforceable undertaking in some respects since, like an enforceable undertaking, a consent decree may be defined as an agreement between involved parties. The similarity stops there, however, because a consent decree must be submitted in writing to a court for approval and it is only when the consent decree receives the approval of a judge that it becomes legally binding. The consent decree encourages greater communication than an enforceable undertaking with the victims and the community affected by the breach. The Antitrust Procedures and Penalties Act 1974 (US) requires the government to solicit public comment before finalising consent decrees relating to antitrust settlements. The settlement document must be published in the Federal Register at least 60 days before the effective acceptance of the decree. Summaries of the proposed decree and other relevant documents are published in certain general circulation newspapers. Such disclosure ensures that the public is aware of the proposed decree and is given an opportunity to comment on its content. This facilitates a certain type of restorative justice since all affected parties are made aware of the proposed consent decree, and can add to it, if the court believes their comments are reasonable.

Arguably, such communication should have a place in the Australian regulatory system to guarantee that the rights of those affected are taken into account in enforceable undertakings. If the public were involved in the process of regulation, the

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regulator could also obtain more information about the alleged offender. For instance, in proceedings between the United States regulator and Microsoft Corporation (‘Microsoft’), there was a deluge of public comment in relation to the proposed consent decree. The judge who was considering the consent decree asked Microsoft and the Justice Department if they were planning any changes to the settlement proposal in response to the public comments.\textsuperscript{89} However, adopting such a system in Australia may be difficult due to the difference in nature between consent decree and enforceable undertakings and should be implemented with care.

Allowing communication between the alleged offender and the victims of the alleged breach may also lead to a change in the attitude and behaviour of the promisor. This was noted, for example, by Braithwaite in his book \textit{Restorative Justice and Responsive Regulation}, where he referred to an investigation conducted by the Trade Practices Commission in relation to the mis-selling of insurance products to remote indigenous communities. The matter was resolved by settlement and the process was restorative. One of the things the process involved was a visit by the top management of the insurance company to the affected communities to meet victims of the alleged breach. Some of these executives returned back to the city ashamed of their company’s conduct. The settlement not only led to the payment of compensation to the victims but also resulted in reforming the organisation’s practices.\textsuperscript{90}

Irrespective of whether there is disclosure of a proposed undertaking to affected parties, the presence of the values of ‘acknowledgment of interests’ and ‘acceptance

\textsuperscript{89} 15 U.S.C. § 16(b).

of alternative approaches’ and the moderate presence of the value of ‘invitation’ mean that, in the context of the second principle, an enforceable undertaking is moderately restorative.

7.3.3 Community and Government Cooperation

The third principle of restorative justice, community and government cooperation, is unlikely to have a strong presence in the context of enforceable undertakings accepted by ASIC. As noted in Chapter 3, the goals of an enforceable undertaking are the prevention of future breaches, the protection of the public and corrective action. 91 These goals do not include transformation of the relationship that exists between the community and the government.

In relation to the first value of this principle, there is no evidence that an enforceable undertaking supports the community’s ownership of the restorative justice process. When the sanction was first introduced in 1993, neither the Parliament nor the ACCC described it as a method of restoring justice. 92 Sections 93AA and 93A of the ASIC Act do not require ASIC to involve the community in the process of negotiating an enforceable undertaking.

However, other regulators that have this sanction at their disposal have deemed that involvement of the community in the process of entering into an enforceable undertaking is required. For instance, when accepting an undertaking, the Environment Protection Authority of Victoria requires referral of the matter to an

91 See 3.5.3.
92 Parker, above n 2, 212.
independent advisory panel. This panel is constituted by persons independent of the Environment Protection Authority who have skills such as ‘social and community understanding, as well as legal, investigative and environmental skills’.  

As for the second value, which requires increasing the community’s awareness and ability to address the harm caused by an offender, enforceable undertakings may achieve this by including certain promises. For instance, an undertaking may contain a promise by the alleged offender to implement a community service program of an educational nature to promote the community’s awareness of the law.

In 2004, for example, it was alleged that advertisements by Colonial First State Investments Ltd for one of its financial products, the Colonial First State First Choice Personal Super Geared Share Option Fund, were misleading. As a result, Colonial First State Investments Ltd entered into an enforceable undertaking in which it promised to contribute $10 000 to be used by ASIC to design a program to further the education of consumers and the regulated industry in relation to the alleged breach. However, ASIC only incorporates community service programs in its undertakings in rare instances, due to concerns that a requirement to implement such a program may be considered punitive in nature and would not be enforceable in court.

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94 ASIC, Enforceable Undertaking: Colonial First State Investments Ltd, Document No 014 835 074 (21 December 2004), [2.9].

95 Only 3.8% of the undertakings studied for the purpose of this thesis contain such a promise: see 6.3.3.
Enforceable undertakings may, in a small way, empower the community through education to deal with certain breaches of the law. The more aware the public is, the better it is able to distinguish true from false information, and the easier it is to establish ‘just peace’. The fact that certain promises in an enforceable undertaking are carried out within the community itself provides benefits to the community through, for instance, education and the destruction of stereotypes. The presence of the third principle of restorative justice in enforceable undertakings is minimal only. A change in the policy of the corporate regulator regarding the involvement of the community would be required to enhance the presence of the third principle.

7.4 In Summary

Until the beginning of the 1990s, the concept of restorative justice in criminal law was acknowledged by only a small group of academics. Almost two decades later, this notion is part of the national and international criminal justice reform dialogue. However, the application of restorative justice is not limited to the criminal justice system. From the above discussion, it is clear that an enforceable undertaking accepted by ASIC is to a certain extent restorative in nature.

Since an enforceable undertaking is a form of settlement that aims, among other things, to correct the action of the promisor, this remedy enhances the position of the

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98 Heather Strang, ‘Restorative Justice Programs in Australia: A Report to the Criminology Research Council’ (Research School of Social Sciences, Australian National University, March 2001).
people affected by the breach. It increases the efficiency of justice by taking into account different parties. This allows ASIC to tailor the terms of an enforceable undertaking to the breach that has allegedly occurred.

Accordingly, the enforceable undertaking is a very important sanction because it introduces into the corporate regulatory system a certain level of restorative justice. Diagram 7.1 summarises the application of the three core principles of restorative justice to enforceable undertakings, to help determine the level of restoration that may be achieved by an undertaking. Diagram 7.1 also illustrates ways in which further restorative justice might be introduced to the system—which will in turn ensure greater fairness and transparency in the sanction of enforceable undertaking.
Diagram 7.1. Application of the three principles of restorative justice to enforceable undertakings
It can be concluded that the sanction of enforceable undertaking is moderately restorative. This sanction may be viewed as a middle ground for the application of restorative justice, and has the potential to apply the theory of restorative justice in most of its aspects, as noted in Diagram 7.2.

Diagram 7.2. Enforceable undertakings: the middle ground

As noted in Diagrams 7.1 and 7.2, further consultation with third parties is required to ensure the fairness of the system toward third parties. Such consultation would enable the regulator to be more aware of the consequences of an alleged breach by allowing victims to be part of the solution. This in turn would help an enforceable undertaking better protect the rights of alleged victims. It would also ensure that the regulator uses the sanction in a fair and just manner. This might facilitate a change in policy regarding the role of the community in an enforceable undertaking—allowing the
community input into the use of the sanction. However, this will be to little avail if promisors do not comply with the terms of their undertakings. Accordingly, Chapters 8 and 9 deal with the monitoring and enforcement of enforceable undertakings in the courts.
Chapter 8 : Monitoring Compliance with Enforceable Undertakings

8.1 The Importance of Monitoring

An enforceable undertaking has a number of advantages over other forms of settlement. For instance, an enforceable undertaking is more transparent. Further, the promises in an undertaking aim to deal with the alleged breach of the law and provide both closure to the promisor and some level of justice to the victims of the alleged breach. These advantages, however, may not mean much if the undertaking is not complied with. Because a breach of an enforceable undertaking does not constitute, by itself, an offence, failure by the promisor to comply with the terms of their undertaking may lead to a problem.

Indeed, the fact that breach of an enforceable undertaking does not constitute an offence raises the following question: Why would a promisor comply with the undertaking they have entered into? The same point Tom Tyler made in respect of judgments—‘a judge’s ruling means little if the parties to the dispute feel they can ignore it’—applies equally to enforceable undertakings. A promisor must have a motivation to comply with the terms of his or her undertaking. One motivation is that

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1 The transparency of undertakings was discussed in Chapter 3 and briefly in Chapter 5.

2 The impact that an undertaking has on the promisor and the victims of the alleged breach was discussed in Chapters 5 and 6.


the regulator has the right to enforce the undertaking in court so that, even though a breach of an enforceable undertaking cannot itself be the subject of contempt proceedings, a breach of a court order granted because of a breach of the undertaking may constitute contempt of court. The regulator’s power to enforce the undertaking in this way may have a deterrent effect, motivating the promisor to implement the terms of their undertaking.

The deterrence thus embedded in the enforceable undertaking is especially important in instances where the promisor has agreed to an undertaking for the sole purpose of escaping litigation. In such situations, the possibility that the undertaking may be enforced in court may ensure compliance with the terms of the undertaking.

However, for this deterrence strategy to have any effect, it is of the utmost importance that enforceable undertakings are monitored properly and that breaches of the terms of undertakings are detected. If the monitoring of an undertaking is inefficient or non-existent, a breach of the undertaking by the promisor will remain undetected, raising questions about the accountability of the promisor. In the absence of an effective monitoring system, the chances of the promisor being caught breaching the undertaking will become extremely slim and, if this is the situation, the words of the late Rene Rivkin will prove true. In an interview, Mr Rivkin described an

5 ASIC Act, ss 93AA(3), (4) and 93A(3), (4). See also ASIC, Regulatory Guide 100, Enforceable undertakings (March 2007), [4.5].


undertaking as a guideline that should be followed in the future.\textsuperscript{8} With an ineffective monitoring system, the enforceable undertaking will no longer be a sanction but would lose any deterrent effect it may have,\textsuperscript{9} becoming merely a guideline with no negative repercussions. The implementation of an efficient monitoring system, however, increases the likelihood of a promisor breaching his or her undertaking being caught and penalised for the wrongdoing. As a result, it may have the opposite effect, as illustrated in Diagram 8.1.\textsuperscript{10}

\textsuperscript{8} Tim Boreham, ‘Rivkin won’t be Misunderstood’, \textit{The Australian} (Sydney), 18 October 2000, 42.

\textsuperscript{9} If breaches remain undetected, the undertaking will not be enforced in court.

\textsuperscript{10} Tom Tyler, ‘Procedural Fairness and Compliance with the Law’ (1997) 133(2) \textit{Swiss Journal of Economic and Statistics} 219, 220–1.
Diagram 8.1. Impact of monitoring system on an enforceable undertaking

It is only when the monitoring system is efficient that breaches of the law are detected and the deterrence strategy embedded in the undertakings takes effect. Monitoring therefore plays a crucial role in enhancing the effectiveness of this form of settlement. As seen in Diagram 8.1, any personal deterrence that an undertaking may have would be lost without a reliable monitoring system. The next part of this chapter analyses the methods used by ASIC to monitor enforceable undertakings.
8.2 Methods Used by ASIC to Monitor Undertakings

ASIC employs a variety of methods to assess whether or not a promisor has complied with the terms of an enforceable undertaking. ASIC’s Regulatory Guide 100 states that, when accepting an undertaking, ASIC must be satisfied that the promisor has adequate arrangements for monitoring and reporting on the implementation of the undertakings.\(^\text{11}\) Further, the undertaking may itself include information on the monitoring system that is to be implemented to ensure the promisor complies with its terms. Details of the monitoring arrangements that might be included in an enforceable undertaking include:\(^\text{12}\)

- monitoring and reporting mechanisms the promisor will adopt, for example, internal control/compliance programs;
- any external assessment of the changes that are put in place;
- the names of the contact officer and of any external expert who is responsible for monitoring compliance with the undertaking; and
- the ASIC officer the promisor will report to about compliance with the undertaking.

A closer look at the terms of the enforceable undertakings accepted by ASIC over the last decade reveals that the following methods have been used to detect non-compliance with the terms of the undertakings:\(^\text{13}\)

\(^{11}\) ASIC, above n 5, 13 (Table 4).
\(^{12}\) Ibid.
Companies report to ASIC on their compliance with the terms of the undertaking and advise ASIC in case of breach.

Directors monitor the compliance of their company with the terms of the undertaking and report to ASIC in case of breach.

Individuals provide a statutory declaration stating that they have complied with their undertaking.

Employers of individuals monitor the compliance of those individuals with the terms of their undertakings and advise ASIC when any breach occurs.

Independent experts report to ASIC on compliance with the undertaking and advise ASIC when any breach occurs.

If it suspects a breach of an undertaking, ASIC conducts an investigation into the matter.

Most of the methods described above depend upon self-regulation by the promisor. Some methods exclusively rely on the promisor to report breaches of the undertaking to ASIC, while others rely on reports of directors, compliance officers and independent experts to assess if compliance with the terms of an undertaking has occurred. Some of these monitoring methods are proactive in their detection of breaches of the terms of an undertaking, while others are more reactive in nature.\(^\text{14}\)

ASIC is also involved in the monitoring of undertakings so that a form of co-regulation may be said to be taking place: the promisor monitors his or her

compliance with the terms of the undertaking, while the corporate regulator supervises and takes legal action if the undertaking is breached.\textsuperscript{15}

The methods of monitoring compliance with an undertaking vary depending on whether the promisor is a company or an individual. Of the enforceable undertakings entered into by ASIC between 1998 and 2008, 61.2\% were made with companies, and 38.8\% were made with individuals.\textsuperscript{16} The third and fourth parts of this chapter consider the monitoring systems imposed in enforceable undertakings entered into by companies and those that may apply when individuals enter into such undertakings.

8.3 Monitoring of Companies

This section considers enforceable undertakings ASIC has entered into both with a company and with a company and its officers. Over the last decade such undertakings have been monitored in a variety of ways, and the monitoring system may be said to have improved drastically over the last couple of years.\textsuperscript{17} Even though self-regulation is still heavily relied on, monitoring strategies include a range of proactive and reactive methods of detecting breaches of undertakings. Information about the methods that will be used to monitor the promisor’s compliance with the terms of their undertaking, and identify any breaches, is usually included in the undertaking.


\textsuperscript{16} See 3.5.1. The figure of 61.2\% for enforceable undertakings entered into with companies consists of both undertakings where a company is the sole promisor (42.7\%) and undertakings where there is more than one promisor in which one of the promisors is a company and the other is an officer of that company (18.5\%). The reason why undertakings entered into by a company and its officers are not looked at in a separate category is because the monitoring system for such undertakings is identical to that for undertakings entered into by companies only.

\textsuperscript{17} ASIC’s initiatives to improve monitoring are discussed later in 8.3.
The methods used by ASIC to monitor undertakings were referred to in 8.2 above. Those methods relevant to undertakings entered into with companies are as follows:

- the company monitors compliance with and reports breaches of the undertaking;
- officers of the company are in charge of monitoring compliance with the undertaking;
- an independent expert is in charge of ensuring compliance with the undertaking.

### 8.3.1 Only Company Monitoring Compliance

An enforceable undertaking may state that the company is in charge of monitoring compliance with the terms of its undertaking and that it will report any breaches of the terms to ASIC.\(^{18}\) While adding such a reporting requirement to an undertaking is an improvement on undertakings which include no reference to monitoring,\(^{19}\) reliance on reporting by a company may be problematic because, in these instances, the company is a passive actor only contacting ASIC when it has breached the terms of the undertaking. Such monitoring relies to a large extent on the goodwill and cooperation of the promisor. Additionally, if monitoring of the undertaking is in the hands of the company itself and the company believes that ASIC is not checking its compliance, the company may not inform ASIC of breaches of the undertaking.

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\(^{18}\) See, for example, ASIC, Enforceable Undertaking: MMC Asset Management Ltd, Document No 917 029 141 (2 December 2004), [3.3].

\(^{19}\) Such undertakings are discussed in 8.3.4 and 8.4.4.
One way to deal with this problem is found in a number of undertakings entered into by ASIC. In the past, the corporate regulator has required companies to provide it with a report on the steps the company has taken to ensure its compliance with its undertaking. For example, in 2006 ASIC entered into an enforceable undertaking with Shareholder Advocacy Ltd because it was concerned the company had contravened s 177 of the Corporations Act which prohibits the use of information obtained from company registers to contact shareholders except in certain scenarios. Shareholder Advocacy Ltd promised that within 14 days of entering into the enforceable undertaking it would provide ASIC with evidence of its compliance with certain terms of the undertaking.20

Such a reporting requirement provides ASIC with an opportunity to detect breaches of undertakings, especially in instances where a company’s report is not submitted on time. This system, however, has two weaknesses.

Firstly, some enforceable undertakings including a reporting requirement have not set a date by which the company is required to lodge its report with ASIC.21 In this situation the corporate regulator may not realise that the company has not yet submitted the report.22 This problem may be dealt with by simply specifying a date by which the compliance report is due.23

20 ASIC, Enforceable Undertaking: Shareholder Advocacy Ltd, Document No 017 029 191 (15 March 2006), [I].

21 See, for example, ASIC, Enforceable Undertaking: Ludgates Chartered Accountants and Ludgates Corporate and Investment Advisory Services Pty Ltd, Document No 008 547 416 (29 February 2000), [2](e) (the promisors ‘will keep ASIC informed of their efforts to return the monies’).

22 In the example given in n 21 above, the promisors breached their undertaking, but ASIC did not detect the breach. Only when ASIC received complaints from investors in relation to the conduct of the promisors did it discover that the alleged offenders were not complying with the terms of the
Secondly, undertakings where the company is in charge of reporting on its compliance with the undertaking raise the following questions: Who in the company is in charge of monitoring compliance with the enforceable undertaking? Who will be reporting to ASIC on the compliance of the company with the undertaking? The answers to these questions are left to the determination of the company. It is preferable that the answers to these questions are provided for in the undertaking by the addition of a clause specifying, for example, that the directors of the company or the compliance officer are to be in charge of monitoring the company’s compliance. Such a clause provides information to ASIC on the identity of the person who should be contacted if the regulator has any concerns about the implementation of the terms of the undertaking. Similar clauses have been included in a number of undertakings.  

8.3.2 Monitoring by Officers of the Company

In some undertakings, the officers of the company are the ones who will monitor the company's compliance with the undertaking. These officers may be the directors of

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23 See, for example, ASIC, Enforceable Undertaking: Mortgage and General Financial Services Pty Ltd, Document No 017 029 060 (17 October 2002); ASIC, Enforceable Undertaking: Macquarie Investment Management Ltd, Document No 017 029 106 (8 September 2003).

the company who are subject to an undertaking along with their company, the board or senior officers of the company, or the company’s compliance manager.\textsuperscript{25}

For example, in 2008 ASIC entered into an enforceable undertaking with TZ Ltd due to ASIC’s concern that the company had breached the continuous disclosure provisions of the \textit{Corporations Act}. TZ Ltd undertook to provide ASIC with a copy of compliance reports prepared by an independent expert. The company further undertook that, when it had implemented the recommendations of the independent expert, an officer of TZ Ltd would provide ASIC with a statutory declaration confirming that the company had adopted revised disclosure policies including all the recommendations of the independent expert.\textsuperscript{26}

Similarly, in 2003 ASIC accepted an undertaking with Tower Australia Ltd because it suspected the company was involved in breaches relating to s 12DA of the \textit{ASIC Act}. Tower Australia Ltd promised, among other things, to provide ASIC by a certain date with a report from one of its senior officers concerning the status of the company’s compliance with the terms of its undertaking.\textsuperscript{27}

This method of monitoring has its advantages because it specifies who in the company is in charge of monitoring the company’s compliance with the terms of its

\textsuperscript{25} ASIC, above n 5, 13; See for example, ASIC, Enforceable Undertaking: TZ Ltd, Document No 017 029 222 (3 July 2008); ASIC, Enforceable Undertaking: Westpac Banking Corporation, Document No 008 547 401 (16 December 1999); ASIC, Enforceable Undertaking: Mortgage Point Pty, Document No 014 835 083 (24 February 2005).

\textsuperscript{26} ASIC, Enforceable Undertaking: TZ Ltd, Document No 017 029 222 (3 July 2008), [3.5.1], [3.5.3.2].

\textsuperscript{27} ASIC, Enforceable Undertaking: Tower Australia Ltd, Document No 017 029 088 (19 June 2003), [3.4].
undertaking. However, it also has certain weaknesses which are discussed in the next paragraphs.

8.3.2.1 Unspecified Officers Monitoring Compliance

In the TZ Ltd and the Tower Australia Ltd undertakings referred to above, ASIC required officers of the promisor companies to report to it on the companies’ compliance with the terms of their undertakings. However, as was the case in these two undertakings, when an officer of a company is required to report to ASIC in relation to the company’s compliance with an undertaking the undertaking does not always specify the name of the officer on whom that obligation falls and who is, in effect, in charge of monitoring the undertaking. This may make it difficult for ASIC to know who is in charge of what within the company.

To name a particular officer in the undertaking, however, may be inappropriate, especially in instances where the officer is not a party to the undertaking as this would result in the undertaking imposing obligations on third parties. It may also be an unreliable strategy, given staff turnover and the competing pressures on officers’ priorities. These difficulties may be avoided by including a term in the undertaking requiring the name and contact details of the officer in charge of monitoring compliance with the undertaking to be sent to ASIC by a certain date. The monitoring role then becomes part of that officer’s job, rather than being an obligation imposed on the officer by the undertaking. ASIC is also then aware of the identity of the person it may contact in the event it has any concerns that the promisor is not following the terms of the undertaking.
Certain undertakings have dealt with this issue by requiring the company to create a new position for a person to be responsible for ensuring the company complies with its undertaking. For example, in 2008 ASIC entered into an undertaking with Fortrend Securities Australia, which required the company to create the position of compliance manager. This person was to be in charge of monitoring the compliance of the organisation with the provisions of the *Corporations Act* and with the terms of the enforceable undertaking.\(^{28}\)

Sometimes the officer in charge of monitoring a company’s compliance with an undertaking may leave the company before compliance with the undertaking has been completely achieved. His or her replacement may not be aware of the terms of the undertaking or how the undertaking is being implemented by the organisation.\(^{29}\) He or she may have to start from scratch and become familiar with the system that has been implemented. This may lead the officer to miss certain pertinent details, which could in turn lead to non-compliance with terms of the undertaking.

An enforceable undertaking may include certain provisions to deal with such a possibility. For example, an undertaking may require the officer leaving the company to write a report, as part of his or her job, on the company’s compliance with the undertaking and send it to the new officer as well as to ASIC. This would provide background information to the new officer and bring him or her up to speed. The undertaking could also require the company to send details of the new officer to

\(^{28}\) ASIC, Enforceable Undertaking: Fortrend Securities Australia Pty Ltd, Document No 017 029 228 (24 November 2008), [3.2.1]. Further steps were also taken in this undertaking to ensure compliance of the promisor with the terms of the undertaking.

\(^{29}\) The level of familiarity of the replacement officer will depend on the policies and organisation of the promisor company.
ASIC. Other undertakings specify that the company’s directors are the officers charged with ensuring the company’s compliance with its undertaking.

8.3.2.2 Directors Monitoring Compliance

When the alleged offenders are a company and its director or directors, ASIC has sometimes required the director/s to ensure the compliance of the company with the terms of the undertaking. For example, in 2008 ASIC accepted an enforceable undertaking from Empower Invest Pty Ltd, Newcastle Palais Holdings and their respective directors Kenneth Watson and Brien Ernest Cornwell because ASIC believed that the companies were involved in the operation of a managed investment scheme without a licence. The companies undertook to provide ASIC, within three months of entering into the undertaking and every three months after that until the obligations set out in the undertaking had been discharged, with a report signed by a director of the companies on the companies’ compliance with the terms of the undertaking. Mr Watson and Mr Cornwell further undertook to use their best endeavours to ensure that their companies complied with the undertaking.\(^\text{30}\)

The fact that a director is a party to the undertaking provides a clear incentive to the director to report breaches by the company of the undertaking to ASIC. If the director does not comply with the monitoring requirement he or she will breach his or her own undertaking and might face legal action brought by ASIC as a result of such a breach.

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\(^\text{30}\) ASIC, Enforceable Undertakings: Brien Ernest Cornwell, Empower Invest Pty Ltd, Newcastle Palais Holding Pty Ltd and Kenneth Watson, Document Nos 017 029 217, 017 029 218, 017 029 219 (9 May 2008), [3.3]–[3.5]. Another example of a director promising to use his best endeavours to ensure his company complies with its undertakings is that of ASIC, Enforceable Undertakings: Cash King Pty Ltd and Daniel Swart, Document Nos 017 029 179, 017 029 180 (5 September 2005), [3.1].
In some undertakings, the incentive is even greater. For instance, certain undertakings have required directors who are parties to the undertaking to act as guarantors to the company. An example of this is the undertaking ASIC entered into in 2002 with Landmark Property Syndicates Ltd, Stephen Peter Diez and McLaughlin Financial Services Ltd, in which Mr Diez, the director of Landmark Property Syndicates Ltd, undertook to provide a guarantee to unit holders in the event that McLaughlin Financial Services Ltd failed to pay any sums it was required to under the terms of the undertaking.\footnote{ASIC, Enforceable Undertaking: Landmark Property Syndicates Ltd, Stephen Peter Diez and McLaughlin Financial Services Ltd, Document No 017 029 048 (8 August 2002), [4.1], [4.2].} In such a situation the directors will be highly motivated to cooperate with ASIC and ensure the company complies with its undertaking because they may become personally affected if the company does not comply with the undertaking. While such a clause may induce directors who have signed the undertaking to ensure that their company has implemented the terms of the undertaking, it is not appropriate in instances where the directors are not parties to the undertaking because, as noted above, the undertaking would then impose a burden on third parties.

Another benefit of involving directors in monitoring compliance with enforceable undertakings is the fact that one of the aims of such undertakings is to change the compliance culture of the organisations entering into them.\footnote{ASIC, above n 5, [1.3], [2.3], [2.9]. See also Karen Yeung, The Public Enforcement of Australian Competition Law (ACCC, 2001), 115, 118–19.} Such a change can only occur if the management of an organisation embraces the values and methods of doing business which are highlighted in the undertaking.\footnote{John Kotter and James Heskett, Corporate Culture and Performance (Free Press, 1992), 15.} Corporate regulators are
among those who contend that top management influences organisational culture. The ACCC, for example, has stated that ‘if the board is not seen to be consistently committed to the implementation of a compliance culture, it may send a message to all employees that compliance may be discretionary’. The importance of management to organisational culture was similarly acknowledged in *ASIC v Chemeq Ltd*, where French J stated:

The seniority of those in the company who were involved in the contravention is also relevant [to the imposition of a penalty] because it goes to the risk of recurrence and the extent to which their conduct is likely to be noticed by subordinates within the company and by others in the wider corporate community.

Therefore, the fact that the directors are embracing the values in the undertaking may lead new and existing employees to take note of the undertaking and this will in turn encourage them to implement these values.

8.3.2.3 Problems with Independence

When the officers of a company, whether they are directors or other officers, are monitoring the company’s compliance with the terms of the undertaking, the issue of the independence of those officers is raised. The officers will presumably be partial

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37 Kotter and Heskett, above n 33, 15, 94.
to the company and may find themselves in some trouble if they have to choose between the regulator’s demands and the company’s wishes. At the end of the day, they are working for the promisor, who can fire them if they do not follow their employer’s wishes.

If a company is being lax in complying with its undertaking, the officer responsible for monitoring the company’s compliance has three choices:

- to report to ASIC and risk being fired from his or her job;
- to ignore the matter and hope that ASIC does not detect the breach; or
- to negotiate terms of compliance with the company to enforce the provisions of the undertaking without reporting the breach to ASIC.

The option chosen by the officer will depend on his or her character. The majority of officers may focus their attention on whether the company has remedied the conduct in the way required.\(^{38}\) For example, the officers may verify whether the compensation was paid or whether the corrective advertisement was published. Similarly, they may ignore deficiencies in a compliance program if its main requirements are met. However, as noted earlier, an undertaking is implemented in the hope of avoiding future breaches of the legislation.\(^{39}\) As a result, if the person monitoring the undertaking is only looking at the letter and not the spirit of the undertaking, the undertaking loses part of its effectiveness.

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\(^{39}\) See, for example, 3.5.5, 5.3.2.
The author suggests that ASIC needs to provide these officers with incentives to come forward and declare the breaches committed by their companies, and that this is especially the case when an undertaking does not specify the name of the person who is to be in charge of monitoring compliance. One such incentive is for the undertaking to require the directors or other officers in charge of monitoring compliance to provide ASIC with a statutory declaration confirming that the company has complied with the terms of the undertaking.

For example, in 2001 ASIC entered into an enforceable undertaking with Ingwersen & Lansdown Securities Ltd in which the promisor undertook to provide ASIC with a statutory declaration signed by one of the company’s directors within 21 days of the date of the undertaking confirming the company’s compliance with the terms of the undertaking. Requiring the officer to make a statutory declaration motivates the officer to make sure that the information provided to ASIC is correct.

The author additionally suggests that where the enforceable undertaking includes a requirement to implement a compliance program, reliance should not only rest on an officer of the company but also on an external independent expert. The involvement of an external party in the monitoring arrangements, while costly, should ensure the compliance of the promisor with the terms of the undertaking.

40 ASIC, Enforceable Undertaking: Ingwersen & Lansdown Securities Ltd, Document No 008 547 504 (5 March 2001), [2.1][g]. For similar examples see also ASIC, Enforceable Undertaking: Path Telecommunications Ltd, Document No 008 547 505 (2 February 2001); ASIC, Enforceable Undertaking: GE Personal Finance Pty Ltd, Hallmark Life Insurance Co Ltd and Hallmark General Insurance Co Ltd, Document No 017 029 193 (20 March 2006) which was subsequently withdrawn on 22 May 2008. For details of the circumstances of the withdrawal of the undertaking see 8.3.3.1.
8.3.3 Monitoring by External and Independent Person

More and more frequently, independent experts are relied on to review and/or audit the compliance of companies with their undertakings. This is especially the case when an undertaking requires the promisor to put in place a compliance program. The report of the independent expert is usually sent to the management of the company that entered into the undertaking and/or to ASIC. Table 8.1 sets out the number of occasions in which enforceable undertakings entered into by companies have required the promisor to hire an independent expert to monitor its compliance with some or all of the terms of the undertaking.

41 ASIC, above n 13.
<table>
<thead>
<tr>
<th>Year</th>
<th>EU requires implementation or review of compliance program/policy of an organisation</th>
<th>Involvement of independent expert when promisor is to implement or review compliance program/policy</th>
<th>Involvement of independent expert in other circumstances&lt;sup&gt;42&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>1999</td>
<td>7</td>
<td>6</td>
<td>3</td>
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<td>2000</td>
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<td>13</td>
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<td>2001</td>
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<td>2002</td>
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<td>2003</td>
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<td>2004</td>
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<td>3</td>
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<tr>
<td>2005</td>
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<td>3</td>
<td>5</td>
</tr>
<tr>
<td>2006</td>
<td>8</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>2007</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>2008</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>67</td>
<td>53</td>
<td>22</td>
</tr>
</tbody>
</table>

Table 8.1. Monitoring by external and independent experts<sup>43</sup>

As illustrated in Table 8.1, the majority of undertakings that require a company to implement or review a compliance program are monitored by an independent expert.

<sup>42</sup> That is, when the implementation or review of a compliance program or policy was not required.

<sup>43</sup> ASIC, above n 13.
Between 1998 and 2008, an independent expert was involved in 79.1% of the undertakings that required the introduction or review of a compliance program.

For example, in 2007 ASIC entered into an enforceable undertaking with PCI Equity Pty Ltd because ASIC was concerned that the company had breached its financial services licence conditions and its duties as a financial services licensee. Among other things the company promised to formulate a compliance program and to engage an independent expert approved by ASIC to assess the compliance program and monitor and report to ASIC on the company’s compliance with the terms of the undertaking and its Australian financial services licence. The undertaking required the independent expert to lodge a quarterly report with ASIC in relation to the compliance of PCI Equity Pty Ltd with the terms of its undertaking for 25 months. One of the benefits of having such quarterly reports is the establishment of a proactive monitoring system which allows experts to assess the compliance of the promisor with the terms of the undertaking. This is a very important step as noted by Justice Goldberg in *ACCC v Australian Safety Stores Pty Ltd*:

> One needs to look at the compliance program in two respects. Firstly one must ask whether there was a substantial compliance program in place which was actively

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44 ASIC, Enforceable Undertaking: PCI Equity Pty Ltd, Document No 017 029 212 (22 June 2007), [3.5], [3.7]. See also ASIC, Enforceable Undertaking: RetireInvest Pty Ltd, Document No 017 029 080 (26 February 2003), [2.4], [2.15].

45 ASIC, Enforceable Undertaking: PCI Equity Pty Ltd, Document No 017 029 212 (22 June 2007), [3.7].

46 Hutter, above n 14, 107.

implemented by [the defendant]… Secondly one must ask whether the implementation of the compliance program was successful.

However, as noted in Table 8.1, not all of the undertakings monitored by an independent expert include a promise to implement or review a compliance program. Independent experts have been involved in monitoring the compliance of companies with some or all of the terms of their undertaking (other than monitoring the implementation of a compliance program) in 12.6% of all enforceable undertakings entered into by companies. For example, in 2004 ASIC entered into an enforceable undertaking with Structured Financial Solutions Pty Ltd because it believed that the corporation was involved in misleading and deceptive conduct. The enforceable undertaking required Structured Financial Solutions Pty Ltd to compensate certain clients for any losses they may have suffered as a result of the misleading conduct and to engage the services of an independent claims reviewer, approved by ASIC, to review any compensation claims the company disputed.

The use of independent experts has certain advantages, but it has also raised certain problems that ASIC has attempted to remedy.

8.3.3.1 Advantages

Where officers of the company are in charge of monitoring the enforceable undertaking, issues such as bias may arise. In the case of an independent expert, the

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48 Independent experts have been involved in 75 of 175 undertakings entered into by companies (42.9%): ASIC, above n 13.

49 ASIC, Enforceable Undertaking: Structured Financial Solutions Pty Ltd, Document No 017 029 130 (10 August 2004), [2.5]–[2.11].
person has no ties with the company and will be able to provide an unbiased report on the performance and compliance of the company with the terms of the undertaking.\textsuperscript{50} Further, the ACCC has noted that ‘independent reviews are more effective than those conducted by internal staff’.\textsuperscript{51} An unsatisfactory report would highlight the weaknesses of a corporation and would provide ASIC with an opportunity to deal with any breach of the undertaking.

For example, in 2006 ASIC entered into an enforceable undertaking with GE Personal Finance Pty Ltd, Hallmark Life Insurance Co Ltd and Hallmark General Insurance Co Ltd (trading as GE Money) due to ASIC’s concerns that these companies were providing unsuitable advice to clients. The enforceable undertaking required the companies to stop such conduct, compensate affected consumers and undertake a review, both internally and by an independent compliance expert, of their sales practices.\textsuperscript{52} The expert’s assessment and review, provided to ASIC, highlighted broader and more serious issues relating to GE Money’s processes which were not dealt with in the enforceable undertaking, and also detected lack of compliance with the terms of the undertaking.\textsuperscript{53}

\textsuperscript{50} Parker, above n 38, 224. However, Parker noted that ‘in practice, … compliance program audits focus more on reviewing (and recommending improvements to) the systems elements of the compliance program, rather than its compliance performance’.


\textsuperscript{52} ASIC, Enforceable Undertaking: GE Personal Finance Pty Ltd, Hallmark Life Insurance Co Ltd and Hallmark General Insurance Co Ltd, Document No 017 029 193 (20 March 2006).

\textsuperscript{53} The enforceable undertaking was withdrawn as no longer an appropriate means of addressing ASIC’s concerns and further, more appropriate regulatory action was taken: see ASIC, Enforceable Undertaking Withdrawal Notice: GE Personal Finance Pty Ltd, Hallmark Life Insurance Co Ltd and Hallmark General Insurance Co Ltd (22 May 2008).
The involvement of independent experts in the process of monitoring compliance with enforceable undertakings may be a useful tool for the detection of breaches of those undertakings. However, this monitoring method has been criticised in the past.

8.3.3.2 Criticism: Lack of Guidelines

A study conducted by Parker in 2003 observed that very few guidelines are available to guide these independent experts in their audit of company practices. This may lead to a lack of uniformity in the different reports. One auditor expressed his frustration in the following terms: ‘We never get any feedback or guidance on what [the regulators] want. I have never been questioned or challenged or brought to task … We set the scope and output of what we do’.55

The lack of guidelines is especially apparent in early undertakings entered into by ASIC. On a number of occasions, the terms of the undertaking include no reference to factors that should be taken into consideration in the implementation or review of a compliance program. No, or only the barest minimum of, advice has been provided to the expert. For example, in 2001 ASIC entered into an enforceable undertaking with Garrisons Pty Ltd (‘Garrisons’) in which company undertook, among other things, to:56

54 Parker, above n 38, 224.


56 ASIC, Enforceable Undertaking: Garrisons Pty Ltd, Document No 017 029 005 (27 June 2001), [11](e).
arrange for the preparation by 31 December 2001 of a report on Garrisons’
compliance program by an independent evaluator in accordance with the
requirements of clause 3.4.3 of Australian Standard AS 3806—Compliance Programs
and on terms approved by ASIC, and, following the receipt of that report, provide
ASIC with copy of that report.

This clause was the only guidance provided to the independent expert. A clause such
as this is very vague, because the requirements of Australian Standard AS 3806 have
been deemed ‘aspirational in their expression and not readily measured in
application’.57 Further, the Garrisons undertaking did not mention what should occur
after the report was written. The undertaking put no obligation on the promisor to
implement the report’s recommendations.

Another example of a very general term relating to the review of a company’s
compliance program may be found in the undertaking ASIC entered into with Count
Financial Group Pty Ltd (‘Count’) in 1999:58

Count will engage external professional compliance consultants, approved by ASIC,
who will review, assess and report, in writing, on Count’s compliance program. This
assessment will include, but not be limited to, assessment of Count’s adherence to the
Compliance Plan as amended from time to time. Such review, assessment and
reporting is to be conducted every 6 months for a period of 18 months from the date
these undertakings take effect.

57 Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc
(1999) 161 ALR 79, [26].

58 ASIC, Enforceable Undertaking: Count Financial Group Pty Ltd, Document No 008 547 347 (1 June
1999), [2.1].
While this undertaking provides for close monitoring of the company’s compliance through the issuing of reports by an independent compliance expert on a regular basis, the expert is not given any instruction with respect to how to implement or conduct his or her review of the compliance program. In neither of these examples was the independent expert provided with any information on the aim of the compliance program he or she was to review. This lack of guidance not only has an adverse effect on the company attempting to implement the undertaking, it must also affect the audit that may be carried out by the independent expert.\textsuperscript{59}

In recent years, however, ASIC has taken steps to provide more guidance to independent experts. For instance, a former senior officer in ASIC stated that ‘it is usual for ASIC to spend time briefing the expert at the time of engagement and then as necessary during the course of the undertaking’s operation’.\textsuperscript{60} Moreover, the same officer observed that there is a new awareness within the corporate regulator about the importance of wording enforceable undertakings in a clear manner, noting that ‘the clearer the terms of the undertakings are, the easier it is to monitor the undertaking’.\textsuperscript{61}

ASIC has additionally developed enforceable undertakings templates that contain a number of terms relating to the engagement of an independent expert, the requirements imposed on the expert and the manner in which his or her review should

\textsuperscript{59} Besides these difficulties, ASIC may have problems enforcing undertakings that don’t include compliance program guidelines because the court may consider that they too are ‘aspirational in their expression and not readily measured in application’: \textit{Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc} (1999) 161 ALR 79, 89.

\textsuperscript{60} Ibid.

\textsuperscript{61} Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).
be conducted. The content of the undertakings accepted in the last couple of years seems to reflect such a change in policy. For example, in 2008 ASIC entered into an enforceable undertaking with Fortrend Securities Australia Pty Ltd (‘Fortrend’) which imposed the following requirements on the engagement of an independent expert:

The terms of engagement must ensure that:

(a) the Independent Expert’s review is conducted to the level of a Reasonable Assurance Engagement;

(b) the Independent Expert assesses whether:

(i) Fortrend and Mr Forster are complying with Fortrend’s Compliance Manual;

(ii) Fortrend and Mr Forster have implemented the Remedial Action Plan;

(c) the Independent Expert provides a written report about the review to Fortrend and ASIC within 4 months after the date of this undertaking (the Initial Report).

The undertaking included further provisions about the requirements of a second expert report 12 months later and potentially a third expert report, as well as an annexure entitled ‘The form of the expert evidence note’ being an extract from the Federal Court of Australia Practice Direction ‘Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia’. This form is also included as an


63 ASIC, Enforceable Undertaking: Fortrend Securities Australia Pty Ltd, Document No 017 029 228 (24 November 2008), [3.3.2].

64 Ibid, [3.3.4]–[3.3.11], Annexure A.
annexure to ASIC’s enforceable undertakings templates. More and more, guidelines are being provided for independent experts.

However, templates specifying in more detail how independent experts should deal with enforceable undertakings may be required. The ACCC, for example, has issued four different trade practices compliance program templates that may be referred to in framing an undertaking, depending on the size of the organisation and the complexity of the compliance program that is to be implemented. Such templates provide more guidance for the business community and the independent expert on what must be present in a compliance program and how it should be monitored.

8.3.3.3 Criticism: Issues of Competency

While guidelines may assist the independent experts in their monitoring of enforceable undertakings, there is not one common practice among the experts as to how to conduct a compliance program audit. Ultimately, the way an assessment is carried out depends on the individual expert. Differences in education, specialisation, experience, training and even the character of experts all have an impact on how the audit is conducted.

Some auditors will do a thorough study of the compliance program while others will just see if the compliance program looks good on paper without checking how the


66 These trade practices compliance program template undertakings are available on the ACCC’s website, <http://www.accc.gov.au/content/index.phtml/itemId/716224>; See further 5.3.1.

67 Hutter, above n 14, 44.
program is being applied.\textsuperscript{68} This can lead to a problem because the most brilliantly designed program may be applied incorrectly, rendering it totally ineffective.\textsuperscript{69} For this reason, another important aspect of the monitoring of enforceable undertakings by independent experts is ensuring that the independent expert selected for the task is both competent and aware of what is expected of him or her.

In recent years, ASIC has been able to determine the competency of the independent expert through the expert’s reports to ASIC. A former senior officer in ASIC described the monitoring process as follows:\textsuperscript{70}

\begin{quote}
[U]sually the consultant is required to do three reports—for example, one initially after the compliance program terms have been updated, one six months down the track, and another one a year later. The first report will give ASIC an indication of whether the consultant is doing what it was envisaged they should be doing, and ASIC can discuss with the consultant/company if there are any problems evident from the first report.
\end{quote}

However, it may be beneficial for ASIC to develop some courses or educational kits for independent experts on how to audit enforceable undertakings.\textsuperscript{71}

\begin{flushleft}
\textsuperscript{68} Parker, above n 38, 231.
\textsuperscript{69} Andrew Hopkins, \textit{Managing Major Hazards: The Lessons of the Moura Mine Disaster} (Allen & Unwin, 1999), 70.
\textsuperscript{70} Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).
\textsuperscript{71} This might be done in conjunction with the Australasian Compliance Institute.
\end{flushleft}
Another issue that may be of concern is that ASIC does not have a specific list of approved experts to do the monitoring. It is up to the company entering into the enforceable undertaking with ASIC to decide who to hire. As a consequence, a wide variety of people may be appointed to the task, including large commercial law firms, solo and small firm lawyers, compliance consultants, and large and small auditing firms.\footnote{Parker, above n 38, 240.} In the past, ASIC has tried to monitor such appointments by including a clause in undertakings requiring the promisor to advise the regulator of the name of the person to be appointed to conduct the audit and the terms of their engagement prior to the person being engaged.\footnote{ASIC, above n 62, [A3.2]. See, for example, ASIC, Enforceable Undertaking: First Capital Planning, Document No 017 029 207 (11 May 2007), [3.5].} This gives ASIC the right to veto an appointment in case it has concerns in relation to the competency of the expert.\footnote{Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).} Additionally, in a number of undertakings, ASIC has included a clause requiring the expert to be appointed to have certain qualifications and experience, for example, accounting qualifications and at least 10 years accounting experience.\footnote{See, for example, ASIC, Enforceable Undertaking: First Capital Planning, Document No 017 029 207 (11 May 2007), [3.4].}

### 8.3.3.4 Criticism: Issues with Independence of Expert

Undertakings usually include a term that the promisor is responsible for paying the fees of the expert and all associated costs.\footnote{ASIC, above n 62, [A3.3]. See, for example, ASIC, Enforceable Undertaking: First Capital Planning, Document No 017 029 207 (11 May 2007), [3.9].} However, the fact that the promisor is hiring and paying the independent consultant can have some drawbacks. Some independent experts interviewed by Parker stated that they believed they had been

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\footnote{Parker, above n 38, 240.}

\footnote{ASIC, above n 62, [A3.2]. See, for example, ASIC, Enforceable Undertaking: First Capital Planning, Document No 017 029 207 (11 May 2007), [3.5].}

\footnote{Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).}

\footnote{See, for example, ASIC, Enforceable Undertaking: First Capital Planning, Document No 017 029 207 (11 May 2007), [3.4].}

\footnote{ASIC, above n 62, [A3.3]. See, for example, ASIC, Enforceable Undertaking: First Capital Planning, Document No 017 029 207 (11 May 2007), [3.9].}
released by the promisors who had engaged them because they were too demanding.\textsuperscript{77} This means the independence of experts may be in jeopardy.

Other regulators who have the sanction of enforceable undertaking at their disposal have dealt with this risk in a variety of ways. For example, the Queensland Department of Employment and Industrial Relations, may enter into enforceable undertakings under both the \textit{Electrical Safety Act 2002} (Qld) and the \textit{Workplace Health and Safety Act 1995} (Qld).\textsuperscript{78} Undertakings the Department enters into under these legislations include a clause providing that monitoring of the promisor’s compliance with the terms of the undertaking is to be conducted by the Department with the promisor paying the fee for such audit.\textsuperscript{79} Independence is ensured by the fact that it is the regulator’s inspectors who are monitoring compliance. However, the implement of such an option by ASIC would be difficult, if not impossible, because of the structural differences between the two agencies. While Queensland’s Department of Employment and Industrial Relations has its own inspectors,\textsuperscript{80} ASIC does not.\textsuperscript{81}

ASIC has tried to counteract this problem by including a clause in undertakings providing that an ASIC-approved appointed expert cannot be removed without the

\textsuperscript{77} Parker, above n 38, 225.

\textsuperscript{78} \textit{Electrical Safety Act 2002} (Qld), ss 49–54; \textit{Workplace Health and Safety Act 1995} (Qld), ss 42D–42I.


regulator’s approval.\textsuperscript{82} To improve and make such clauses more effective, however, ASIC might consider establishing a guideline on when an application to change an independent expert may be accepted. Further, ASIC should make clear in its \textit{Regulatory Guide} and templates that, in the scenario where an independent expert is removed from his or her position, ASIC will require a report from both the promisor and the expert on the reasons behind the removal. This would allow ASIC to become aware of both sides of the story.

\textbf{8.3.3.5 \textit{In Brief}}

The use of independent experts to monitor compliance with enforceable undertakings and/or the implementation of a compliance program is beneficial, since this monitoring strategy allows an impartial party to determine the compliance of the promisor with the terms of their undertaking. As seen in the previous paragraphs, ASIC has attempted to redress the weaknesses present in this monitoring method. Ultimately, such a proactive monitoring method is very important and is regarded positively because of the preventive role it can play.\textsuperscript{83}

\textbf{8.3.4 \textit{No Monitoring}}

Although monitoring of undertakings entered into with companies has improved over time, a minority of undertakings still do not contain any information about how the enforceable undertaking is going to be monitored.\textsuperscript{84} For example, in 2003 ASIC

\textsuperscript{82} ASIC, above n 62, [A3.2]; ASIC, Enforceable Undertaking: Avco Access Pty Ltd, GE Automotive Financial Services, GE Capital Finance Australia, GE Personal Finance Pty Ltd and GE Finance Australasia Pty Ltd, Document No 017 029 220 (22 May 2008), [3.5.4].

\textsuperscript{83} Hutter, above n 14, 126.

\textsuperscript{84} This is problematic for the same reasons as noted in 8.4.5 below.
suspected that Wanted World Wide (Australia) Pty Ltd was contravening the fundraising provisions in the *Corporations Act*. ASIC entered into an enforceable undertaking with the company and its directors, Francesco Bagyio Carbone and Teresa Jane Carbone. The promisors undertook, among other things, to write to affected clients disclosing that their conduct had been in contravention of the *Corporations Act* and offering each person the opportunity of obtaining a full refund of all money they had invested in the company.\(^85\) The undertaking included no reference to the manner in which it was to be monitored.

Adding a clause on monitoring does not have to impose an onerous burden on the promisor. For example, this undertaking could have required Mr and Mrs Carbone, in their capacity as directors of the company,\(^86\) to promise to ensure the compliance of the organisation with the terms of the undertaking. The company could have been required to send a quarterly report to ASIC about the repayments it had made to investors. The undertaking could also have required the directors to provide ASIC with a statutory declaration that all the terms of the undertaking had been met once this was the case.

Failure to include information about the provision made by ASIC for monitoring the promisor’s compliance with the terms of an enforceable undertaking in the undertaking may send a signal to alleged offenders that ASIC is not closely monitoring the undertakings it enters into, and that it will only check compliance with

\(^85\) ASIC, Enforceable Undertakings: Wanted World Wide (Australia) Pty Ltd, Francesco Bagyio Carbone and Teresa Jane Carbone, Document Nos 017 029 090, 017 029 091, 017 029 092 (24 July 2003), [8.5].

\(^86\) Since Mr and Mrs Carbone are parties to the undertaking, adding such a clause would not cause the undertaking to place a liability on third parties.
the terms of an undertaking if it receives a complaint from the public that the promisor is breaching its provisions. For the same reasons as those mentioned in 8.4.5 below in relation to undertakings entered into with individuals, information about the system for monitoring compliance with an undertaking should be included in all undertakings entered into with companies.

8.4 Monitoring of Individuals

Individuals have entered into enforceable undertakings with ASIC as a consequence of a number of alleged contraventions of the *Corporations Act*, for example, breaches of the duties of an authorised representative, auditor, liquidator or director. In response to these breaches, most undertakings entered into by individuals have included a clause stating that the promisor agreed to a voluntary ban and/or the completion of an educational course.\(^{87}\)

The methods used by ASIC to monitor undertakings were referred to in 8.2 above. These methods relevant to undertakings entered into with individuals are as follows:

- the individual monitors his or her compliance with the undertaking;
- the individual’s employer monitors the individual’s compliance with their undertaking;
- an independent expert monitors the individual’s compliance with their undertaking.

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\(^{87}\) Marina Nehme, ‘Enforceable Undertakings: A New Form of Settlement to Resolve Alleged Breaches of the Law’ (2007) 11 *University of Western Sydney Law Review* 104, 113–14, 116–17; ASIC, above n 13. As to voluntary bans and requirements to complete further education see Chapters 5 and 7 respectively.
8.4.1 Only Self-monitoring

Some enforceable undertakings entered into by individuals include a provision that the promisor must lodge with ASIC a statutory declaration of compliance with the terms of their undertaking. If the undertaking required the promisor to fulfil an education requirement, the promisor may additionally be required to provide ASIC with a certificate proving completion of the required course.

8.4.2 Monitoring by Employer

In other instances, an enforceable undertaking may require the promisor’s employer to monitor the employee’s compliance with the terms of their undertaking. For example, in 2005 ASIC was concerned that George Paul Andreola and Michael John Phillips, who were partners in and worked for the auditing firm PKF Victoria, had breached their duties as auditors. ASIC accepted enforceable undertakings from Mr Andreola, Mr Phillips and all the partners of PKF Victoria. The partners of PKF Victoria undertook, among other things, to monitor the compliance of Mr Andreola and Mr Phillips with the terms of their undertakings and, if a breach occurred, to contact ASIC’s Assistant Director Enforcement with their concerns. Since all the partners

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88 See, for example, ASIC, Enforceable Undertaking: Daniel Jean Civil, Document No 017 029 209 (15 May 2007), [3.8].

89 See, for example, ASIC, Enforceable Undertaking: Christopher John Daws, Document No 017 029 198 (25 May 2006), [2.3][ii].

90 ASIC, Enforceable Undertakings: George Paul Andreola, Michael John Phillips, Noel Francis May, Simon John Marsh, Dennis Anthony Turner, Richard Albert Dean, John Pasias, Scott Michael McKay and John Paolacci, Document Nos 017 029 166, 017 029 167, 017 029 169, 017 029 170, 017 029 171, 017 029 172, 017 029 173, 017 029 174, 017 029 175, 017 029 176 (16 September 2005).

91 ASIC, Enforceable Undertakings: Michael John Phillips, Noel Francis May, Simon John Marsh, Dennis Anthony Turner, Richard Albert Dean, John Pasias, Scott Michael McKay and John Paolacci, Document Nos 017 029 169, 017 029 170, 017 029 171, 017 029 172, 017 029 173, 017 029 174, 017 029 175, 017 029 176 (16 September 2005), [2.2], [2.4].
of the firm were party to this undertaking, the employer agreed to be in charge of monitoring the promisors’ compliance with the terms of their undertakings.

A problem may arise where the promisor’s employer is not a party to the undertaking but is nevertheless required to monitor the promisor’s compliance with its terms: in such instances, the undertaking imposes a liability on external parties. For example, in 2006 ASIC entered into an enforceable undertaking with Christopher John Daws after the AAT revoked a banning order imposed on Mr Daws in 2001 because he had engaged in improper conduct as an authorised representative of a securities dealer. In the intervening period of time Mr Daws had ceased to be employed, and an unintended consequence of the banning order was that Mr Daws could not be appointed to the boards of companies. In his undertaking Mr Daws agreed to complete a Certificate in Directors Essentials and to send ASIC evidence of completion of the certificate. Mr Daws further undertook that if he was to re-enter the financial services industry, he would comply with ASIC’s training requirements and, prior to commencing employment, would obtain from his employer a letter stating that the employer agreed to closely supervise Mr Daws in the manner specified in the undertaking for a 12 month period. This included the writing of monthly reports on the proper performance of Mr Daws and allowing ASIC to audit Mr Daws’ work randomly at least twice during that year.92

While such monitoring provides ASIC with an opportunity to keep a close eye on the promisor, it imposes significant obligations on an external party to the undertaking (the employer) to monitor the compliance of the promisor (the employee) with the

92 ASIC, Enforceable Undertaking: Christopher John Daws, Document No 017 029 198 (25 May 2006), [2.4]–[2.6].
terms of the undertaking. These obligations are unlikely to be enforceable in court against the employer because he or she never agreed to the terms of the undertaking.\textsuperscript{93}

One way to avoid this problem is for ASIC to enter into an undertaking with the promisor’s employer at the same time as entering into the undertaking with the promisor. Where this occurs, the employer agrees to become responsible for monitoring the promisor’s compliance with their undertaking. For example, Robert William Tresidder was disqualified from managing a corporation until 7 February 2010. When Mr Tresidder was appointed as an insurance intermediary, ASIC accepted an enforceable undertaking from his employers, Halliday & Nicholas Insurance Brokers Pty Ltd and Halnic Nominees Pty Ltd, in which the employers jointly and severally agreed to strictly adhere to the terms and conditions of the appointment of Mr Tresidder and to notify ASIC of any breach of the sub-broker agreement by Mr Tresidder during the course of his sub-brokerage within two days of the breach occurring.\textsuperscript{94} When Mr Tresidder changed employment, his new employer Action Insurance Brokers Pty Ltd agreed to enter into an enforceable undertaking with ASIC in substitution for the undertakings given by his previous employer. In that undertaking Action Insurance Brokers Pty Ltd promised to immediately notify ASIC of any change in the terms and conditions of Mr Tresidder’s appointment as an insurance intermediary and to notify ASIC of any breach by Mr Tresidder of the terms and conditions of his appointment within two days of becoming aware of the breach.\textsuperscript{95}

\textsuperscript{93} This aspect is discussed in detail in Chapter 9.

\textsuperscript{94} ASIC, Enforceable Undertakings: Robert William Tresidder, Sharon Denise Tresidder, Halliday & Nicholas Insurance Brokers Pty Ltd and Halnic Nominees Pty Ltd, Document Nos 008 547 421, 008 547 420, 008 547 409, 008 547 419 (7 February 2000), [2.6.1], [2.6.3].

\textsuperscript{95} ASIC, Enforceable Undertaking: Robert William Tresidder and Action Insurance Brokers Pty Ltd , Attachment B to Document No 017 029 154 (23 January 2004), [2.4.1], [2.4.2].
Subsequently a similar undertaking was entered into by Ausure Insurance Finance Pty Ltd when it too entered into an insurance broking relationship with Mr Tresidder.\textsuperscript{96}

\textbf{8.4.3 Monitoring by External and Independent Person}

Certain undertakings go one step further by prescribing that the individual should be monitored for a certain period by an independent third party. For example, in 2007 ASIC entered into an enforceable undertaking with Jonathan Pye because of its concerns that he had failed to adequately perform his duties as an auditor. In his undertaking Mr Pye agreed to a voluntary ban, at the end of which period he was required to lodge with ASIC a statutory declaration that he had not signed any audit report between May 2002 and 30 June 2007. Mr Pye further undertook that the first five audits he completed after 30 June 2007 would be reviewed by an independent auditor who would in each case provide a written statement, to be supplied by Mr Pye to ASIC, that Mr Pye’s audit had been conducted properly.\textsuperscript{97} Such a monitoring system has its benefits because an independent person ensures that the promisor is doing his or her job properly.

\textbf{8.4.4 No Monitoring}

Since 2003 a worrying trend appears to have been developing, as illustrated in Table 8.2, in which an increasing number of enforceable undertakings entered into by individuals do not include any terms relating to the manner in which those undertakings are to be monitored.

\textsuperscript{96} ASIC, Enforceable Undertaking: Robert William Tresidder and Ausure Insurance Finance Pty Ltd, Document Nos 017 029 154, 017 029 155 (30 March 2005), [2.4.1], [2.4.2].

\textsuperscript{97} ASIC, Enforceable Undertaking: Jonathan Pye, Document No 017 029 207 (15 May 2007), [2.1]–[2.3].
As may be seen from the above table, 48.6% of the undertakings entered into between ASIC and individuals between 1998 and 2008 do not include any information in relation to how the compliance of the promisor with the terms of his or her undertaking is to be monitored. In 2008, none of the enforceable undertakings entered into by ASIC with individuals contained any reference to monitoring.  

98 ASIC, above n 13.

99 ASIC, Enforceable Undertaking: Michael Melvila Kirwan, Document No 024 130 410 (22 December 2008); ASIC, Enforceable Undertaking: Anthony Michael Travers, Document No 017
Assessment and Suggestions

Failure to include in an enforceable undertaking information about the provision made by ASIC for monitoring the promisor’s compliance with the terms of the undertaking may, rightly or wrongly, send a signal to alleged offenders that ASIC is not closely monitoring enforceable undertakings and that, once an undertaking has been entered into, ASIC will only check compliance with the terms of an undertaking if it receives a complaint from the public that the promisor is breaching its provisions.

The monitoring system to be implemented in respect of an undertaking need not be onerous. Depending on the scenario, a simple acknowledgment of compliance may be enough. For example, in 2008 ASIC entered into an enforceable undertaking with John Robert Buttle after expressing concerns that Mr Buttle may have failed to adequately and properly perform his auditor’s duties. Mr Buttle promised to cancel his registration as an auditor within seven days of entering into the enforceable undertaking, but the undertaking did not refer to any monitoring to be put in place to ensure that this actually occurred. This undertaking could have included a clause requiring Mr Buttle to advise ASIC of the cancellation of his registration as an auditor by a certain date. The undertaking could also have specified the particular department within ASIC to which this information should have been reported.

029 223 (29 August 2008); ASIC, Enforceable Undertaking: John Robert Buttle, Document No 017 029 222 (28 July 2008); ASIC, Enforceable Undertaking: Gregory Michael Gordon O’Shaughnessy, Document No 027 029 214 (31 January 2008). The undertakings given by Joseph Burke Forster and Phillip Raymond Coop have not been included here because they are undertakings accepted by these individuals and their company.

While it may be argued that the requirement to notify suggested above would not make a difference since ASIC controls the register of auditors and would therefore automatically discover if a promisor failed to cancel his or her registration as per their undertaking, this is not necessarily the case. As ASIC regulates over one million regulated entities, it is unlikely to be possible for it always to keep such a close eye on what is happening with each promisor. For example, in 2008 ASIC entered into an enforceable undertaking with Anthony Michael Travers following concerns that Mr Travers may have failed to adequately and properly perform his duties as a registered liquidator. Mr Travers undertook to cancel his registration as a liquidator within no more than 56 days of entering into the undertaking. The undertaking again did not refer to any monitoring to be put in place to ensure that this actually occurred. A search of ASIC’s register of liquidators on 20 November 2009 shows that on that date Mr Travers’ licence still had not been cancelled. ASIC, however, did not appear to be aware of this fact.

If, however, the enforceable undertaking requires the individual to notify a particular department within ASIC of the cancellation of his or her registration by a certain date and the notification is not received as required, there is a greater chance that ASIC will be made aware that a breach of the undertaking has occurred. Further, the inclusion of such a clause puts an obligation on the promisor to actively report his or her compliance with the undertaking to ASIC, and this sends a message to alleged offenders that ASIC is keeping track of the undertakings it accepts.

102 Since then, the matter has been reported to ASIC.
The author suggests that ASIC ought not to accept enforceable undertakings that do not contain reference to the method in which the promisor’s compliance with the undertaking is to be monitored. Further, the author proposes that it is not enough to require the promisor to contact ASIC only when a breach of the undertaking has occurred. Instead, at the end of each of the first three years after their having entered into an undertaking, promisors should be required to provide a statutory declaration to ASIC that they have complied with the terms of their undertaking. The consequences of providing a false statutory declaration may be a strong incentive for promisors to report truthfully on their actions. The inclusion of some of the following clauses in enforceable undertakings may therefore be desirable:

- Any breach of the enforceable undertaking by the individual must be reported to ASIC. Details of the person or department within ASIC that must be contacted in case of a breach should also be included.
- Where the individual has agreed not to be a director of a company or not to deal with securities for a certain period of time, at the end of that period the promisor must provide ASIC with a statutory declaration that compliance has taken place.
- Where the individual has agreed to complete an educational course before a certain event occurs or within a certain period of time, at the end of that period the promisor must provide ASIC with proof of successful completion of the course.
- Where the individual’s compliance with the terms of the undertaking is monitored by an independent party, that person must send his or her report

in relation to the promisor’s compliance to ASIC as well as to the promisor.

These strategies may assist ASIC in detecting breaches of enforceable undertakings by promisors and may motivate alleged offenders to comply with the terms of their undertakings. Such clauses produce the impression that the regulator is keeping a close eye on promisors, providing the additional motivation referred to above and further maximising the deterrent impact of the sanction of enforceable undertaking.

It is also suggested that the following clause should also be included in all undertakings ASIC enters into with individuals:104

The promisor acknowledges that, should ASIC form the view that he or she has failed to comply with the terms of this undertaking, ASIC may take additional action, including (without limitation) the seeking of court orders under s 93AA of the ASIC Act that the promisor complies with the terms of this undertaking.

Inclusion of such a provision may raise the promisor’s awareness of the consequences of breaching their undertaking. This may enhance the alleged offender’s compliance with the undertaking for, as Braithwaite has observed, the business community is unlikely to cooperate with the regulatory agency unless the regulatory agency has an

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104 Such a clause has previously been included in a number of enforceable undertakings. See, for example, ASIC, Enforceable Undertakings: Brighton RV Syndication Pty Ltd, William Lionel Lenski, Brighton RV Holdings Pty Ltd and Australian Commercial Property Syndications Pty Ltd, Document Nos 014 835 351, 014 835 352, 014 835 353, 014 835 354 (25 September 2007), [4.5].
ace up its sleeve.\textsuperscript{105} In the instance of an enforceable undertaking, the ace is that the regulator may, among other things, enforce the undertaking in court. The above mentioned clause emphasises that this characteristic exists in an undertaking. Further, for the same reason, such a clause should also be included in enforceable undertakings entered into with companies.

\section*{8.5 ASIC on the Offensive}

While a proactive approach using monitoring by independent experts is relied on by ASIC to detect breaches of certain enforceable undertakings, the monitoring of the majority of the undertaking relies on self-regulation. 73.8\% of all undertakings entered into between 1998 and 2008 either do not include any reference to how compliance with the undertaking is to be monitored or rely solely on the promisor (or its officers, in instances where the promisor is a company) to report breaches of the undertaking to ASIC.\textsuperscript{106} This implies that, in most situations, ASIC is more reactive than proactive in monitoring the undertakings it has entered into. ASIC usually discovers that an undertaking has been breached after receiving complaints from the public or a report from an expert that the undertaking has not been complied with.\textsuperscript{107}

In theory, whenever someone reports a breach of an undertaking to ASIC, the corporate regulator initiates its own investigation into the matter. In the undertaking, the power to punish permits regulators to persuade. A regulated entity is probably more inclined to listen to the concerns of a regulator if the consequences of not listening are drastic: John Braithwaite, \textit{To Punish or Persuade: Enforcement of Coal Mine Safety} (State University of New York Press, 1985), 117–18.

\textsuperscript{106} That this is the case may be seen when reading the undertakings: ASIC, above n 13.

\textsuperscript{107} See, for example, \textit{Australian Securities and Investments Commission v Ludgates Corporate and Investment Advisory Services Pty Ltd} (2003) 21 ACLC 1366; ASIC, Enforceable Undertaking: GE Personal Finance Pty Ltd, Hallmark Life Insurance Co Ltd and Hallmark General Insurance Co Ltd, Document No 017 029 193 (20 March 2006).
ASIC may point out this possibility in the terms of the undertaking. For example, some undertakings contain a clause in which the promisor undertakes to:  

at the written request of ASIC, provide ASIC officers with access to books which will allow ASIC to ascertain that the company has complied with [its] undertakings … .

This phrase attempts to ensure the future cooperation of the promisor in an investigation, should it be required. If ASIC suspects a breach of the undertaking, it will take action and ask to check the promisor’s books for evidence of the breach. The promisor undertakes to facilitate ASIC’s inquiry by giving the regulator access to all the information it needs.

But who in ASIC is in charge of such monitoring? Commenting on the previous structure of ASIC, a former ASIC senior officer observed that:  

the Compliance Directorate will usually monitor enforceable undertakings dealing with financial service entities. The Enforcement Directorate will rarely be involved in the compliance aspect of the enforceable undertaking. The Consumer Protection Directorate will usually monitor enforceable undertakings dealing with consumer protection.

With the introduction of ASIC’s new structure from 1 September 2008, 12 stakeholder teams and eight deterrence teams are in charge of monitoring the

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108 See, for example, ASIC, Enforceable Undertaking: IT Investing Ltd, Document No 008 547 460 (18 August 2000), [2.1](b).

109 Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).
undertakings that fall under their area of specialty. Only time will tell if this new structure of monitoring will be more effective than the previous structure.

ASIC has also been criticised in the past for its reaction to expert reports. Research conducted by Parker in 2003 illustrated that the regulator did not always respond to the concerns of the expert, or did not always take action if the expert’s report was not lodged on time. Since then, however, ASIC appears to have responded to this criticism by taking action whenever it has been presented with negative expert reports. For example, after receiving an expert report in 2008 indicating breaches of the undertaking GE Money had entered into in 2006, ASIC directly took action by withdrawing the undertaking and imposing tougher sanctions on the promisor.

When an expert report is not required by the undertaking, assessing how ASIC deals with monitoring is more problematic. As noted in 8.4.5 above, for example, in the case of Mr Travers ASIC does not appear to have detected the breach. Similarly, in ASIC v Ludgates Corporate and Investment Advisory Services Pty Ltd it was pointed out that ASIC did not closely monitor compliance with the undertaking entered into in 2000 by Ludgates Corporate and Investment Advisory Services Pty

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110 Parker, above n 38, 223.
111 Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).
113 ASIC, Enforceable Undertaking: Anthony Michael Travers, Document No 017 029 223 (29 August 2008).
114 Australian Securities and Investments Commission v Ludgates Corporate and Investment Advisory Services Pty Ltd (2003) 21 ACLC 1366.
Lt and Ludgates Chartered Accountants. Rather, ASIC discovered that there might be a breach of the undertaking because the regulator received complaints concerning other schemes in which these entities were allegedly involved. The discovery was not made through the monitoring system that was put in place when the undertaking was entered into. It appears, therefore, that ASIC must improve its system of monitoring undertakings. This may be possible through a greater communication and collaboration with the promisors.

8.6 In Summary

Although the monitoring system that ensures a promisor’s compliance with the terms of the enforceable undertaking it has entered into has improved over time, it remains to a certain extent flawed. Ultimately, due to its largely self-regulatory aspect, the effectiveness of the monitoring of undertakings depends heavily on the character and integrity of the individual promisors.

While ASIC’s system of monitoring company compliance with the terms of enforceable undertakings has improved over the last decade, it can be further enhanced. For instance, all future undertakings entered into with companies should include reference to the method by which the undertaking is to be monitored. Further, it is important to require the senior officers of the company to monitor the implementation of the terms of the undertaking and to have an independent expert reviewing the company’s compliance with the undertaking. These requirements

115 ASIC, Enforceable Undertaking: Ludgates Chartered Accountants and Ludgates Corporate and Investment Advisory Services Pty Ltd, Document No 008 547 416 (29 February 2000).

116 Australian Securities and Investments Commission v Ludgates Corporate and Investment Advisory Services Pty Ltd (2003) 21 ACLC 1366, [9], [10].
maximise the chances that a change in the compliance culture of the organisation will be achieved, because it may then be expected that the senior officers will both encourage and ensure the implementation of the undertaking. This also sends a message to the company’s employees about the importance of incorporating the changes required by the undertaking.

ASIC’s monitoring of the compliance of individuals with the terms of enforceable undertakings has a number of weaknesses. This is especially so where the undertaking does not refer to how it is to be monitored. Such undertakings should not be entered into. The author recommends that individual promisors should be required to lodge periodically a statutory declaration with ASIC stating that they have complied with the terms of their undertaking. Such an obligation would remind promisors that ASIC is keeping track of their implementation of the terms of their undertaking.

The use of independent experts to monitor the compliance of promisors, whether companies or individuals, with their undertakings is highly beneficial and should be further supported by ASIC. Diagram 8.2 provides a summary of the current monitoring system along with the improvements that need to take place.
Diagram 8.2. Monitoring of undertakings

Promisors are companies

- Clause on monitoring included in EU
  - Company monitors EU
    - Improvement needed: the company has to appoint someone to be in charge of the monitoring
  - Officer monitors EU
  - Expert monitors EU
    - This monitoring system helps to change the compliance culture, however there is the issue of bias
    - Biggest advantage is the involvement of independent person

Promisors are individuals

- No monitoring system included in EU
  - High risk: breach of undertaking may remain undetected
  - Need to include a monitoring system to improve the monitoring of an EU
  - Statutory declaration and/or proof of compliance with the terms of the EU

- Clause on monitoring included in EU
  - Risk: monitoring by employer who is not a party to EU → EU imposing liability on third party

ASIC monitoring is important; however, ASIC more reactive than proactive

More communication between ASIC and the promisor is needed to detect breaches of EU
As may be seen in Diagram 8.2, collaboration between the regulator and the promisor is needed to ensure a good monitoring system is in place. The author recommends that ASIC follow up with promisors any failures to comply with the terms of their undertakings. Such closer involvement by ASIC will improve the monitoring system and increase the deterrent effect embedded in enforceable undertakings, because promisors will realise that breaches of undertakings will be detected. Alleged offenders will be more inclined to comply with the terms of their undertakings, since a breach of the undertaking potentially leads to more drastic penalties. For this to be true, however, the courts must be willing to enforce undertakings when applied to by the regulator. Chapter 9 therefore considers the manner in which undertakings are enforced in court.
Chapter 9: Enforceable Undertakings and the Court System

9.1 Consequences of Non-compliance with the Terms of an Undertaking

An enforceable undertaking is a form of settlement that is enforceable in court. As discussed in Chapter 3, the enforceability of an undertaking in court was one of the reasons behind the introduction into the regulatory system of the enforceable undertaking as a sanction. This enforceability in court means that when the persuasion strategy attempted in the use of an enforceable undertaking fails (because the promisor has not complied with the terms of the undertaking), the enforcement strategy embedded in the undertaking may take over since, in such instances, ASIC has the option of enforcing the undertaking in court.\(^1\) Section 93AA(3) of the ASIC Act provides:

> If ASIC considers that the responsible entity has breached any of the terms of the undertaking, ASIC may apply to the Court for an order under subsection (4).\(^2\)

The breach of an undertaking is in itself neither an offence nor contempt of court, but once the court orders a person to comply with their undertaking, to continue to breach the undertaking is a breach of the court order and constitutes contempt. If ASIC did not have the power to make such an application to the court, alleged offenders who enter into undertakings with ASIC may not be deterred from contravening the terms

\(^1\) See 3.3.

\(^2\) For the orders the court may make under s 93AA(4) of the ASIC Act see 3.2.
of their undertakings. The possibility that the undertaking may be enforced in court, however, may be an extra incentive and a motivation for promisors not to stray. To obtain the benefits of this deterrent effect, the regulator must not only monitor the undertakings it enters into but must also, when a breach of an undertaking occurs, be willing to take the steps necessary to ensure the promisor complies with their undertaking.

Just as important in ensuring that the enforceability of the undertaking in court is an effective deterrent against breach of its terms by the promisor is the reception given by the court to ASIC’s application for an order under s 93AA(4): Will the court be willing to enforce the undertaking? The question arises because the courts may deem the sanction of enforceable undertaking to be inappropriate and, if this were so, a court might refuse to make orders enforcing the undertaking—preferring, for example, that the regulator prosecuted the original breach instead of enforcing the undertaking. Opposition to undertakings by the courts would result in a situation where regulatory agencies were less likely to approach the courts for enforcement purposes and this, ultimately, would mean that the legislative provisions relating to enforceable undertaking may not achieve what they were enacted to do. If it were the case that enforceable undertakings could not be enforced in court, the sanction would lose any deterrent effect it may have, especially in instances (rare as they may be)

3 Since a regulator can prosecute for the original breach irrespective of whether or not an undertaking is in effect, there is a limit to the extent to which a non-compliant promisor may breach an undertaking. Where this limit is may depend on the regulator’s capacity to monitor and enforce the undertaking. However, if there are matters affecting the likelihood of an undertaking being enforced, these matters should be considered carefully. One of the reasons for the introduction of enforceable undertakings is their potential to be enforced in court; if they are not enforced, the sanction of enforceable undertaking will not be any different to administrative resolutions.

4 See Chapter 8.
where the alleged offender had entered into the undertaking for the sole purpose of avoiding litigation. This scenario is illustrated in Diagram 9.1.\(^5\)

As illustrated in Diagram 9.1, in order for the deterrent effect of enforceable undertakings to operate effectively, it is necessary, when there has been a breach of an undertaking, for the regulator to apply to the court to enforce the undertaking and for the court to be willing and able to enforce that undertaking. The next part of this chapter considers the policies of ASIC and the ACCC in relation to the enforcement of enforceable undertakings. Because of the similarity of the provisions of s 87B of the *Trade Practices Act* and ss 93AA and 93A of the *ASIC Act*, judgments relating to

\(^5\) For the purpose of this diagram ‘enforceable undertaking’ is abbreviated to ‘EU’.
s 87B are often referred to in decisions involving enforceable undertakings entered into by ASIC. Since the chapter refers frequently to judgments relating to enforceable undertakings entered into by the ACCC, it is important to highlight the similarities between the ACCC’s policy regarding the enforcement of enforceable undertakings and that of ASIC.

The third part of this chapter examines whether or not the response of the courts to enforceable undertakings generally is supportive of the use of the sanction. The fourth part of the chapter looks at matters considered by the courts in responding to a regulatory agency’s application for an order enforcing an undertaking. The final part of the chapter reviews the level of success achieved by ASIC and the ACCC in bringing applications for orders to enforce undertakings before the courts.

### 9.2 Regulators’ Policies in Relation to Enforcement

Braithwaite’s enforcement pyramid is generally applied by both ASIC and the ACCC in the administration of their respective Acts. Further, the policies of both ASIC and the ACCC in relation to the enforcement of undertakings may be seen as being based on Braithwaite’s enforcement pyramid, since it plays an important factor in the regulators’ decision-making when they are faced with a promisor who is in breach of an undertaking.

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6 See, for example, *Australian Securities and Investments Commission v Edwards* (2004) 51 ACSR 320, 324, where the Court referred to the manner in which s 87B is interpreted and applied the same interpretation to s 93AA. See further 9.4.3.1.

7 Braithwaite’s enforcement pyramid may be found in Diagram 2.1; Diagram 3.1 illustrates the enforcement pyramid of sanctions available to ASIC. As to the pyramid of enforcement see further 2.5.1. See also Vicky Comino, ‘The Enforcement Record of ASIC Since the Introduction of the Civil Penalty Regime’ (2007) 20 *Australian Journal of Corporate Law* 183, 193; Christine Parker, ‘The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement’ (2006) 40 *Law and Society Review* 591, 593.
Diagram 9.2. Steps taken by the regulators when an enforceable undertaking is breached

Diagram 9.2 illustrates the fact that when ASIC and the ACCC discover that an enforceable undertaking has been contravened, they will not usually apply directly to the court to enforce the undertaking using ss 93AA(4) or 93A(4) of the ASIC Act or s 87B(4) of the Trade Practices Act.

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8 The top two layers of this pyramid apply to ASIC but not to the ACCC, which doesn’t have these sanctions at its disposal.
The ACCC’s *Guidelines on the Use of Enforceable Undertakings* observes that, if an undertaking is not complied with, the ACCC will ‘usually first try to resolve the matter by consultation’ with the alleged offender.\(^9\) If the consultations fail, the breach will lead to court action.\(^10\) This policy is, in certain instances, embedded in the enforceable undertakings entered into. At least one undertaking entered into by the ACCC has included the following clause:\(^11\)

> If the Company is unable to comply with its obligation under this undertaking … the Company and the Commission will review this undertaking and negotiate in good faith the withdrawal or variation of all or a part of this undertaking pursuant to section 87B(2) of the [*Trade Practices*](http://example.com) *Act*.

Accordingly, in cases of non-compliance with an enforceable undertaking, the ACCC may be willing to accept a variation of the undertaking. For example, in 2000 the ACCC entered into an undertaking with Moore Talk Communication Pty Ltd in which the promisor was required to conduct audit reports on certain dates.\(^12\) However, due to delays in the formulation of its trade practices compliance program, the alleged offender did not manage to comply with the auditing requirements. As a

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\(^10\) Ibid. The guidelines continue: ‘The ACCC will make public its application to the court and will seek legal costs from the offending party where appropriate’, at 9.

\(^11\) See, for example, ACCC, Enforceable Undertaking: British American Tobacco Australia Ltd, Document No D05/2381 (11 May 2005), [26].

\(^12\) ACCC, Enforceable Undertaking: Moore Talk Communication Pty Ltd, Document No D00/13207 (16 May 2000).
consequence, the ACCC agreed to the variation of the enforceable undertaking in relation to the auditing dates.\textsuperscript{13}

ASIC’s \textit{Regulatory Guide 100} states that ASIC may apply to the court for appropriate orders and enforcement of an enforceable undertaking in situations where the breach of the undertaking is ‘a significant breach’ or one involving a failure of the promisor to perform an obligation by a certain time.\textsuperscript{14} However, ASIC is also willing to consult with the promisor in cases of breach of an enforceable undertaking.

For example, in 2003 ASIC entered into an enforceable undertaking with Perpetual Plantations of Australia Pty Ltd as a result of its concerns that the company was allegedly operating an unregistered managed investment scheme. In the undertaking the company promised to stop operating an unregistered managed investment scheme. The company also agreed to take all necessary actions to enable it to change its type from a proprietary company to a public company limited by shares.\textsuperscript{15} But it failed to comply with the terms of the initial undertaking (for instance, the company remained a proprietary company). Accordingly, Perpetual Plantations of Australia Pty Ltd contacted ASIC and proposed to wind up its unregistered scheme in May 2005. ASIC agreed to this proposal.\textsuperscript{16}

\textsuperscript{13} ACCC, Enforceable Undertaking: Moore Talk Communication Pty Ltd, Document No D01/43263 (3 September 2001).

\textsuperscript{14} ASIC, \textit{Regulatory Guide 100: Enforceable Undertakings} (March 2007), [4.1].

\textsuperscript{15} ASIC, Enforceable undertakings: Perpetual Plantations of Australia, Dee Dee Fleming (formerly Margaret Dianne Fleming) and Donald Brownlie Fleming, Document Nos 017 029 077, 017 029 078, 017 029 079 (10 February 2003), [12.1], [12.2].

\textsuperscript{16} ASIC, ‘South Australian pistachio plantation scheme to be wound up’, Media Release 04–425 (23 December 2004).
ASIC may sometimes include a clause in an undertaking that refers to more drastic consequences that may apply to the promisor in the event that the undertaking is breached. For example, in 2000 Neil John White and Glenn Rainer Meuwissen entered into an undertaking with ASIC in relation to their alleged breach of the duties of a representative of a security dealer. Mr White and Mr Meuwissen promised, among other things, to undergo a course of professional training, have their compliance program reviewed and disclose the undertaking to their clients. ASIC added an extra clause to the undertaking that in the event of ‘any material breach’ of the undertaking in the future, both promisors agreed to a voluntary ban from dealing with securities or investment advice for a period of five years.\(^{17}\) In this case the escalation in the gravity of the additional promise may be clearly seen. ASIC started with a relatively light undertaking, education and the review of a compliance program. If there was a breach of this promise, ASIC was willing to move to the tougher sanction of a voluntary ban. If the breach persisted, then ASIC could go to court.

A former senior officer in ASIC has noted that ‘when there is a breach of the enforceable undertaking, ASIC is less likely to accept a further undertaking and may seek to impose a more serious sanction.’\(^{18}\) For example, in 2001 ASIC entered into an enforceable undertaking with GE Personal Finance Pty Ltd, Hallmark Life Insurance Co Ltd, Hallmark General Insurance Co Ltd (trading as GE Money).\(^{19}\)

\(^{17}\) ASIC, Enforceable Undertaking: Neil John White and Glenn Rainer Meuwissen, Document No 008 547 449 (22 June 2000), [2.1], [2.6], [2.10].

\(^{18}\) Interview with Jan Redfern, former ASIC Executive Director of Enforcement (face to face meeting, 20 June 2008).

When ASIC subsequently believed that the companies had breached the terms of the undertaking, ASIC deemed it appropriate to withdraw the undertaking. To remedy the breach, ASIC imposed additional conditions on the Australian financial services licences of the Hallmark companies.\textsuperscript{20}

It may be observed that the enforcement policies of ASIC and the ACCC in the case of a breach of an enforceable undertaking are very similar. Both regulators are willing to apply to the court to enforce undertakings in cases of significant breach. Do the courts, then, usually support and encourage the use of enforceable undertakings?

\section*{9.3 Judicial Attitudes to the Use of Enforceable Undertakings}

Chapter 3 described the reasons behind the introduction of enforceable undertakings into the regulatory system. It noted that while the enforceable undertaking bears certain similarities to a contract and to an administrative resolution,\textsuperscript{21} it may also be considered as a form of settlement in which the legislature gives the regulator the power to enforce in court a promise given in writing by the alleged offender.\textsuperscript{22} This was one of the main features behind the introduction of this sanction to the \textit{Trade Practices Act}.\textsuperscript{23} It is therefore important to consider if the courts are willing to enforce an undertaking. If the courts do not support the use of undertakings, they are

\begin{itemize}
\item \textsuperscript{20} ASIC, Enforceable Undertaking Withdrawal Notice: GE Personal Finance Pty Ltd, Hallmark Life Insurance Co Ltd and Hallmark General Insurance Co Ltd (22 May 2008).
\item \textsuperscript{21} See 3.2.
\item \textsuperscript{22} ASIC Act, ss 93AA(3) and 93A(3); \textit{Trade Practices Act}, 87B(3).
\item \textsuperscript{23} House of Representatives Committee on Legal and Constitutional Affairs, \textit{Mergers, Monopolies and Acquisitions—Adequacy of Existing Legislative Controls} (December 1991), recommendation 19; House of Representatives Committee on Legal and Constitutional Affairs, \textit{Mergers, Takeovers and Monopolies: Profiting from Competition} (May 1989), recommendation 9.
\end{itemize}
unlikely to enforce them. This would defeat the purpose behind the introduction of the sanction.

The courts usually are in favour of settlement, due to the cost of and delays involved in the litigation process. In a joint judgment in *NW Frozen Foods v ACCC*, Burchett and Kiefel JJ noted some of the advantages of negotiated resolutions:

> When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention. At the same time, a negotiated resolution in the instant case may be expected to include measures designed to promote, for the future, vigorous competition in the particular market concerned.

This view was confirmed in *ACCC v Real Estate Institute of Western Australia Inc* where French J observed that:

> as a general principle fair and appropriate settlements are encouraged to reduce the burden of litigation on both public and private resources.

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26 *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79.

27 *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79, [1].
It may, therefore, be said that the courts view the use of settlements, including the use of enforceable undertakings, in a positive light.

A literal reading of the sections relating to enforceable undertakings in both the ASIC Act and the Trade Practices Act indicates that neither ASIC nor the ACCC has power under the law to require a person to enter into an enforceable undertaking. Conversely, a person cannot compel ASIC or the ACCC to accept an enforceable undertaking. Accordingly, the following question may be raised: May the court require the parties to enter into an enforceable undertaking?

In theory, the ACCC is not required to explain the reasons behind its decision to refuse to enter into an enforceable undertaking. In Trade Practices Commission v Cue Design Pty Ltd, O’Loughlin J stated:

In my opinion, it is not for the court to express a view that the commission should have or should not have proceeded under s 87B: the section clearly states that it is the Commission who “may accept a written undertaking”. The court has no involvement until (if at all) it believes upon the application made by the Commission that a person has breached an undertaking.

The situation is similar in the case of ASIC, since the content of ss 93AA and 93A of the ASIC Act is similar to the content of s 87B of the Trade Practices Act. This line of

28 ASIC, above n 14, [1.5], ASIC Act, ss 93AA and 93A, Trade Practices Act, s 87B.


reasoning was followed in *Sage v ASIC*. The applicant in that case sought a declaration from the court to force ASIC to enter into an enforceable undertaking. Goldberg J held that such a declaration was inappropriate:

There is no basis upon which the Court could make an order or declaration requiring the Commission to enter into enforceable undertakings with the applicant in relation to s 920A [of the *Corporations Act*]. The applicant did not provide any jurisdictional basis upon which such an order might be made and, in my view, no such jurisdiction exists.

However, the courts usually do prefer settlement to occur and they sometimes push toward it. This is illustrated by the cases of *ACCC v Apollo Optical (Aust) Pty Ltd* and *ACCC v Monza Imports Pty Ltd*.

In *ACCC v Apollo Optical (Aust) Pty Ltd*, Apollo Optical Pty Ltd (‘Apollo’) supplied fashion spectacles which were intended to be used, or were likely to be used,
by consumers but which did not comply with the consumer product safety standard. In doing so, it breached s 65C(1)(a) of the *Trade Practices Act*. The ACCC applied for a consent order to stop the offending behaviour. But Apollo was at all times avowedly prepared to cooperate with the ACCC and willing to take the necessary steps to prevent such a breach from occurring in the future. Given this, the Court was concerned that the proceedings were unnecessary. Carr J considered whether, in this instance, an enforceable undertaking could achieve the same result as a consent order. He noted:

I raised the question whether, in those circumstances, the proceedings were necessary. I was concerned about the appropriateness of the Court making the proposed orders if the same result could easily have been achieved by the statutory undertaking process (under s 87B of the Act) without using up the resources of the parties and the Court by resorting to litigation. I had in mind also whether, for example, the applicant should be denied the costs order in its favour which was contained in the minute of proposed consent orders.

In response, the ACCC had to defend its position and explain why it had not entered into an enforceable undertaking, even though in theory it could not be compelled either to accept or reject an undertaking. The ACCC pointed out that it had considered entering into an enforceable undertaking with Apollo but that after weighing different factors, such as the seriousness of the offence allegedly committed,

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it had decided to litigate.\textsuperscript{38} The ACCC also observed that on other occasions it had accepted undertakings under s 87B of the \textit{Trade Practices Act} from other people in similar situations but that, despite those undertakings, breaches of the relevant product safety standard had continued. The ACCC was concerned at the time that the desired effect of educating traders and protecting the public was not being achieved by non-litigated outcomes.\textsuperscript{39} Specifically concerning Apollo, the ACCC had entered into an undertaking with Apollo in 1997 in relation to the supply of sunglasses that did not comply with the prescribed standard. Apollo undertook to cease the conduct, to remove the offending sunglasses from sale, and to institute a compliance program.\textsuperscript{40} Yet in 2001, the company allegedly again committed the same offence.

Carr J considered that these were relevant factors for the ACCC to have taken into account and that, in doing so, the ACCC was entitled to give them substantial weight. Carr J stated that ‘in the circumstances of this case I do not think that the Commission brought these proceedings unnecessarily or acted unreasonably in doing so’,\textsuperscript{41} and noted his agreement with the view of O’Loughlin J in \textit{Trade Practices Commission v Cue Design Pty Ltd}\textsuperscript{42} quoted above.

\begin{footnotesize}
\begin{enumerate}
\item Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd [2001] FCA 1456 (Unreported, Carr J, 17 October 2001), [6].
\item Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd [2001] FCA 1456 (Unreported, Carr J, 17 October 2001), [8]-[9].
\item ACCC, Enforceable undertaking: Apollo Optical Pty Ltd, Document No 97/13P (18 March 1997).
\item Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd [2001] FCA 1456 (Unreported, Carr J, 17 October 2001), [15].
\end{enumerate}
\end{footnotesize}
It is interesting to note that although the courts usually agree with O'Loughlin J’s statement that they cannot require a regulatory agency to enter into undertakings, if they find that a proceeding before them is unnecessary because the matter could have been dealt with by an undertaking, they might subtly push for an enforceable undertaking by, for instance, not granting a costs order. This was suggested in ACCC v Monza Imports Pty Ltd where Carr J noted:

I respectfully agree with O'Loughlin J’s view and will take a similar approach in the particular circumstances of this case. However, I should not be taken as ruling out the possibility that in different circumstances a Court might take into account the Commission’s refusal to accept a statutory undertaking when deciding whether to make orders such as those proposed in this matter or to award costs in its favour, even when such orders are proposed on a consent basis.

This statement may have serious implications in relation to the use of different sanctions by the regulators. It suggests that in certain instances the court may check the legitimacy of an action against the possible use of enforceable undertakings instead. This might particularly be the case when a breach may be remedied (through an enforceable undertaking) by the time the action gets to court and the outcome of the case becomes futile as a result.


Overseas, there also exists a preference towards settling proceedings out of court and
the resolution of disputes in relation to breaches of the law outside court is
encouraged. In the United States, emerging practice suggests that the deployment of
negotiated prosecutions within the financial services sector provides the basis for
much more effective control than court action. In negotiated prosecutions, a
corporation admits wrongdoing, agrees to a narrative proposed by prosecutors,
provides evidence to secure convictions against identified executives, and makes
traditional financial restitution and governance reforms in exchange for a decision to
defer civil or criminal prosecution or sentencing.46

Rule 16 of the Federal Rules of Civil Procedure (US) strengthens the hand of a trial
judge in brokering settlements. Rule 16 permits the court, at its discretion, to direct
the attorneys for the parties and any unrepresented parties to appear before it for a
conference or conferences before trial. There was even a proposal at one time to
amend Rule 68 of the Federal Rules of Civil Procedure to sharpen the incentive for
seeking settlement by requiring a party who rejects a settlement offer and then
receives a judgment less favourable than that offer, to pay the attorney fees of the
other party. However, the proposed amendment faced huge resistance and was
dropped.47 Currently, only statutory costs are included in Rule 68; they must be paid
when a party rejects a settlement offer and then receives a judgment less favourable
than that offer.

46 Justin O’Brien, ‘Securing Corporate Accountability or By-passing Justice? The Efficacy and Pitfalls

9.4 Matters Considered by the Courts before Enforcing an Undertaking

As noted in 9.1 above, if a promisor breaches an undertaking, the regulator may initiate legal action against the alleged offender by asking the court to enforce the undertaking. Section 87B(4) of the Trade Practices Act provides that:

If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the person to comply with that term of the undertaking;
(b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
(c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
(d) any other order that the Court considers appropriate.

Sections 93AA(4) and 93A(4) of the ASIC Act are framed in very similar terms.\textsuperscript{48} According to these provisions, the decision whether to make orders to enforce an undertaking entered into by the ACCC or ASIC is at the discretion of the court.

In ACCC v Alinta 2000 Ltd,\textsuperscript{49} the ACCC applied for enforcement of the undertaking it had entered into with Alinta 2000 in 2004. In his judgment Weinberg J stated that the breach of an undertaking ‘is a matter that will be viewed with the utmost

\textsuperscript{48} For the text of s 93AA(4) of the ASIC Act see 3.2.

\textsuperscript{49} Australian Competition and Consumer Commission v Alinta 2000 Ltd (2007) ATPR ¶42–179. As to the result in this case see 9.5.
seriousness'. What matters does the court consider in deciding whether or not to make orders enforcing an undertaking? If the court were only to ‘rubber stamp’ an undertaking, promisors would lose some of the protections available to them, especially in instances (rare as they may be) where the terms of an undertaking are unreasonable or the promisor has been bullied by the regulator into the undertaking. On the other hand, if the court sets difficult criteria or very high standards relating to the enforcement of undertakings, the regulator may be unwilling to attempt to enforce breaches of undertakings and the sanction would lose some of its effectiveness.

A review of the case law shows that courts may consider the following matters in deciding whether or not to enforce an enforceable undertaking:

- What circumstances led to the undertaking?
- Is there a breach of the undertaking?
- If there is a breach of the undertaking, should the court enforce the terms of the undertaking?

### 9.4.1 What Circumstances Led to the Undertaking?

The courts may look at the circumstances that led the promisor and the regulator to accept an undertaking. In *ACCC v Signature Security Group Pty Ltd*, the ACCC alleged that Signature Security Group Pty Ltd (‘Signature’) had breached certain provisions of an enforceable undertaking it had entered into with the ACCC and

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51 This will have an impact on the procedural fairness of the undertaking for it lowers the protection provided to the promisor. See further 4.3.2.3.

sought injunctive relief, declarations and orders in respect of Signature’s promotion of its security systems to the public. In his judgment, Stone J considered whether the undertakings had been properly given by the promisor and properly accepted by the ACCC.  

Further, Stone J distinguished circumstances in which an undertaking was accepted by the regulator to resolve a dispute from situations where an undertaking was given as part of a matter heard by the court.

In *ACCC v Woolworths (South Australia) Pty Ltd*, Mansfield J stated that the court should not ‘note’ undertakings proffered to the ACCC under s 87B(1) without regard to their content, reasoning that ‘the proper balance is for the Court to consider the terms of the undertaking, to be satisfied that prima facie it is one which the ACCC is empowered to accept.’ The court should not take an entirely passive attitude; and, importantly, that the full details of settlement should be properly recorded by the court. Mansfield J stated further, however, that when ‘noting’ an undertaking the court will not necessarily look at the circumstances that led to the undertaking in detail, due to the concern that making a positive finding that it is within power may ‘expose the risk of inconsistent findings upon the question, if a later application for [an] order under s 87B(4) was made’. This comment suggests that the court is

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56 *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 417, [44].

57 *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 417, [41]–[58].
unlikely to make a final determination as to whether or not an undertaking is within power at the time of ‘noting’ it: the proper time to fully investigate the circumstances that led to an enforceable undertaking is when the court is asked to determine whether a breach has occurred, that is, when the regulator seeks to enforce it. It is therefore likely that, when deciding whether or not to enforce an undertaking, the court may take into consideration whether the undertaking has been (or has not been) entered into as a proper exercise of the regulator’s discretion.

In situations where the court receives an application only for enforcement of the undertaking (and not also for a declaration that a breach of the law has occurred),\footnote{In making an application to the court for orders enforcing an undertaking, ASIC or the ACCC may also ask for a declaration that a breach of the law has occurred: see, for example, \textit{Australian Securities and Investments Commission v Online Investors Advantage Inc} (2005) 194 FLR 449; \textit{Australian Competition and Consumer Commission v Signature Security Group Pty Ltd} (2003) ATPR ¶41–942.} the court may consider whether the alleged breaches that led to the enforceable undertaking have actually occurred. Has there been a breach of the law? It may be necessary to confirm this because in a number of enforceable undertakings accepted by both ASIC and the ACCC, the promisors do not admit to any breach of the relevant legislation.\footnote{See further 5.4.} If ASIC or the ACCC tried to enforce such an undertaking, it would be possible for the promisor to challenge the enforceable undertaking itself. This is why the court may check the reason for entering into the undertaking in the first place. For example, in \textit{ASIC v Sharetrend Software Pty Ltd},\footnote{\textit{Australian Securities and Investments Commission v Sharetrend Software Pty Ltd} [2000] VSC 472 (Unreported, Mandie J, 3 November 2000).} ASIC sought to enforce an undertaking it had accepted from Share Trend Software Pty Ltd and its two directors, which required the company to cease doing any act in relation to the
marketing and sale of certain computer software that recommended its users buy or sell shares.\textsuperscript{61}

In this case, ASIC sought to enforce not only the terms of the enforceable undertaking but also the provisions of the \textit{Corporations Act}. The Court found there was an important issue to be decided as to whether the defendant had given investment advice without a licence. Ultimately, the Court decided that it would be more appropriate to hold a full trial on the substantive issues, rather than simply to enforce the undertaking.\textsuperscript{62} This case, in particular, shows that where the regulator does not prosecute the underlying breach, the court may in its own discretion consider the merits of the original undertaking.\textsuperscript{63} Consideration by the court of whether or not there has been a breach of the law enhances the procedural fairness of an undertaking, for it may provide extra protection to the promisor. This would especially be true in instances where an alleged offender entered into an undertaking not because it had contravened the law, but because it wanted to quickly remedy the regulator’s concerns without attracting too much negative publicity.

\textbf{9.4.2 Is There a Breach of the Undertaking?}

If the court is satisfied with the circumstances under which an enforceable undertaking was entered into, the court may consider whether a breach of the

\textsuperscript{61} ASIC, Enforceable Undertakings: Share Trend Software Pty Ltd, Robert Szatmari and Ian Albert Thour, Document Nos 008 547 309, 008 547 310, 008 547 311 (13 October 1998).

\textsuperscript{62} These proceedings were discontinued following the winding up of Share Trend. Although no final ruling in relation to Share Trend’s conduct was made in the Victorian proceedings, the case nevertheless sheds some light on factors the court may consider when deciding whether or not to enforce an enforceable undertaking.

enforceable undertaking actually occurred. The burden of proof in relation to this issue lies with the regulator. If ASIC or the ACCC cannot prove the breach, the court will not enforce the undertaking. This provides protection to the promisor and ensures the fairness of an undertaking by involving an impartial body, the court, in assessing whether or not the undertaking has been complied with.

For example, in 2000 ASIC was concerned that Online Investors Advantage Inc (‘Online’) was providing advice without a licence. It entered into an undertaking with the company to prevent this from happening in the future.\(^\text{64}\) In 2005, ASIC took action against Online and asked the court to enforce certain provisions of the undertaking which required Online to put certain amounts in trust for repayment to affected people. In ASIC v Online Investors Advantage Inc,\(^\text{65}\) the Court rejected ASIC’s request, finding that ASIC had not proven the breach of the enforceable undertaking and therefore could not ask for its enforcement. In fact, the Court observed that Online had complied with the provisions ASIC wanted to enforce and had actually paid the amounts required.\(^\text{66}\)

In ACCC v Signature Security Group Pty Ltd,\(^\text{67}\) the ACCC alleged that the undertaking it had entered into with Signature had been breached. Signature submitted that in order to show that it had breached the enforceable undertaking, it

\(^{64}\) ASIC, Enforceable Undertaking: Online Investors Advantage Inc, Document No 008 547 407 (20 January 2000).

\(^{65}\) Australian Securities and Investments Commission v Online Investors Advantage Inc (2005) 194 FLR 449.

\(^{66}\) Australian Securities and Investments Commission v Online Investors Advantage Inc (2005) 194 FLR 449, [216].

was necessary to show that it had intentionally conducted itself in a manner inconsistent with the enforceable undertaking. The Court rejected this argument, Stone J observing.  

The purpose of a corporation giving undertakings to the ACCC is, at least in part, to avoid unnecessary litigation by voluntary undertakings that the corporation will not engage in conduct of the type precluded by the terms of the undertakings. It would be strange if the effect of the undertakings were to give the ACCC rights resulting from breach only where the conduct is intentional in circumstances where intention is not an element of the alleged offence under the Trade Practices Act. Such an interpretation would severely limit the efficacy of such undertakings which presumably are designed to prevent the alleged contravening conduct in any form, whether deliberate, inadvertent or otherwise. In any event if it were intended that intention be a necessary element of breach it would be easy for the parties to incorporate this in the undertakings.

In deciding whether or not an undertaking has been breached, therefore, the court will apply an objective test and will not consider intent where intent is not a requirement of the law that has been breached. The lack of an intention to breach the undertaking cannot be used by the promisor as a defence to avoid enforcement of the undertaking.

9.4.3 If There is a Breach, Should the Court Enforce the Undertaking?

In their joint judgment in *NW Frozen Foods v ACCC*, Burchett and Kiefel JJ noted in relation to agreed penalties that “[t]he court will not depart from an agreed figure

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[decided by the parties] merely because it might otherwise have been disposed to select some other figure, or except in a clear case’. 70 This principle of non-interference is not necessarily followed when enforcing an undertaking, however. Even when the courts acknowledge that an enforceable undertaking has been breached, they are not always willing to enforce it. The courts are not disposed simply to ‘rubber stamp’ the terms of the resolutions agreed and tendered by consent of the parties in court proceedings, and may usually try to find an equilibrium between the desire to support the settlement reached by the parties and the public interest.

In ACCC v Real Estate Institute of Western Australia Inc, 71 French J considered the role of the court when adjudicating on the appropriateness of undertakings and orders tendered to it: 72

In carrying out these functions, courts are conscious of the public interest in the settlement of cases. They must also be conscious, however, that the laws they apply are public laws. It is in the public interest that, in considering agreement between parties requiring orders of a court, the court does not act as a mere rubber stamp. What is proposed must always be scrutinised to determine whether undertakings or consent orders are within power and are appropriate … In the exercise of that power the court is not merely giving effect to the wishes of the parties, it is exercising a

71 Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 161 ALR 79.
72 Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 161 ALR 79, [3] and [20].
public function and must have regard to the public interest in doing so. This principle applies to the resolution of private litigation by consent orders or undertakings.

There are no clear rules on factors the courts should consider when scrutinising an undertaking having regard to the public interest and deciding whether or not to enforce its terms. However, a court may look at the following criteria in assessing the validity of an enforceable undertaking and whether it has been breached:

- Are the undertakings within the power of the regulator and the court?
- Are the undertakings clear and unambiguous?
- Are the undertakings ‘live undertakings’?

9.4.3.1 Undertakings Within the Power of the Regulator and the Court

If an undertaking is beyond the power of the regulator, the court may not make an order to enforce it. In *ACCC v Woolworths (South Australia) Pty Ltd*,73 the ACCC argued that the court should not be concerned with the terms of an undertaking when asked to note it, because the undertaking is given to the ACCC, not to the court. Mansfield J rejected this reasoning. His Honour held that the court will not acknowledge an undertaking proffered by the ACCC under s 87B(1) of the *Trade Practices Act* unless the court is satisfied that, prima facie, the undertaking is one which the ACCC is empowered to accept because, even though the court is empowered to enforce an undertaking in the case of breach, if the undertaking is

73 *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 417.
beyond the ACCC’s power, the court will not make an order to enforce it. 74 This line of reasoning was adopted in ASIC v Tower Australia Ltd. 75 In short, the court may check whether the undertaking clearly is ‘in connection with a matter in relation to which [the regulator] has a power or function under [the relevant legislation]’. 76

It was observed in ACCC v Woolworths (South Australia) Pty Ltd, 77 however, that the words ‘in connection with’ present in s 87B(1) of the Trade Practices Act have a wide import. Mansfield J stated that: 78

[T]he ACCC’s power under s 87B is to accept an undertaking ‘in connection with’ a matter in relation to which it has a power or function. It is arguably a more extensive power. The scope of the power is to be determined as a matter of statutory construction. The expression ‘in connection with’ was given a wide scope of operation by Kitto J in Berry v Federal Commissioner of Taxation (1953) 89 CLR 653 at 658–9, as requiring ‘a substantial relation, in a practical business sense’. The test does not necessarily require an immediate causal relationship: per Wilcox J in Our Town FM Pty Ltd v Australian Broadcasting Tribunal (1987) 16 FCR 465 at 479–80.

74 Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd (2003) 198 ALR 417, [42].

75 Australian Securities and Investments Commission v Tower Australia Ltd [2003] FCA 660 (Unreported, Sackville J, 4 July 2003), [10]. The Court, when deciding whether to note court enforceable undertakings proffered to the regulator as part of the ultimate resolution of proceedings, may look at whether the undertakings fall within or outside ASIC’s powers.

76 Trade Practices Act, 87B(1); ASIC Act, ss 93AA(1), 93A(1).


78 Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd (2003) 198 ALR 417, [55].
Mansfield J further noted that the power of a statutory authority empowered by such a provision to accept an enforceable undertaking is more comprehensive than that of a court, which is subject to certain restraints. The wide import of the words ‘in connection with’, also present in s 93AA(1) of the ASIC Act, was similarly pointed out by the Court in ASIC v Edwards.

It may be argued, therefore, that enforceable undertakings enable parties to reach a more flexible, and appropriate, resolution than a court order may, because s 87B(1) of the Trade Practices Act and ss 93A(1) and 93AA(1) of the ASIC Act give wider powers to the regulators to accept court enforceable undertakings than the court may have when it directly accepts undertakings or makes orders. There is some judicial support for this notion. For instance, in BMW Australia Ltd v ACCC, the Full Federal Court observed (although it did not express a final opinion) that, even though the ACCC may accept an undertaking that requires an expert to audit a compliance program, the court may have no power under s 86C of the Trade Practices Act to make such an order. The Court has similarly held that it cannot order compensation

79 Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd (2003) 198 ALR 417, [55].


81 Christine Parker, ‘Arm-Twisting, Auditing and Accountability: What Regulators and Compliance Professionals Should Know about the Use of Enforceable Undertakings to Promote Compliance’ (Presentation to the Australian Compliance Institute, 28 May 2002), especially 15–19.


83 BMW Australia Ltd v Australian Competition and Consumer Commission (2004) 207 ALR 452, [51]. However, the position does not appear to be settled. See, for example, the reasoning in Australian Competition and Consumer Commission v Auspine Ltd (2006) 235 ALR 95, 109 where Besanko J considered that orders requiring an external audit of a compliance program could be made, provided that they do not involve an impermissible delegation of the court’s power to determine the question of a breach of the order or undertaking to a third party; Australian Competition and Consumer Commission v EDirect Pty Ltd (2008) ATPR ¶42–216, [37].

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for non-parties to a proceeding. However, one of the aims of the sanction of enforceable undertaking is corrective action and a number of undertakings have been entered into by ASIC and the ACCC in order to provide refunds or compensation to affected persons not parties to those undertakings. As the regulators are not confined to what a court might ordinarily order, they are able to assist in remedying legislative ‘gaps’.

This may raise the question whether the court may enforce undertakings containing promises that are beyond the power of the court? Are the limitations applying to the court’s power to grant a final injunction relevant to its enforcing of undertakings?

Limitations on the court’s jurisdiction or power to grant a final injunction are usually observed in the acceptance of a court undertaking when it is offered as a substitute for a final injunction. In short, the court cannot put itself in the position of enforcing conduct which it has no capacity to command or compel, and the parties cannot by consent confer power on the court to make orders which the court lacks the power to make. The reason behind this is that the power of the court to make orders is conferred by public law and not by private agreement. The court should ensure that what is proposed by the parties is not contrary to the public interest and is at least consistent with it.

85 Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 161 ALR 7, [3].
This reasoning may not apply in the case of an enforceable undertaking. Section 87B(4) of the *Trade Practices Act* and ss 93A(4) and 93AA(4) of the *ASIC Act* expressly allow the court wide latitude to make orders for the enforcement of enforceable undertakings. These sections provide that the court may make an order enforcing the terms of an enforceable undertaking. In cases where the parties have elected to enter into an enforceable undertaking to resolve a dispute rather than start court proceedings, there is a tendency for the court to be willing to enforce the terms of the undertaking even where the terms of the undertaking are beyond the power of the court.

It would nevertheless be prudent for the regulator, in deciding what terms it should seek in court enforceable undertakings, to examine the principles the court enunciates when making orders. The regulator may not wish to stray too far from what the court might order since, if it were to do so, the enforceable undertaking drafted may have no utility if the court were to find it unenforceable. This may be more likely to be the case in some instances than others. For example, if the regulator requests the court to note an enforceable undertaking, this may be akin to invoking its power to grant injunctions or make orders more generally, and therefore the court will not directly accept undertakings that are outside of those powers. Similarly, in other cases where the matter has been resolved in court and enforceable undertakings are given as

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90 See, for example, *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 41, [46], where the Court considered that where undertakings are proffered to the court it may accept them only when the terms of the undertaking fall within its powers.
part of the ‘determination of the matter’, the court may not make such orders if the undertaking imposes obligations that exceed the court’s power to make orders then.\textsuperscript{91}

\textbf{9.4.3.2 Undertakings are Clear and Unambiguous}

The terms of an enforceable undertaking must be formulated with precision so that they are capable of being carried out. Undertakings that involve vague evaluative judgments or significant debates on their interpretation are not likely to be given the court’s sanction.\textsuperscript{92} The Court has expressed concern, for instance, at orders for the implementation of a compliance program the specifications for which were very vague, in fact able to be described as ‘aspirational in their expression and not readily measured in application’;\textsuperscript{93} although this difficulty may be overcome by the insertion of a ‘best endeavours’ qualification, allowing final determination of a breach of the terms of the undertaking to be adjudicated on by the court.\textsuperscript{94}

In the past, a number of enforceable undertakings have provided only limited advice to promisors in respect of exactly what is required of them to fulfil the terms of their undertakings. For instance, examples of undertakings containing vague clauses in

\begin{footnotesize}
\begin{enumerate}
\item Australian Competition and Consumer Commission v Signature Security Group Pty Ltd (2003) ATPR ¶41–942. See also Miller, above n 54, 974.
\item Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 161 ALR 7, [13].
\item See, for example, ASIC, Enforceable Undertaking: Garrisons Pty Ltd, Document No 017 029 005 (27 June 2001), [11](b)(i) (the company undertook ‘to make reasonable endeavours’ to seek the return and payment of any interest outstanding on the principal sum from relevant third parties).
\end{enumerate}
\end{footnotesize}
relation to compliance programs were considered in Chapter 8. If the terms of an undertaking are vague this may cause problems when the regulator seeks to enforce the undertaking, since if the terms of the undertaking are too wide and too vague the question of breach of the undertaking is likely to be a subjective one, and difficult to prove. If the terms of the undertaking are vague, the court may consider there has been no breach. This may lead to a situation where the spirit of an undertaking has been breached but not the substance of the undertaking, yet in such an event the court’s hands may be tied.

As a consequence, ASIC and the ACCC have attempted to make the terms of enforceable undertakings more specific. It was also noted in Chapter 5 that in 2005 the ACCC issued a series of detailed template trade practices compliance program obligations which it has sought to include where appropriate in the undertakings it has subsequently entered into, and two accompanying guides. Similarly, as noted in Chapter 3, in 2007 ASIC released guidelines in relation to the broader content to be expected in enforceable undertakings it enters into, as well as templates including sample terms in relation to compliance programs, compensation and corrective advertisements.

95 See 8.3.3.2.
96 Farmer, above n 92, 252.
97 See 5.3.1; ACCC, ‘Trade Practices Compliance Program Template Undertakings’, <http://www.accc.gov.au/content/index.phtml/itemId/716224>. See also Louise Sylvan, ACCC Deputy Chair, ‘Future proofing—working with the ACCC’ (Presentation to the Australian Compliance Institute, Melbourne, 1 September 2005), <http://www.accc.gov.au/content/index.phtml?itemId=706591&nodeId=a5b95d899226cb9db64fcb45b4674b0f&fn=20050901%20ACI.pdf>.
Both ASIC and the ACCC are also willing to vary the enforceable undertakings they have entered into if they believe the terms of the undertaking are vague or unclear, or if it is found that the undertaking is unable to be complied with for a variety of reasons. There are many such instances on the ACCC’s public register. For example, in 2000 the ACCC agreed to vary the undertaking it had entered into with Waratah Towage Ltd for the purpose of clarifying what was meant by one of the promises given in the undertaking.\textsuperscript{99} In another example, in 2007 the ACCC varied an enforceable undertaking it had entered into with Alliance Factoring Pty Ltd which imposed an obligation on Alliance Factoring Pty Ltd to establish a complaints handling procedure for dealing with debtors who question or deny that they owe a debt to the company. The variation dealt with persisting complaints about possible breaches of the undertaking in relation to the company’s complaints handling system.\textsuperscript{100}

ASIC has also modified undertakings it has entered into in certain instances. For example, in 2000 ASIC agreed to vary the undertaking it had accepted from CIBC World Markets Australia Ltd. The company had undertaken to engage an independent consultant to review and assess its legal and regulatory compliance program and make an initial report to the company and ASIC by a certain date. The consultant subsequently advised the company and ASIC that the task was


\textsuperscript{100} ACCC, Enforceable Undertaking: Alliance Factoring Pty Ltd, Document No D05/50801 (17 June 2005) varied by ACCC, Enforceable Undertaking: Alliance Factoring Pty Ltd, Document No D07/18524 (27 February 2007).
considerably more complex and time consuming than anticipated and it would be
unable to meet the deadline specified in the undertaking.\textsuperscript{101} The company requested
and ASIC consented to an extension of the deadline. In another example, also in
2000, ASIC accepted a variation of the undertaking it had entered into with Online
Investors Advantage Incorporated. The company had undertaken, among other
things, that it would apply to ASIC for an investment adviser’s licence for Australia
by a certain date. The company advised that it was restructuring its business
operations in Australia and that conducting a search for persons with relevant
qualifications and experience of the Australian market to act as its responsible officers
from the United States had taken more time than anticipated. It requested a short
extension of time in which to apply for the appropriate licence so as to enable the
company to provide a complete application to ASIC based upon the skills and
experience of the new company employee. ASIC agreed to vary the date by an
extension of one month.\textsuperscript{102}

As the above instances demonstrate, the regulators are making an effort to ensure that
the terms of the undertakings they enter into are clear and able to be complied with.
This is likely to make it easier for the courts to enforce the terms of enforceable
undertakings.

\textsuperscript{101} ASIC, Enforceable Undertaking, CIBC World Markets Australia Ltd, Document No 008 547 427
(27 March 2000) varied by ASIC, Enforceable Undertaking, CIBC World Markets Australia Ltd,
Document No 008 547 449 (3 May 2000).

\textsuperscript{102} ASIC, Enforceable Undertaking, Online Investors Advantage Incorporated, Document No 008 547
407 (20 January 2000) varied by ASIC, Enforceable Undertaking, Online Investors Advantage
Incorporated, Document No 008 547 437 (1 May 2000).
Another consideration affecting the likelihood of the court making an order to enforce an undertaking is whether there is a sufficient link between the undertaking sought to be enforced and the alleged breach which gave rise to the undertaking. In *ACCC v Z Tek Computer Pty Ltd*, it was pointed out that there should be a nexus between the conduct and the injunction granted by the court, that is, there should be a sufficient link between the alleged offence and the order sought by the regulator. If the order sought does not relate to the alleged breach, the court may not enforce the undertaking. For instance, if ASIC or the ACCC sought to enforce an undertaking in relation to the implementation of a compliance program covering all the provisions of the *Corporations Act* or the *Trade Practices Act*, the court may not enforce it as being too remote from the alleged contravention. The lack of a sufficient nexus may make such an order an inappropriate exercise of the court’s power which, on appeal, may run the risk of being held to be an order that it was not within the court’s power to make. This difficulty may be resolved by linking the promises given in an undertaking to the alleged breach of the law that led to the undertaking. To do so, however, may hamper the introduction of certain clauses that are restorative in nature into an undertaking, as was discussed in Chapter 7.

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105 Farmer, above n 92, 252.

106 See 7.3.1.4.
9.4.3.3 Undertakings are Still ‘Live Undertakings’

Before deciding to enforce the terms of an enforceable undertaking the court is also likely to ensure that the particular undertaking is a ‘live undertaking’,\(^\text{107}\) that is, that the undertaking is still in effect. In most instances, the ACCC expressly limits in time the obligations in the undertakings it enters into and, for the most part, the obligations run for a maximum of three years, although there are exceptions. For example, in 2006 the ACCC entered into an undertaking with JB Hi-Fi Group Pty Ltd following concerns that the company was involved in misleading and deceptive advertisement. JB Hi-Fi Group Pty Ltd promised, among other things, to implement a compliance program and maintain it for a period of three years from the date of the enforceable undertaking.\(^\text{108}\) That particular term of the enforceable undertaking would only be enforceable during that period of time. In certain instances, ASIC has imposed similar time restrictions in undertakings it has entered into.\(^\text{109}\)

Where an undertaking is not limited in time, a question may be raised by the court as to when it ceases to have effect? In principle, an undertaking will remain in effect until the terms of the undertaking have been complied with or until the undertaking is

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\(^{108}\) ACCC, Enforceable Undertaking: JB Hi-Fi Group Pty Ltd, Document No D06/85555 (5 December 2006).

\(^{109}\) See, for example, ASIC, Enforceable Undertaking: Transcomm Credit Co-operative Ltd, Document No 017 029 194 (28 March 2006), [2.12] (maintain compliance program for two years); ASIC, Enforceable Undertaking: Mortgage Point Pty Ltd, Document No 014 835 083 (24 February 2005), [2.10] (maintain compliance program for three years). However, ASIC has not usually included time limitations on such promises in its undertakings: examples of undertakings including a promise to implement a compliance program for an unspecified duration include ASIC, Enforceable Undertaking: American International Assurance Company (Australia) Ltd, Document No 017 029 191 (24 January 2006), [2.2] (maintain and regularly update compliance program); ASIC, Enforceable Undertaking: AIA Financial Services Ltd, Document No 017 029 190 (24 January 2006), [2.2] (maintain and regularly update compliance program). While there is, of course, no provision in the *ASIC Act* equivalent to s 86C of the *Trade Practices Act*, it is possible this may raise issues relating to the enforceability of the undertakings: see further text below.
varied or withdrawn. However, while the situation is by no means clear, it is possible that if express statutory time limits are stated in relation to other provisions of the same legislation, the court may have some difficulty enforcing an undertaking of a longer or undefined duration. For example, s 86C of the *Trade Practices Act* provides that, on application by the ACCC, the court may make an order directing a person to establish a compliance program for a period of no longer than three years. In this circumstance, a promise in an enforceable undertaking to implement a compliance program for a period longer than three years may intuitively seem to be overly burdensome if there is no clear and compelling reason for the longer duration.

Matters considered by the courts in relation to the granting of injunctions under s 80 of the *Trade Practices Act* may be informative in respect of judicial attitudes on this point.\(^\text{110}\) In *ACCC v Francis*,\(^\text{111}\) Gray J found that ‘the period of five years, for which the proposed injunction is to run, has been chosen by the parties. It is not an obviously excessive period’.\(^\text{112}\) On the other hand, when in *ACCC v Midland Brick Co Pty Ltd*\(^\text{113}\) the Court considered the interrelationship between injunctive relief and non-punitive orders and the time limits that were appropriate, five years was considered to be ‘the outer limit’ for an injunction in the particular circumstances.\(^\text{114}\)

\(^{110}\) Section 80(1) of the *Trade Practices Act* provides that where, on the application of the ACCC or any other person, the court is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute a contravention of a provision of certain parts of the *Trade Practices Act*, the court may grant an injunction in such terms as the court determines to be appropriate.


\(^{112}\) *Australian Competition and Consumer Commission v Francis* (2004) 142 FCR 1, [126].


\(^{114}\) *Australian Competition and Consumer Commission v Midland Brick Co Pty Ltd* (2004) 207 ALR 329, [44]–[47].
In *ACCC v George Weston Foods Ltd*, Gyles J questioned the reason for a time limit at all, stating ‘[i]t is difficult to see the reason for a time limit in relation to a properly framed injunction, bearing in mind s 80(3)’.

Further, where the effect of the undertaking may impose obligations in excess of those imposed by the *Corporations Act* or the *Trade Practices Act*, or the controversy between the parties has been resolved by the court, then even if the undertaking has been breached, the court may refuse to enforce it. In the end, the court has the discretion to decide whether or not an undertaking will be enforced.

### 9.5 Results of Applications for Orders to Enforce Undertakings

If the court is satisfied that an enforceable undertaking has been breached, the legislation provides that the court may make any order it considers appropriate to deal with the breach. This may include an order directing the promisor to comply with that term of the undertaking and/or requiring the promisor to pay a sum of money to various persons such as the victims of the breach, the regulator or the Commonwealth.

ASIC and the ACCC have attempted to enforce enforceable undertakings in court on a number of occasions. Between 1998 and 2008 ASIC has endeavoured to enforce

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116 *Australian Competition and Consumer Commission v George Weston Foods Ltd* (2004) 210 ALR 486, [30]. Section 80(3) of the *Trade Practices Act* provides that the court may rescind or vary an injunction granted under subsection (1) or (2).


118 *ASIC Act*, ss 93AA(4), 93A(4); *Trade Practices Act*, s 87B(4).
nine undertakings in court. Those undertakings and the results of the attempt to enforce them are listed below:\textsuperscript{119}

- Enforceable undertaking with Graeme Clifford Grubb and Margaret Elizabeth Grubb dated 4 May 1999.\textsuperscript{120} The Court found, in this case, that the promisors had breached the enforceable undertaking. Among other things, ASIC obtained an injunction restraining Mr Grubb from carrying on business as a finance broker or mortgage manager or being in any way directly or indirectly concerned in the management of any such business or businesses.\textsuperscript{121}

- Enforceable undertaking with Robyn-Ann Carrolle Cochrane dated 20 October 1998.\textsuperscript{122} This was one of the first undertakings that ASIC attempted to enforce. The Court found that Ms Cochrane had breached the enforceable undertaking and ordered her to stop providing investment advice to any person and to pay certain victims compensation for the losses they had suffered.\textsuperscript{123}

- Enforceable undertaking with Suncorp-Metway Insurance Ltd dated 30 August 1999.\textsuperscript{124} ASIC sought consent orders with Suncorp-Metway Insurance Ltd for breach of the undertaking because ASIC believed that the promisor continued to make claims about available discounts on its premiums without

\textsuperscript{119} The data shown has not been verified by ASIC and does not include all the proceedings started and then withdrawn by ASIC.

\textsuperscript{120} ASIC, Enforceable Undertakings: Rowena Nominees Pty Ltd, Graeme Clifford Grubb and Margaret Elizabeth Grubb, Document Nos 008 547 349, 008 547 350 (4 May 1999).


\textsuperscript{124} ASIC, Enforceable Undertaking: Suncorp Metway Insurance Ltd, Document No 008 547 385 (30 August 1999).
stating a basis for the claimed available discounts. As a consequence, the Federal Court placed injunctions on the promisor regarding all future promotional materials.\textsuperscript{125}

- Enforceable undertaking with Australian Investors Forum Pty Ltd dated 31 January 2000.\textsuperscript{126} ASIC took action against the promisor for breach of the enforceable undertaking. The Supreme Court of New South Wales ordered the company to stop publishing any type of promotional material until it became a licensed investment adviser, and to refund all affected parties.\textsuperscript{127}

- Enforceable undertaking with Share Trend Software Pty Ltd dated 13 October 1998.\textsuperscript{128} In this case, ASIC had commenced a number of proceedings against Share Trend Software Pty Ltd, one of which was a proceeding in the Supreme Court of Victoria in relation to the breach of an enforceable undertaking the company had entered into with ASIC.\textsuperscript{129} However, after ASIC obtained an order in the Supreme Court of Queensland winding up the company, the regulator did not continue with the civil proceedings commenced in relation to the enforcement of the enforceable undertaking.\textsuperscript{130}

\textsuperscript{125} ASIC, ‘Injunctions Placed on SunCorp-Metway’, Media Release 99/384 (20 October 1999).

\textsuperscript{126} ASIC, Enforceable Undertaking: Australian Investors Forum Pty Ltd, Document No 008 547 408 (31 January 2000).

\textsuperscript{127} ASIC, ‘Court Upholds AIF Enforceable undertaking’, Media Release 00/253 (13 June 2000).

\textsuperscript{128} ASIC, Enforceable Undertakings: Share Trend Software Pty Ltd, Robert Szatmari and Ian Albert Thour, Document Nos 008 547 309, 008 547 310, 008 547 311 (13 October 1998).

\textsuperscript{129} Australian Securities and Investments Commission v Sharetrend Software Pty Ltd [2000] VSC 472 (Unreported, Mandie J, 3 November 2000).

\textsuperscript{130} ASIC, ‘ASIC Obtains Orders Winding up Share Trend’, Media Release 03–207 (1 July 2003).
• Enforceable undertaking with Richard Clayton Sharland dated 8 April 2002. The Court found that Mr Sharland had breached the enforceable undertaking. ASIC obtained a number of declarations, one of which was in relation to a breach of the undertaking.

• Enforceable undertaking with Henry Kaye dated 30 July 2003. ASIC had commenced a number of proceedings against Mr Kaye, one of which was a proceeding in relation to breach of the compensation provisions in an enforceable undertaking he had entered into with ASIC. This proceeding was discontinued because ASIC was successful in obtaining other orders it had sought against Mr Kaye which had a greater regulatory impact (compensation orders, undertakings to the Court not to engage in such conduct in future), and ASIC determined that continuing proceedings in relation to the breach was not an effective use of its resources.

• Enforceable undertaking with Ludgates Corporate and Investment Advisory Services Pty Ltd dated 29 February 2000. ASIC instituted proceedings for breach of the enforceable undertaking, but settled later with declarations, a


banning order and repayment of investors’ funds paid in breach of the enforceable undertakings.  

- Enforceable undertaking with Online Investors Advantage Inc dated 20 January 2000.  

The Court did not find that the enforceable undertaking had been breached.  

Between 1993 and 2008, the ACCC has endeavoured to enforce eight undertakings in court. Those undertakings and the results of the attempt to enforce them are listed below:  

- Enforceable undertaking with Ultra Tune Australia Pty Ltd dated 8 May 1996.  

The proceedings resulted in a consent order.  

- Enforceable undertaking with Acepark Pty Ltd dated 27 July 1999.  

The ACCC instituted proceedings against the company, company directors and related companies partly to enforce the undertaking, however, that part of the proceedings was later dropped. The Court made declarations and findings of fact, including that the company, through one of its directors, had breached the

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136 Australian Securities and Investments Commission v Ludgates Corporate and Investment Advisory Services Pty Ltd (No 1) [2005] FCA 827 (Unreported, Graham J, 14 June 2005).


139 This data may not include all proceedings started and then withdrawn by the ACCC.


141 Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd (Unreported, Federal Court (Sydney registry), Madgwick J, 1 October 1998).

undertaking. The Court also made consent orders against the directors and granted permanent injunctions against several companies, including the company formerly known as Acepark Pty Ltd. 143

- Enforceable undertaking with Signature Security Group Pty Ltd dated 21 December 2000. 144 The Court found that a breach of the enforceable undertaking had occurred and made a number of orders in relation to the breach of the undertaking. It did not order the company to comply with the terms of the undertaking because the dispute arising from the case had been resolved through the other orders made by the Court. Issuing an order enforcing the undertaking would have imposed excessive obligations on the party. 145

- Enforceable undertaking with Autex Pty Ltd dated 13 May 2005. 146 The ACCC took action against Autex Pty Ltd for breach of its undertaking. The Court made declarations and orders (including an order to disclose the outcome of the proceedings to the public) by consent against Autex Pty Ltd for breaches of the enforceable undertaking and the Trade Practices Act. 147

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143 See ACCC, ‘ACCC Trifecta against Gold Coast Punting Software Promoters’, Media Release 215/02 (9 September 2002).


146 ACCC, Enforceable Undertaking: Autex Pty Ltd, Document No D05/33139 (13 May 2005).

• Enforceable undertaking with GO Drew Pty Ltd dated 3 February 2004.\textsuperscript{148} The ACCC started proceedings against GO Drew Pty Ltd in relation to possible breaches of its enforceable undertaking and the \textit{Trade Practices Act}. The Court made orders against GO Drew Pty Ltd and its manager and compliance officer.\textsuperscript{149}

• Enforceable undertaking with Alinta 2000 Ltd (then Alinta Ltd) dated 25 October 2004.\textsuperscript{150} The ACCC took action against Alinta 2000 Ltd for breach of the enforceable undertaking. The Court found that the company had breached the enforceable undertaking and made orders settling the litigation by consent, including requiring the company to pay the ACCC’s costs.\textsuperscript{151}

• Enforceable undertaking with StoresOnline International, Inc and StoresOnline, Inc dated 24 April 2006.\textsuperscript{152} The ACCC started proceedings against StoresOnline International, Inc and StoresOnline, Inc in relation to alleged breaches of the undertaking. The Court enforced the terms of the undertakings.\textsuperscript{153}

\textsuperscript{148} ACCC, Enforceable Undertaking: GO Drew Pty Ltd, Document No D04/5047 (3 February 2004).

\textsuperscript{149} \textit{Australian Competition and Consumer Commission v GO Drew Pty Ltd} [2007] FCA 1246 (Unreported, Gray J, 16 August 2007).

\textsuperscript{150} ACCC, Enforceable Undertaking: Alinta Ltd, Alcoa of Australia Ltd and Diversified Utility and Energy Trusts No 1 and No 2, Document No D04/53564 (25 October 2004).

\textsuperscript{151} \textit{Australian Competition and Consumer Commission v Alinta 2000 Ltd} (2007) ATPR \textsuperscript{¶}42–179, [3]. See also ACCC, ‘Federal Court declares Alinta breached s 87B undertakings’, Media Release 235/07 (29 August 2007).

\textsuperscript{152} ACCC, Enforceable Undertaking: StoresOnline International, Inc and StoresOnline, Inc, Document No D06/29587 (24 April 2006).

\textsuperscript{153} \textit{Australian Competition and Consumer Commission v StoresOnline International Inc} (2007) ATPR \textsuperscript{¶}42–196. See also ACCC, ‘StoresOnline found to have breached previous undertakings: Workshops to go ahead under new orders’, Media Release 285/07 (22 October 2007).
• Enforceable undertaking with Richard Alexander Roberson dated 2 April 2008.\textsuperscript{154} The ACCC alleged that Mr Roberson was in breach of his undertaking. The Court found that the undertaking had been breached and ordered Mr Roberson to comply with the terms of the undertaking and pay the ACCC’s costs.\textsuperscript{155}

The breach of an undertaking may result in a court order enforcing the undertaking. However, the power given to the court by ss 93AA(4) and 93A(4) of the \textit{ASIC Act} and s 87B(4) of the \textit{Trade Practices Act} enables it to go further, when satisfied that the person who gave the undertaking has breached any of its terms, than merely ordering the person to comply with the terms of the undertaking they have made. Using this power courts have in the past, for example, made declaratory orders, punitive and non-punitive orders and issued injunctions. They have also ordered refunds to be paid to people affected by the breach. Further, breach of an undertaking may even result in aggravation of the penalty.

\textbf{9.6 \hspace{1em} In Summary}

It may be concluded that the courts are not averse to enforceable undertakings if they are used appropriately by the regulators. Courts have, at times, encouraged the regulators to enter into enforceable undertakings. As was apparent from \textit{ACCC v

\textsuperscript{154} ACCC, Enforceable Undertaking: Richard Alexander Roberson, Document No D08/26915 (2 April 2008).

\textsuperscript{155} \textit{Australian Competition and Consumer Commission v Roberson} [2008] FCA 1735 (Unreported, Graham J, 4 November 2008). See also ACCC, ‘Employment services operator found to have breached court-enforceable undertakings’, Media Release 340/08 (1 December 2008).
Apollo Optical (Aust) Pty Ltd\textsuperscript{156} and ACCC v Monza Imports Pty Ltd,\textsuperscript{157} if an undertaking could be utilised to deal with an offence, the court may not welcome the fact that the regulator initiated court action instead. Carr J made it clear that the court’s resources should be left for more important matters. However, the court will not enforce an undertaking without taking into consideration a number of factors, as is illustrated in Diagram 9.3. Some factors the court may consider when deciding whether or not to enforce an undertaking are the existence of a nexus between the conduct and the undertakings given, the clarity of the wording and lack of vagueness of the undertaking. Such considerations provide some protection to the promisor and enhance the procedural fairness of the enforceable undertaking.

Both ASIC and the ACCC have adopted a number of templates and guides in relation to the content of enforceable undertakings and, in continuing to formulate undertakings, appear to be taking into consideration the previous court decisions in respect of the enforcement of undertakings. This strategy will enable the regulators to systematically adapt their policies in relation to enforceable undertakings in the light of evolving court scrutiny.

The model illustrated in Diagram 9.3, which summarises the process the court may go through in deciding whether or not to enforce an enforceable undertaking, may assist regulators in maximising the chances that the undertakings they enter into will be enforceable.


\textsuperscript{157} Australian Competition and Consumer Commission v Monza Imports Pty Ltd (2001) ATPR ¶41–843.
Diagram 9.3. Factors that may be considered by the court when enforcing the undertaking\textsuperscript{158}.

\textsuperscript{158} For the purpose of this diagram, ‘enforceable undertaking’ is abbreviated to ‘EU’.
The court’s considerations in interpreting the legislative provisions regulating the enforceable undertakings that may be entered into by ASIC and the ACCC may be highly informative for other statutory regimes in Australia with or considering the introduction of enforceable undertakings provisions. Similarly, the above model may offer a useful conceptualisation to other regulators that have or are to have the sanction of enforceable undertaking at their disposal, to assist them in drafting effective enforceable undertakings.
Chapter 10 : Conclusion

10.1 Aim of this Thesis

Although settlements have often been used by regulators to deal with contraventions of the law,\(^1\) such settlements have been criticised.\(^2\) Criticisms have included concerns about the transparency\(^3\) and reasonableness of the terms\(^4\) of such settlements, as well as the adequacy of the monitoring of settlements\(^5\) and whether regulators were able to enforce settlements in court in instances where the other party to the settlement failed to comply with its terms.\(^6\)

In 1993 a new sanction named the enforceable undertaking was introduced into the ACCC’s regulatory system and, due to its apparent success, it was subsequently introduced into ASIC’s regulatory system in 1998. The enforceable undertaking is a promise enforceable in court by which an alleged offender promises the regulator to do or not do certain actions.\(^7\) This sanction, which may be classified as an

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\(^4\) Fiss, above n 2, 1076.

\(^5\) Tom Tyler, Why People Obey the Law (Princeton University Press, 2\(^{nd}\) ed, 2006), 19.

\(^6\) Yeung, above n 2, 105; Parker, above n 1, 214.

administrative sanction, is a new form of settlement. The incorporation into legislation of enforceable undertakings provisions thus legitimised the use of settlements to deal with alleged breaches of the law.

As the provisions of enforceable undertakings under s 87B of the *Trade Practices Act* and ss 93AA and 93A of the *ASIC Act* are very similar, judgments considering undertakings made under one provision have frequently referred to decisions made under the other provisions. This similarity means that one regulator has the opportunity to learn from the experiences of the other.

This thesis has sought to determine whether the enforceable undertaking has the same weaknesses as the settlement or whether it is a superior form of settlement. The chapters of this thesis have considered how the sanction of enforceable undertaking stands up to the following three major criticisms linked to the use of settlements:

- transparency of the sanction;
- reasonableness of the terms of the sanction; and
- enforceability of the sanction.

Further, because ASIC must first detect a breach of an enforceable undertaking before it may seek to enforce the undertaking in court, the method used by ASIC to monitor a promisor’s compliance with the terms of their undertaking has also been considered.

Examining these issues in turn has enabled the author to draw conclusions about the extent to which the sanction of enforceable undertaking is an improved form of settlement. It has also allowed the identification of certain potential weaknesses
remaining in the sanction, the use of which might be improved through the amendments suggested. The findings of the thesis are summarised below.

10.2 Transparency of an Enforceable Undertaking

In entering into an enforceable undertaking with an alleged offender ASIC is using a persuasion strategy: its aim is to reach a compromise with the alleged offender in order to deal with the alleged contravention of the law. As a form of settlement is created, ASIC’s acceptance of an enforceable undertaking raises a question as to the transparency of the sanction: Will the alleged offender know what to expect when entering into an enforceable undertaking?

Chapter 3 examined ASIC’s use of enforceable undertakings between 1998 and 2008. Although the enforceable undertakings provisions in the ASIC Act do not state what an enforceable undertaking should include or what otherwise might be expected from such an undertaking, ASIC has issued detailed guidelines in relation to the policies behind its use of enforceable undertakings. ASIC’s Regulatory Guide 100 states that the corporate regulator will only accept enforceable undertakings that provide a more effective regulatory outcome than other sanctions.8 The guide also notes the circumstances in which ASIC will consider entering into an enforceable undertaking and the matters it will take into consideration in deciding whether or not to enter into an enforceable undertaking.9

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8 ASIC, Regulatory Guide 100: Enforceable Undertakings (March 2007), [1.4].

9 Ibid, [2.4], [2.8].
ASIC has also issued templates to give additional guidance to alleged offenders in respect of the content of undertakings.\(^\text{10}\) These templates provide examples of the types of provisions that might be contained in an enforceable undertaking. However, ASIC has not stopped there. Even though there is no legislative requirement that enforceable undertakings be available to the public, ASIC has created an online enforceable undertakings register available to the general public from which enforceable undertakings may be downloaded free of charge. These strategies have also been adopted by the ACCC.

These steps are not in themselves enough to ensure transparency, because the enforceable undertakings provisions in the *ASIC Act* do not detail the procedure of entering into an enforceable undertaking. This raises a question as to whether there is a danger that an alleged offender may be bullied into accepting an enforceable undertaking. Chapter 4 considered this question in assessing the procedural fairness of an undertaking both from an administrative law perspective and from the perspective of the promisor. From an administrative law perspective, the procedure of entering into an enforceable undertaking is fair. There are protections available to ensure this is the case as the court is unlikely to enforce undertakings in situations where the regulator has bullied the alleged offender.\(^\text{11}\)

From the perspective of the promisor, the procedure of entering into an enforceable undertaking appears to be fair since, in theory, the alleged offender has a say in the


\(^{11}\) *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* (2003) 52 ATR 1, [38].
formulation of their undertaking: the sanction is supposed to be the result of a compromise between the parties. Additionally, promisors have certain protections available to them in instances where undertakings may be procedurally unfair. This does not mean that the process of entering into an undertaking cannot be improved. The involvement of independent parties, such as a panel of expert advisors, may help to ensure the procedural fairness of an undertaking and would improve the application of the rule against bias.

10.3 Reasonableness of an Enforceable Undertaking

Between 1998 and 2008 ASIC accepted 286 enforceable undertakings. Some of these undertakings were entered into with individuals while others were with companies or with companies and their officers. As was illustrated in Diagram 3.3, 61.2% of the enforceable undertakings ASIC entered into during that period were with companies or with companies and their officers. Irrespective of the identity of the promisor, however, an enforceable undertaking aims to achieve the following goals:

- protection of the public;
- prevention of similar breaches in the future through a change in the promisor’s attitude to compliance or ‘compliance culture’;
- corrective measures, such as compensation or corrective advertisement.

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12 A promisor may apply for judicial review, for example.

These aims are different from those of a settlement. A settlement may not take into account the interest of third parties while an enforceable undertaking does. The kinds of promises most commonly made in enforceable undertakings are that the alleged offender will:

- stop committing the alleged offence;
- put a compliance program in place;
- agree to a voluntary self-ban;
- fulfil some education requirements;
- compensate affected parties;
- be involved in community service work or projects; and
- disclose the undertaking to a certain category of people.

Like any settlement, an enforceable undertaking may provide a quicker and cheaper remedy than court proceedings in the event of an alleged contravention of the law, but it may also impose a higher burden than a settlement on the promisor. May the inclusion of such promises be deemed unreasonable from the point of view of the promisor?

This question was examined in Chapter 5. It became apparent that promises such as to implement a compliance program and compensate affected parties could be very costly to promisors. The implementation or review of a compliance program was nevertheless seen to have a number of benefits which outweighed the cost of the implementation or review. This was especially the case in instances where the

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14 Yeung, above n 3, 111.

promisor had an Australian financial services licence and should already have had an effective compliance program in place. In this situation, the cost of a compliance program is to be seen as embedded in the cost of running the organisation.

Similarly, to compensate or refund affected consumers may be costly. The amount that is to be repaid by a promisor to victims of the alleged breach may run into millions of dollars, yet even though an enforceable undertaking does not derogate from the rights and remedies available to any person arising from any conduct described in the undertaking or any future conduct, the inclusion in an undertaking of a promise to refund may stop victims of the alleged breach from suing the promisor because they have already been compensated for their losses. The enforceable undertaking has already provided them with the justice that they would achieve in a trial. If they are not satisfied with the refund provided in an undertaking, they may initiate legal action, but the existence of the undertaking is not deemed to be an admission of liability by the promisor and it may be difficult for affected consumers to prove that a breach of the law has actually occurred.

A requirement to disclose the terms of the undertaking may result in higher levels of publicity than in the case of a settlement, but such a promise is only included in an undertaking to correct the conduct of the promisor. To undertake a voluntary ban may have drastic consequences as it means the promisor will lose their livelihood. Irrespective of this, agreeing to a voluntary ban has fewer negative repercussions for a promisor than the alternative sanction of being made the subject of a banning order.
While an enforceable undertaking may impose a higher burden on the promisor than other forms of settlement, ultimately the terms of an undertaking may be viewed as reasonable from the perspective of the alleged offender when compared with alternative sanctions that could be used by the regulator to deal with similar conduct. Chapter 6 found that, in addition, the fact that an enforceable undertaking may include promises such as disclosure and refund means that in rectifying the conduct of the alleged offender undertakings may positively impact and provide some sort of justice to the victims of the alleged breach. This means that, unlike a settlement, an enforceable undertaking may be restorative in nature.

The enforceable undertaking may be considered to be a moderately restorative sanction. Chapter 7 found that further measures might be taken to enhance the use of enforceable undertakings and allow undertakings to provide additional protection to third parties. Such measures could include involvement of the victims of the alleged breach in the process of entering into an undertaking. Their involvement may additionally provide ASIC with a more complete picture of the conduct of the promisor, which is of relevance because such conduct does not exist in a vacuum. Further, involvement of the community in the process of entering into enforceable undertakings—for example, through the creation of an independent advisory panel to have input into the undertakings entered into—may provide some benefits. Such a step would not only empower the community, it would also enhance the awareness of the public.
10.4 Monitoring Compliance with the Terms of an Undertaking

The sanction of enforceable undertaking appears to be able to deliver a number of benefits to the regulator, the alleged offender and the victims of an alleged breach, but why should a promisor comply with the terms of their undertaking? The enforceable undertakings provisions in the *ASIC Act* state that, in case of non-compliance of the alleged offender with the terms of their undertaking, an enforceable undertaking may be enforced in court. The legislative provisions thus allow the corporate regulator to move from a persuasion strategy to an enforcement strategy. However, before the enforcement strategy may be initiated, ASIC must be aware that a breach of the undertaking has actually occurred.

The system of monitoring compliance with an enforceable undertaking is, therefore, crucial in maximising the effectiveness of the undertaking. If ASIC discovers an enforceable undertaking has not been complied with, it is able to take further action against the promisor. An effective monitoring system may also deter alleged offenders from breaching their undertakings.

Chapter 8 determined that ASIC’s system of monitoring enforceable undertakings relies heavily on self-regulation. Enforceable undertakings entered into by companies or companies and their officers often rely on the promisor to detect breaches of the undertaking and report these breaches to ASIC. However, 45.7% of such undertakings also involved an external and independent person in the monitoring of the undertaking. This is a proactive approach more likely to detect breaches of undertakings. ASIC has improved this type of monitoring over recent years by providing the external experts with guidelines as to what is expected of them when
auditing a promisor’s compliance with the terms of their undertaking. Other undertakings have required senior officers in a company to monitor the company’s compliance with its undertaking. This mode of monitoring also has its benefits, in maximising the chances of a change in the compliance culture of the organisation since the senior officers are expected to encourage and ensure the implementation of the undertaking.

In the case of undertakings entered into with individuals, while on some occasions an external and independent person may be involved in monitoring the undertaking, the promisor is usually expected to monitor his or her own conduct. In 48.6% of the undertakings accepted by individuals, the undertaking did not include any clauses relating to monitoring of the undertaking. This is a fundamental weakness of such undertakings because promisors may perceive that the corporate regulator is not closely monitoring the undertaking. As a consequence, the fact that the undertaking is enforceable in court may not deter the promisor from breaching the undertaking as any breach of an undertaking may remain undetected. This weakness could be remedied by including a clause in undertakings entered into with individuals requiring the promisor to report to ASIC on his or her compliance with the undertaking by a certain date.

ASIC’s system of monitoring enforceable undertakings has been criticised for being more reactive than proactive. Although the monitoring system has improved over the last decade, more needs to be done to ensure that breaches of undertakings are detected. ASIC could play a greater role in monitoring undertakings through following up any non-compliance by promisors with the terms of their undertakings
and this would move the system of monitoring undertakings from one of self-regulation to co-regulation. The use of independent experts to monitor the compliance of promisors, whether companies or individuals, with their undertakings should also be further encouraged.

10.5 Enforcement of an Undertaking

It is essential that when ASIC discovers an enforceable undertaking has been breached it takes action to penalise the breach. ASIC’s policy in deciding what action to pursue in the event of a breach of an undertaking is based on Braithwaite’s enforcement pyramid. One level of the pyramid as illustrated in Diagram 9.2 is that the regulator will apply to the court to enforce the undertaking. For this to be a viable option, the regulator must be assured that the courts support the use of the sanction of enforceable undertaking and are willing to enforce undertakings in appropriate circumstances.

Chapter 9 found that the courts are usually supportive of the use of settlements including enforceable undertakings, but they will not simply rubber stamp any compromise reached between ASIC and an alleged offender. It appears that, when deciding on the enforcement of an undertaking, the courts have reached the right balance. On the one hand, they support the use of enforceable undertakings by the regulator and are willing to enforce such undertakings. On the other hand, a court

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17 Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc (1999) 161 ALR 79, [3] and [20].
examines matters such as the following when deciding whether or not to enforce the terms of a particular undertaking:

- What circumstances led to the undertaking?
- Is there a breach of the undertaking?
- If there is a breach of the undertaking, should the court enforce the terms of the undertaking?

These criteria provide protection to promisors and allow the court to strike down undertakings that may be unreasonable or procedurally unfair.

10.6 In Summary

This thesis has found the sanction of enforceable undertaking to have successfully dealt with a number of criticisms levelled at other forms of settlement. ASIC’s use of the sanction of enforceable undertaking appears to be transparent. The terms of the enforceable undertakings are reasonable from the perspective of the promisor and from the perspective of the victims of the alleged breach. The fact that undertakings are enforceable in court gives the sanction an additional advantage over other settlements. One weakness, relating to the system of monitoring a promisor’s compliance with the undertaking they have entered into, persists with the use of enforceable undertakings to this point in time but, the author suggests, this may be overcome.

It may, therefore, be concluded that the sanction of enforceable undertaking is an improved form of settlement, which all Australian regulators would do well to adopt. It enhances the enforcement arsenal of regulators in providing them with a remedy to
deal with breaches of the law that is both quicker and cheaper than court action. Further, due to the advantages it has over other forms of settlement, most particularly the protections it provides to both promisors and victims of the alleged breach, the enforceable undertaking should generally replace the use of other settlements.
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