



University of Technology, Sydney

**STUDY OF THE USE OF
ENFORCEABLE UNDERTAKING BY
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

By

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Abbreviations

ABA	American Bar Association
<i>The Tunney Act</i>	<i>Antitrust Procedures and Penalties Act</i> (United States of America)
ACA	Australian Communication Authority
ACCC	Australian Competition and Consumer Commission
AAT	Administrative Appeals Tribunal
ADR	Alternative dispute resolution
ALRC	Australian Law Reform Commission
APRA	Australian Prudential Regulation Authority
ASC	Australian Securities Commission
ASIC	Australian Securities and Investments Commission
<i>The ASIC Act</i>	<i>Australian Securities and Investment Commission Act</i> (Cth)
ASX	Australian Stock Exchange
CASA	Civil Aviation Safety Authority
Cth	Commonwealth
DOJ	Department of Justice
DPP	Director of Public Prosecution
ET	The economic theory of regulation
UK undertakings	Enforceable undertakings accepted in the United Kingdom
HREOC	Human Rights and Equal Opportunity Commission
NSW	New South Wales
NPT	Normative analysis as a positive theory
REIWA	Real Estate Institute of Western Australia Inc
SA	South Australia
TFT	Tit-for-tat
WA	Western Australian

Abstract

Enforceable undertaking is one of the many sanctions that are available to the Australian Securities and Investments Commission (ASIC). It is a promise enforceable in court. The alleged offender, known as the promisor, promises the regulator to do or not to do certain actions. As a consequence, the result achieved in the enforceable undertaking reflects the compromise that is agreed upon by the parties involved. This penalty is widely used in the regulatory community for it allows the regulators to reach plausible solutions to alleged offences without spending the resources of their agencies or the resources of the courts. This thesis looks at the way ASIC uses enforceable undertakings through a study of all the undertakings that were given by the corporate regulator between 1998 and 2004. It points out the goals behind the use of enforceable undertakings and checks if those goals are in conformity with the recommendations of the Australian Law Reform Commission. It also notes if there is fairness, stability and consistency in the treatment of the alleged offenders in the undertakings. Furthermore, it observes the method by which ASIC monitors the undertakings. Finally, it considers whether the courts encourage ASIC to enter into enforceable undertakings.