

University of Technology, Sydney

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

By

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Table of Contents

CERTIFICATE OF AUTHORSHIP/ORIGINALITY I

ACKNOWLEDGEMENTS II

ABBREVIATIONS XI

ABSTRACT XII

CHAPTER 1 INTRODUCTION 1

1.1. PROPOSITION *1*

1.2. PHILOSOPHIES OF ENFORCEMENT *1*

1.2.1. Purpose of penalties *2*

1.2.2. More or fewer sanctions? *4*

1.2.3. Worst of two worlds? *5*

1.3. RESEARCH QUESTIONS *5*

1.3.1. Theoretical framework *6*

1.3.2. Research question *6*

1.4. JUSTIFICATION OF THE RESEARCH *7*

1.4.1. Legislative aspect *7*

1.4.2. Benefits to ASIC *8*

1.4.3. Benefits to regulated entities *8*

1.4.4. Benefits to society *9*

1.5. DELIMITATION *10*

1.6. METHODOLOGY *10*

1.6.1. The instrumental goals *11*

1.6.2. Fairness, stability and consistency *12*

1.6.3. Response of courts *13*

1.7. IN BRIEF *13*

CHAPTER 2 LITERATURE REVIEW 15

2.1. INTRODUCTION *15*

2.2. NORMATIVE ANALYSIS AS A POSITIVE THEORY *16*

2.3. ECONOMIC THEORY OF REGULATION *17*

2.4. GAME THEORY OF REGULATION *18*

2.5. STRATEGIC REGULATION THEORY *20*

2.5.1. Example of Pyramid *21*

2.5.2. Regulatory Tripartism *23*

2.5.3. Criticism of the Braithwaite theory *24*

2.6. RESTORATIVE JUSTICE *24*

2.7. PROBLEM-SOLVING STRATEGY *26*

2.7.1. Cooperation between enforcement and prevention teams *28*

2.7.2. Need for proactive strategies *28*

2.7.3. Other problems with the problem-solving theory *29*

2.8. SELF-REGULATION *30*

2.9. POSITIVE INCENTIVES IN THE SANCTIONING PROCESS *32*

2.10. UNREASONABLENESS OF REGULATION *33*
2.11. LOOPHOLES IN LEGISLATION *34*
2.12. TOUGH REGULATION AND LEGALISM *35*
2.13. RESENTMENT FROM REGULATED ENTITIES *37*
2.14. SOCIAL RESPONSIBILITY OF REGULATORS: APPLICATION OF THE TRIPLE BOTTOM DEBATE *38*

CHAPTER 3 : BACKGROUND TO PENALTIES AVAILABLE TO ASIC **40**

3.1. CREATION OF ASIC ***40***
3.2. OBJECTIVES AND POWERS OF ASIC ***40***
3.3. PENALTIES AVAILABLE TO ASIC ***43***
3.4. CRIMINAL PENALTIES ***45***
3.4.1. Imprisonment *45*
3.4.2. Fines *46*
3.4.3. Community service orders *49*
3.5. CIVIL PENALTIES ***49***
3.5.1. Introduction of civil penalties *49*
3.5.2. Reservations about civil penalties *50*
3.5.3. Pecuniary penalties *53*
3.5.4. Injunction *54*
3.5.5. Disqualification order *54*
3.5.6. Compensation orders to third party *55*
3.5.7. Community service orders *56*
3.6. ADMINISTRATIVE PENALTIES ***57***
3.6.1. Infringement notices *57*
3.6.2. Advantages and disadvantages of infringement notice *58*
3.6.3. Negotiated penalties *60*
3.6.4. Publicity *61*
3.7. QUASI-PENALTIES ***62***
3.7.1. Banning orders *63*
3.7.2. Withholding licences *63*
3.7.3. Withholding financial benefits *64*
3.7.4. Enforceable undertakings *64*

CHAPTER 4 THE INTRODUCTION OF ENFORCEABLE UNDERTAKING INTO OUR SYSTEM **68**

4.1. NEGOTIATION ***68***
4.2. ENFORCEABLE UNDERTAKING ***68***
4.3. ON A FEDERAL LEVEL ***69***
4.3.1. Introduction of enforceable undertakings to the ACCC *69*
4.3.2. Introduction of enforceable undertakings to ASIC *73*
4.3.3. Introduction of enforceable undertakings to APRA *76*
4.3.4. Introduction of enforceable undertakings to CASA *77*
4.3.5. Introduction of enforceable undertakings to the ACCC *80*
4.4. ON A STATE LEVEL ***81***

4.4.1. Introduction of enforceable undertaking to the New South Wales Department of Fair Trading 82
4.4.2. Introduction of enforceable undertakings to the Queensland Electrical Safety Office 83
4.4.3. Introduction of enforceable undertaking to the Queensland Department Industrial Relations 85
4.5. DESIRE OF SOME REGULATORS TO INCLUDE ENFORCEABLE UNDERTAKING INTO THEIR SYSTEM **87**
4.5.1. Comcare 87
4.5.2. The New South Wales Office of the Legal Services Commissioner 88
4.5.3. Environmental regulators 89
4.6. SIMILAR PENALTY OVERSEAS **90**
4.6.1. Consent decrees in the United States of America 90
4.6.2. Enforceable undertaking in the United Kingdom 93
4.6.3. Enforceable undertakings in Northern Ireland 95
4.6.4. Enforceable undertakings in New Zealand 95
4.7. IN BRIEF **96**

CHAPTER 5 ENFORCEABLE UNDERTAKINGS AND ASIC 98

5.1. INITIATING ENFORCEABLE UNDERTAKINGS **98**
5.2. CIRCUMSTANCES IN WHICH ENFORCEABLE UNDERTAKINGS ARE APPLIED **99**
5.2.1. Before and after court proceedings 100
5.2.2. During criminal proceedings 101
5.2.3. Conjunction with Administrative Appeal Tribunal proceedings 101
5.3. TRENDS **102**
5.3.1. Enforceable undertakings done over the years by ASIC 103
5.3.2. ACCC's use of enforceable undertakings 108
5.3.3. Enforceable undertakings accepted at State levels 109
5.3.4. Consistency of the structure of the undertakings accepted by ASIC's different State departments 115
5.4. SUMMARY **118**

CHAPTER 6 INSTRUMENTAL GOALS OF ENFORCEABLE UNDERTAKINGS: THEORY 120

6.1. ASIC'S USE OF ENFORCEABLE UNDERTAKINGS **120**
6.2. THE UNDERTAKING **121**
6.3. BREACH OF THE UNDERTAKING **122**
6.4. BRAITHWAITE'S PYRAMID **124**
6.5. INTERACTION OF PROMISES **126**
6.6. INTEGRATED PYRAMID OF ENFORCEABLE UNDERTAKINGS **127**
6.7. IN BRIEF **128**

CHAPTER 7 INSTRUMENTAL GOALS OF VOLUNTARY BAN AND EDUCATION 130

7.1. INTRODUCTION **130**
7.2. BANNING ORDERS IN GENERAL **131**

7.2.1. *Protection of the public?* ... 131
7.2.2. *Punishment* ... 135
7.3. GOAL BEHIND VOLUNTARY BAN AND EDUCATION ... **136**
7.3.1. *Varying the accepted undertaking* ... 140
7.3.2. *Fulfilling the requirements of the undertaking: Education, protection of the public and prevention* ... 141
7.4. ENFORCEABLE UNDERTAKINGS IN UNITED KINGDOM ... **145**
7.5. IN BRIEF ... **146**

CHAPTER 8 DISCLOSURE AND COMPENSATION IN ENFORCEABLE UNDERTAKINGS ... **148**

8.1. INTRODUCTION ... **148**
8.2. ADVERSE PUBLICITY IN GENERAL ... **149**
8.3. USE OF PUBLICITY BY REGULATORS ... **150**
8.4. DISCLOSURE OF THE ENFORCEABLE UNDERTAKINGS ... **153**
8.4.1. *Publicity through Register of Enforceable Undertakings* ... 153
8.4.2. *Promisor acknowledgments in the undertakings* ... 154
8.4.3. *Withholding of certain information* ... 154
8.5. DISCLOSURE REQUIREMENT IN ENFORCEABLE UNDERTAKINGS ... **155**
8.5.1. *Areas where disclosure is used* ... 155
8.5.2. *Disclosure of undertaking to people affected* ... 159
8.5.3. *Disclosure of undertaking to general public* ... 164
8.5.4. *Disclosure of the undertaking to staff* ... 167
8.5.5. *Disclosure of undertaking to future employers* ... 168
8.5.6. *Summary of the goal behind disclosure of the undertaking* ... 170
8.6. REFUND, INDEMNIFICATION AND COMPENSATION ... **170**
8.6.1. *Goals behind the refund and compensation requirement* ... 171
8.6.2. *Summary of the goals of compensation* ... 173
8.7. IN BRIEF ... **174**

CHAPTER 9 COMPLIANCE PROGRAMS AND COMMUNITY SERVICE REQUIREMENTS IN ENFORCEABLE UNDERTAKINGS ... **175**

9.1. INTRODUCTION ... **175**
9.2. COMPLIANCE PROGRAMS IN GENERAL ... **176**
9.2.1. *Role of compliance programs* ... 176
9.2.2. *Goals behind the implementation of compliance programs* ... 177
9.2.3. *Compliance program as a mitigating factor* ... 178
9.2.4. *Compliance as a prevention measure* ... 179
9.3. COMPLIANCE PROGRAMS AND ENFORCEMENT UNDERTAKINGS ... **179**
9.3.1. *Compliance program in undertakings* ... 179
9.3.2. *The promisors* ... 180
9.3.3. *The alleged breaches* ... 181
9.3.4. *Content of compliance program* ... 183
9.4. GOAL BEHIND THE INCLUSION OF COMPLIANCE PROGRAMS ... **191**
9.5. CRITICISM OF COMPLIANCE PROGRAMS IN ENFORCEABLE UNDERTAKINGS ... **191**

9.5.1. Problem with enforcing the undertaking *192*
9.5.2. Lack of precision in undertakings *192*
9.5.3. Monitoring the compliance of the promisor *193*
9.6. COMMUNITY SERVICE REQUIREMENTS ***194***
9.6.1. Enforceable undertaking and community services *194*
9.6.2. Purpose behind the use of community service requirements in the undertakings *196*
9.6.3. Potential criticism *197*
9.7. IN BRIEF ***198***

CHAPTER 10 FAIRNESS, STABILITY AND CONSISTENCY IN THE ENFORCEABLE UNDERTAKINGS **199**

10.1. INTRODUCTION ***199***
10.2. TYPES OF PEOPLE INVOLVED IN UNDERTAKINGS ***200***
10.3. UNDERTAKINGS GIVEN TO INDIVIDUALS ONLY ***202***
10.4. TREATMENT OF PROPRIETARY COMPANIES: 1998 TO 2004 ..... ***204***
10.5. TREATMENT OF UNLISTED PUBLIC COMPANIES: 1998 TO 2004 ..... ***207***
10.6. TREATMENT OF LISTED PUBLIC COMPANIES: 1998 TO 2004 ..... ***210***
10.7. TREATMENT OF FOREIGN COMPANIES ***212***
10.8. SUMMARY ***213***
10.9. POSSIBLE CRITICISM OF THE SYSTEM ***214***
10.10. IN BRIEF ***214***

CHAPTER 11 MONITORING OF ENFORCEABLE UNDERTAKINGS **216**

11.1. INTRODUCTION ***216***
11.2. MONITORING SYSTEM ***217***
11.3. SELF-REGULATION AND ENFORCEABLE UNDERTAKINGS ***218***
11.4. SELF-REGULATION OF UNDERTAKINGS ***218***
11.4.1. Monitoring by individuals who entered into an undertaking with ASIC *219*
11.4.2. Monitoring by company who entered into an undertaking with ASIC *221*
11.4.3. Monitoring by officers of companies *223*
11.4.4. Monitoring by external and independent experts *227*
11.5. ASIC ON THE OFFENSIVE ***232***
11.6. SUMMARY ***234***

CHAPTER 12 THE COURTS AND ENFORCEABLE UNDERTAKINGS: A LOOK AT THE REACTION OF THE COURTS TOWARD THE UNDERTAKINGS ACCEPTED BY ASIC AND THE ACCC **240**

12.1. INTRODUCTION ***240***
12.2. SUPPORT FOR THE USE OF ENFORCEABLE UNDERTAKINGS ***241***
12.2.1. ACCC v Real Estate Institute of Western Australia Inc *241*
12.2.2. ACCC v Apollo Optical and ACCC v Monza Imports *242*
12.2.3. AAT and enforceable undertakings *244*
12.2.4. IN BRIEF ***249***

12.3. COURTS ENFORCING THE UNDERTAKINGS 249
12.3.1. Breach of the undertaking 250
12.3.2. Court deciding on enforcement of undertakings 252
12.3.3. Caution on the part of regulators 255
12.4. UNITED STATES EXPERIENCE: DODGING THE PROBLEM 256
12.5. POSSIBLE CRITICISM OF SUCH A SYSTEM 257
12.6. REGULATORS ATTEMPTS TO HAVE UNDERTAKINGS ACCEPTED IN COURT 259
12.7. SUMMARY 261

CHAPTER 13 CONCLUSION 263

13.1. AIM OF THIS THESIS: 263
13.2. INSTRUMENTAL GOALS OF ENFORCEABLE UNDERTAKINGS: IN THEORY 263
13.2.1. Voluntary ban and education 265
13.2.2. Disclosure of the undertaking and compensation 267
13.2.3. Compliance programs and community services 269
13.2.4. Summary 269
13.3. FAIRNESS, STABILITY AND CONSISTENCY: 271
13.4. MONITORING OF THE ENFORCEABLE UNDERTAKINGS 271
13.5. REACTION OF COURTS TO ENFORCEABLE UNDERTAKINGS: 272
13.6. CONCLUSION 273

BIBLIOGRAPHY 275

List of Figures

FIGURE 2.1: ENFORCEMENT PYRAMID (BRAITHWAITE AND AYRES) 22
FIGURE 2.2: VICIOUS CYCLE RESULTING FROM LEGALISTIC AND UNREASONABLENESS LEGISLATION. 37
FIGURE 4.1: FROM A LESSER SANCTION TO A HARSHER ONE 71
FIGURE 4.2: THE SITUATION BEFORE THE INTRODUCTION OF ENFORCEABLE UNDERTAKING TO CASA 79
FIGURE 5.1: NUMBERS OF ENFORCEABLE UNDERTAKINGS ACCEPTED BY ASIC BETWEEN 1998 AND 2004 104
FIGURE 5.2: APPORTIONMENT OF THE USE OF UNDERTAKINGS BY ASIC'S STATE DEPARTMENT FROM 1998 TO 2004 109
FIGURE 5.3: ENFORCEABLE UNDERTAKINGS ACCEPTED BY THE NEW SOUTH WALES DEPARTMENT FROM 1998 TO 2004 110
FIGURE 5.4: ENFORCEABLE UNDERTAKINGS ACCEPTED BY THE VICTORIAN DEPARTMENT FROM 1998 TO 2004 111
FIGURE 5.5: ENFORCEABLE UNDERTAKINGS ACCEPTED BY THE WA DEPARTMENT FROM 1998 TO 2004 112
FIGURE 5.6: ENFORCEABLE UNDERTAKINGS ACCEPTED BY THE SA DEPARTMENT FROM 1998 TO 2004 113
FIGURE 5.7: ENFORCEABLE UNDERTAKINGS ACCEPTED BY THE QUEENSLAND DEPARTMENT FROM 1998 TO 2004 114
FIGURE 6.1: PYRAMID OF UNDERTAKINGS 125
FIGURE 6.2: THE INTERACTION OF THE DIFFERENT PROMISES IN UNDERTAKINGS 126
FIGURE 6.3: INTEGRATED PYRAMID OF ENFORCEABLE UNDERTAKINGS BASED ON BRAITHWAITE'S PYRAMID OF ENFORCEMENT 127
FIGURE 7.1: VOLUNTARY BAN AND EDUCATION IN UNDERTAKINGS 142
FIGURE 8.1: DIFFERENT TYPES OF DISCLOSURE REQUIREMENTS 158
FIGURE 10.1: PEOPLE ACCEPTING UNDERTAKINGS 202
FIGURE 11.1: MONITORING SYSTEM OF UNDERTAKING 235
FIGURE 11.2: MONITORING SYSTEM OF UNDERTAKING 238
FIGURE 13.1: THE FREQUENCY OF THE USE OF THE PROMISES INCLUDED IN ENFORCEABLE UNDERTAKINGS FROM 1998 TO 2004 265
FIGURE 13.2: PURPOSES OF THE VOLUNTARY BAN IN UNDERTAKINGS ACCEPTED FROM 1998 TO 2004 267
FIGURE 13.3: THE DISCLOSURE OF THE UNDERTAKING TO CERTAIN PEOPLE 268
FIGURE 13.4: GOALS BEHIND THE PROMISES AGREED UPON IN THE UNDERTAKING 270

List of Tables

TABLE 7.1: ALLEGED OFFENCES WHERE A VOLUNTARY BAN WAS AGREED UPON BETWEEN ASIC AND THE PROMISOR 137
TABLE 7.2: DURATION OF THE BAN 138
TABLE 8.1: COMPARISON OF ACCC PRESS RELEASES 152
TABLE 8.2: ALLEGED BREACHES WHERE ASIC USED A DISCLOSURE REQUIREMENT IN THE UNDERTAKINGS 156
TABLE 8.3: DISCLOSURE TO DIFFERENT CATEGORIES IN UNDERTAKINGS 157
TABLE 8.4: MATTERS WHERE ASIC REQUIRED THE PROMISOR TO DISCLOSURE THE UNDERTAKING TO AFFECTED PARTIES 160
TABLE 8.5: MATTERS WHERE ASIC USED DISCLOSURE TO THE GENERAL PUBLIC IN AN UNDERTAKING 164
TABLE 8.6: MATTERS WHERE ASIC USED DISCLOSURE TO EMPLOYERS IN AN UNDERTAKING 169
TABLE 8.7: UNDERTAKINGS THAT CONTAIN A REFUND, INDEMNIFICATION OR COMPENSATION REQUIREMENT 171
TABLE 9.1: COMPANIES TARGETED BY A REQUIREMENT TO HAVE A COMPLIANCE PROGRAM 181
TABLE 9.2: ALLEGED OFFENCES THAT LED TO THE INCLUSION OF COMPLIANCE PROGRAM REQUIREMENT IN THE UNDERTAKINGS 182
TABLE 10.1: CLASSIFICATION OF PEOPLE INVOLVED IN UNDERTAKINGS 201
TABLE 10.2: ALLEGED BREACHES AND THE UNDERTAKINGS GIVEN TO INDIVIDUALS ONLY 203
TABLE 10.3: ALLEGED BREACHES AND THE UNDERTAKINGS GIVEN BY PROPRIETARY COMPANIES 206
TABLE 10.4: ALLEGED BREACHES AND THE UNDERTAKINGS GIVEN BY UNLISTED PUBLIC COMPANIES 209
TABLE 10.5: ALLEGED BREACHES AND THE UNDERTAKINGS GIVEN BY UNLISTED PUBLIC COMPANIES 211
TABLE 10.6: ALLEGED BREACHES AND THE UNDERTAKINGS GIVEN BY UNLISTED PUBLIC COMPANIES 213
TABLE 11.1: MONITORING BY INDIVIDUALS THAT ENTERED INTO THE UNDERTAKING 220
TABLE 11.2: MONITORING OF UNDERTAKINGS BY COMPANY 221
TABLE 11.3: MONITORING BY OFFICERS OF THE COMPANY 224
TABLE 11.4: MONITORING BY EXTERNAL AND INDEPENDENT EXPERTS 227

Abbreviations

ABA	American Bar Association
The *Tunney Act*	*Antitrust Procedures and Penalties Act* (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
The *ASIC Act*	*Australian Securities and Investment Commission Act* (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.

Chapter 1 Introduction

1.1. Proposition

Today, a number of penalties are at the disposal of the regulatory agencies in Australia. These penalties allow the enforcement agencies to ensure that the public will comply with the terms of the law. Accordingly, it is very important to be aware of the sanctions that are available to each regulator. This thesis reviews the way in which the Australian Securities and Investments Commission (ASIC) has used one of the penalties available to it: the enforceable undertaking.

An enforcement undertaking is a promise enforceable in court. When ASIC suspects that a party is breaching the law, either ASIC or the party may propose entering into an undertaking. The undertaking reflects a compromise reached by the two parties.[1] In it, the alleged offender will promise to do or not to do certain things. The purpose of the undertaking is the protection of the public and the prevention of future breaches.[2] This approach differs from other methods of dealing with non-compliance on the part of corporations and individuals.

1.2. Philosophies of enforcement

The philosophy of punishment has evolved greatly over time. For instance, during the Roman Empire, it was believed that transforming a citizen into a slave was a fit sanction if the citizen did not honor the debt owed to the debtor. Today we would be outraged at such a sanction, since it affects our basic rights.[3]

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[1] *Australian Securities and Investments Commission Act 2001* (Cth), ss 93AA and 93A.
[2] ALRC, *Compliance with the Trade Practices Act 1974,* Report No 68 (1994) 38.
[3] Thomas Wiedemann, *Greek and Roman Slavery* (Routledge; Reprint ed, 1989, first print 1981) 39.

We have slowly moved toward a system that is more equitable, where you only risk losing your possessions if you cannot repay your debt. Bankruptcy no longer has the stigma it had in the past, and some people use it today for their own advantage.[4]

The avert cruelty that existed in the Middle Ages has disappeared from the modern legal system. Today, people are no longer tortured in order to extract a confession of guilt. The judicial system has been reinvented. Our rights are theoretically well fixed and protected by laws. The sanctions and penalties in place today no longer have punishment as their sole rationale.[5] Sanctions are preventative: they aim to deter people from breaking the law.[6]

1.2.1. Purpose of penalties

Penalties enable law enforcers to promote desired behavior and punish undesirable acts. The form and level of penalty will depend on its purpose and on the type and nature of the wrongdoing. A penalty can have several incompatible purposes.[7]

This reality is reflected in the following statement by Spigelman CJ:[8]

> *"The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just deserts and of mercy, often conflict. Yet we live in a society which values both justice and mercy."*

---

[4] Kevin J Delaney, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to their Advantage* (University of California Press; Reprint ed, 1999) 12.
[5] This is apparent when one looks at the Sentencing Legislation in Australia.
[6] Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties in Australia,* Report No 95 (2002) 104.
[7] Ibid.
[8] The Hon Chief Justice J Spigelman, "Sentencing Guidelines Judgements", (Address to the National Conference of District and County Court Judges, Sydney, 24 June 1999) <www.agd.nsw.gov.au/sc/sc.nsf/pages/CJ_240699>, at 15 May 2005.

Accordingly, a variety of goals is aimed for when imposing a penalty:[9]

- retribution or "just deserts";
- social condemnation (expressed through the stigma of a criminal record or severe penalty such as imprisonment);
- specific deterrence (deterring the offender from repeating the contravention);
- general deterrence (deterring others from committing the prohibited act);
- protection of third parties or the public; and
- payment of reparation or compensation.

Most sanctions attempt to achieve more than one of these goals. For instance, if person A causes damages to person B, even a criminal court can order A to pay restitution to B. The goal behind the use of such a sanction is to protect the person that suffered a loss, B, and to correct the action of the person who inflicted the damage, A.

The court will decide which penalties to impose according to the purpose it wishes to achieve. For example, misconduct by a company director can lead to criminal penalties (punishment), an order of compensation to the people affected (reparation), publicity by the regulator (deterrence), a requirement that a company implements a compliance program (prevention through education), and a banning order (protection of the public).[10] The court will decide on the penalty by looking at the purpose of the sanction. It will usually pick the remedy that will be most effective in the circumstances of each case.

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[9] ALRC, above n 6, 104.

[10] ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 83.

However, if the legislation behind the penalty cannot be enforced, the goal of the sanction will never be reached because the wrongdoer will escape the sanction. For this reason, devising sanctions that can easily be applied is essential. It is also a requirement that has plagued legislators in most countries. In theory, the reason is simple: creating penalties is easy, but devising ones that can be applied effectively is a lot harder. Today, we need sanctions that reflect the gravity of the offence committed, that are enforceable by law officials and that have effective or deterrent consequences.[11]

1.2.2. More or fewer sanctions?

Sadly, people can find themselves surrounded by laws and sanctions that are supposed to protect them when, in reality, those penalties cannot be used effectively. The corporate sector is particularly subject to such problems. Today, the sanctions available under the *Corporations Act 2001* (Cth) are wide in scope and large in number. The existing penalties regulate different offences ranging from contraventions of the disclosure requirements to breaches of directors' duties.[12]

Yet with all the sanctions available, how do some offenders still escape punishment? The answer might be the following: the sanctions available to law enforcers are not applicable in some situations.[13] This leaves the law enforcers frustrated, and creates a public perception that the regulatory agencies need even more sanctions to regulate the situations that are beyond the current scope of the legislation.

But the reality is that as commercial activities expand, non-regulated situations will always appear. If our laws fail to respond and remain inflexible in the face of changes,

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[11] Mirko Bagaric and Jean Du Plessis, "Expanding Criminal Sanctions for Corporate Crimes: Deprivation of Right to Work and Cancellation of Education Qualifications" (2003) 21(7) *Companies & Securities Law Journal* 7, 7.

[12] *Corporations Act 2001* (Cth).

[13] John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York State, 1985) 117-118.

our statutes will not be applicable and will become of little consequence. All the sanctions in place will not be useful.[14]

Braithwaite proposed that the more sanction options there are, the better, since if we have a multitude of penalties for the one act, at least one of those penalties can be used to deal with the offending behavior.[15] But, arguably, creating more penalties does not guarantee the offence will be punishable.

1.2.3. Worst of two worlds?

Howard has observed: [16]

> *"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 this author's view, this observation reflects today's reality. A huge number of penalties are contained in the *Corporations Act* yet we still have situations that escape regulation.

1.3. Research questions

Corporate regulators are confronted with the following dilemma: how to prevent breaches of the law when the sanctions available to them cannot be applied in some situations. To address this dilemma, it is necessary to first study how each penalty is used. Such a study will highlight the strengths and weaknesses of the current system of sanctions. In particular, this thesis examines the way in which ASIC applies one of its penalties, the enforceable undertakings.

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[14] Julia Prichard and Louis Jordan, *Maximizing Performance in Insurance Operation* (Woodhead Publishing, 1999) 4.
[15] Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, 1992) 36.
[16] Philip K Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (Random House, 1994) 11.

1.3.1. Theoretical framework

The research in this thesis is underpinned by "strategic regulatory theory", a theory of economic regulation. 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. The thesis examines whether these two concepts apply to the use of enforceable undertakings. Emphasis is also placed on the need for reasonableness and fairness of penalties. All these concepts are discussed in detail in the literature review: see Chapter 2.

1.3.2. Research question

As noted before, the corporate regulator, ASIC, has a huge range of powers and penalties at its disposal. But the sanctions available are not always reliable. This research is limited to the use of enforceable undertakings since they are considered by many as a quick, cheap and successful way of dealing with breaches of the law.[17] Indeed, many regulators wish to introduce a similar penalty into their own systems.[18] However, little research has been undertaken into ASIC's use of enforceable undertakings in order to determine whether this penalty is as good as everyone believes it is. The thesis examines and evaluates this sanction to assist in filling this gap.

The objectives of this study are:

- to determine the goals behind the use of enforceable undertakings;
- to provide a detailed survey of the enforceable undertakings accepted by ASIC, in order to determine the consistency in use of this sanction;
- to observe the monitoring system of enforceable undertakings; and

[17] ASIC, *Annual Report 1999-2000*, 10.
[18] ALRC, above n 6, 99. See Chapter 4 of this thesis for more information.

- to consider the courts' reactions to enforceable undertakings.

The way in which this thesis will study these points is set out in the methodology: see 1.6 below.

1.4. Justification of the research

Corporate regulation is important in a free market society because it ensures stability of the market. For instance, in the 1980s, the wave of deregulation that swept the nation contributed to the collapse of the market at the end of the decade.[19] A new era started with the introduction of new laws and new regulators. It is essential to learn more about the sanctions available to regulators, because the more we know about the way they are applied, the more effective our regulatory system will become, and arguably the less chance there is that corporate collapses will take place. The importance of such a matter is apparent not only to the regulator and to regulated entities, but also to the community in general.

1.4.1. Legislative aspect

Our legislation already contains an abundant number of sanctions. Research undertaken by the Australian Law Reform Commission (ALRC) research shows there are approximately 2400 regulatory penalty provisions in areas such as aged care, aviation, banking, border control, customs, environmental protection, social security, corporations and trade practices. We have arguably reached a level of saturation. As a result, some sanctions will make other penalties obsolete and our system will become more complicated.[20]

For this reason, before embarking on a campaign to add more penalties, legislators should check and evaluate the penalties that are already in place to see if there is a real need for

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[19] Trevor Sykes, *The Bold Riders: Behind Australia's Corporate Collapses* (Allen and Unwin, 2 ed, 1994) 1-18.
[20] ALRC, above n 10, 35.

new sanctions. Sometimes a simple modification in the law is all that is needed to better the system.[21]

Evaluating the sanctions that are already in place will lead to a better understanding of the legal system. Legislators will discover the strengths and weaknesses of each penalty and they will be able to make an informed decision on how to proceed in their work.[22]

1.4.2. Benefits to ASIC

It is essential for ASIC to assess from time to time the penalties at its disposal. Such an assessment will show the weaknesses of the system and this will enable the regulator to overcome the difficulties it has experienced in the past. Knowing why some penalties are not applicable in some situations, or why some other sanctions are not being used, will allow ASIC to improve its enforcement policies.[23]

In addition, potential offenders usually calculate the risk of being caught. If there are effective penalties in the system, the chances of being caught and punished will be increased. This should increase the deterrent effect on potential offenders.[24]

The importance of having effective sanctions also extends to cost savings. Effective penalties diminish the cost of enforcement, since they provide the regulator with a better idea of what works in each situation.[25]

1.4.3. Benefits to regulated entities

Dealing with corporate offender is different than dealing with people committing murder, rape... When targeted by regulators, corporate offenders tend to feel that they are "unfairly maligned pillars of respectability". For this reason punishment by itself is not

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[21] Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982) 19-20.
[22] Mark Costanzo, *Just Revenge: Costs and Consequences of the Death Penalty* (Worth Publishing, 1997) 90.
[23] Ibid.
[24] Ayres and Braithwaite, above n 15, 36.
[25] John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York State, 1985) 117-118.

enough to deal with corporate violations. Prevention and education need to be promoted by society.[26] On the other hand, Chambliss argues that white-collar criminals are among the most deferrable offenders because they satisfy the following two conditions:[27]

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

On this analysis, effective penalties are potent in deterring white-collar criminals. The business community benefits from the knowledge that effective penalties are being applied. Even more, if coercion and prevention are used at the same time, corporate crime can be prevented.[28]

When the regulator imposes obsolete or unreasonable sanctions on the regulated entities, resentments could be generated in the companies that have been dealt with harshly. This may lead to less cooperation from the business community. Effective penalties should improve compliance in the future and lessen the cost of business. They also benefit the community we live in.[29]

1.4.4. Benefits to society

Public confidence in the regulatory system is essential for the wellbeing of all. Effective penalties ensure better protection for the public. The feeling of security emanating from this protection leads to greater confidence in the regulatory system and its law enforcers.

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[26] Ibid 86- 87
[27] William Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions" [1967] *Wisconsin Law Review* 703, 709, 713.
[28] Braithwaite, above n 25, 86-93.
[29] Bardach and Kagan, above n 21, 102.

1.5. Delimitation

This study considers enforceable undertakings as an administrative penalty, concentrating on those accepted by ASIC between 1998 and 2004. This scope of seven years allows the author to consider the evolution of the use of enforceable undertaking.

1.6. Methodology

Regulators usually restructure their departments in order to adapt their enforcement methods to the environment they regulate. It is only when they challenge deep-rooted assumptions and test new arrangements that they can ameliorate and improve the existing system. Accordingly, it is essential to be aware of all the penalties that are available to the regulator and be able to acknowledge their weaknesses and their strengths.[30]

In order to improve the use of enforceable undertakings accepted by ASIC, the notion of regulation needs to be examined because the framework of this thesis will be directed toward the regulatory enforcement activities. Even though there is not one specific definition of regulation, the following chapters will adopt this definition: [31]

> *"Regulation may be broadly conceived as the purposive, sustained and focused control by the state over socially valued activities to promote collectivist goals by addressing social risk, market failure or equity concerns through rule-based direction of social and individual action."*

The database examined in this thesis can be accessed via ASIC's website <www.asic.gov.au>. All enforceable undertakings are registered by ASIC and made available to the public through this website. Analyzing the enforceable undertakings that have been implemented in the past will be an essential part of this thesis because it reveals the way this sanction is used by ASIC. To be able to study how the corporate regulator is applying this penalty, this thesis will concentrate on three areas:

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[30] Malcolm K Sparrow, *Imposing Duties: Governments Changing Approach to Compliance* (Westport, 1994) 31.

[31] Karen Yeung, *Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?* 7 <http://www.aic.gov.au/conferences/regulation/yeung.pdf> at 28 February 2005.

- the instrumental goals of enforceable undertakings;

- the consistency, stability and fairness of the use of enforceable undertakings; and

- the reaction of the courts to the use of enforceable undertakings.

These three areas will be the centerpiece of this thesis. The reasons for this are developed in the paragraphs that follow.

1.6.1. The instrumental goals

Since it is apparent from the definition of regulation stated above that the primary purpose of regulation is to secure the attainment of collectivistic goals, the enquiry this research will undertake is: What are the instrumental goals behind the remedy of enforceable undertakings? Finding the answer involves looking at the results achieved by the enforceable undertakings. Will such a sanction reduce or eliminate conduct that is considered to be socially undesirable? Will it allow for restitution? Will it retain public confidence? Will it retain business confidence? Will it be considered by the victims as just desert? Our central aim is determining whether this particular enforcement practice enhances the compliance with the law and the prevention of future breaches.[32] For this reason, a number of chapters in this thesis will concentrate on identifying the degree to which the enforceable undertakings accepted by ASIC have contributed to, or detracted from, the system of regulatory compliance. In other words, what goals do the undertakings achieve?

Correspondingly, there is a need to explore the mechanism by which enforceable undertaking is supposed to improve compliance, both in theory and practice. This thesis will study the use of the most common promises incorporated in the enforceable undertakings. This will allow the author to ascertain the goals behind the use of

[32] Ibid 8-9.

undertakings. Furthermore, it will answer to the following questions. Do these goals comply with the proper purposes of administrative penalties?[33] Are they punitive or protective in nature? If the goal of the undertaking is punitive, the courts will not usually be willing to enforce the undertaking because administrative remedies should not have a punitive goal.[34]

Even if, in theory, the undertakings facilitate the prevention of undesirable conduct, it is still essential to check whether in practice the undertakings are being complied with. Since this author does not have the resources to make conclusive findings of this kind, this thesis will study the ways in which the regulator monitors compliance of parties with their undertakings. It will be assumed that if the monitoring system that is in place is good, the alleged offender will have no choice but to follow the undertaking. If the promisor does not do so, the regulator can enforce the undertaking in court and any breach of it will then be considered contempt of court.[35] In addition to looking at the instrumental goals of the enforceable undertakings, it is necessary to check the way in which ASIC treats those who enter into an undertaking.

1.6.2. Fairness, stability and consistency

Agencies should always consider the nature and importance of their relationships with the entities they regulate and with the public. Compliance usually depends upon public confidence in the regulator and support for its mission. This is particularly evident when dealing with enforceable undertakings because this remedy requires cooperation between ASIC and the alleged offender. If such cooperation is non-existent, entering into an undertaking will be almost impossible.[36]

For this reason, it is essential that fairness, stability and consistency are taken into consideration when ASIC accepts an undertaking. Without these elements, no one would

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[33] The proper purposes of administrative penalties will be developed in Chapter 6 of this thesis.
[34] ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 38.
[35] Ibid 8-9.
[36] Karen Yeung, *The Public Enforcement of Australian Competition Law* (ACCC, 2001) 3-4.

enter into an undertaking and the penalty would lose its efficacy. [37] Accordingly, Chapter 11 will compare the way ASIC deals with different alleged offenders when they face similar charges.

This will be achieved through a study of the treatment of individual, public and proprietary companies by ASIC when accepting an undertaking. We turn now to the last of the three areas which will be the center of this study: it is the reaction of the courts toward enforceable undertakings.

1.6.3. Response of courts

Assessing the lawfulness of enforceable undertakings cannot be ignored, because their enforcement depends on how this penalty is perceived by the judicial system. [38] Accordingly, examining the reaction of the courts to an enforceable undertaking is essential. Furthermore, if enforceable undertakings are not easily enforceable in court, or if the courts refuse to enforce them, the sanction will lose its effectiveness. A breach of the undertaking will not have any consequences. It will not be enforceable and an unenforceable penalty will not have any detrimental effect on the promisor. The alleged offender will have less incentive to comply with the undertakings.

1.7. In brief

Before applying this methodology, it will be useful to look at the following elements:

- Background on ASIC: Chapter 3 considers the role of ASIC and its powers. It also provides an overview of the penalties available to this regulator along with their advantages and weaknesses.

- Introduction of enforceable undertaking to the Australian system: Chapter 4 looks at the introduction of the enforceable undertaking sanction

[37] Spigelman, above n 8.
[38] Yeung, above n 31, 22-24.

to the Australian Competition and Consumer Commission (ACCC) and to other regulators at the federal and State levels. It also examines whether other countries have penalties similar to enforceable undertakings.

- ASIC's use of enforceable undertakings: Chapter 5 focuses on the enforceable undertakings that have been implemented by ASIC to determine how often will ASIC accepts undertakings.

Subsequent chapters consider the objective listed in mentioned in the methodology. Chapters 6 to 9 study the goals behind the use of the undertakings, concentrating on the promises given to ASIC by the promisor. Chapter 10 targets the treatment of alleged offenders in the undertakings and the need for fairness, stability and consistency. Chapter 11 relates to the monitoring of ASIC's undertakings. Chapter 12 considers whether the courts encourage ASIC to enter into enforceable undertakings. And finally Chapter 13 draws together the conclusions of this research.

Chapter 2 Literature review

2.1. Introduction

Whenever a problem occurs in our society, the need for reform appears. As a result, regulation has existed for centuries. In *The Social Contract*, Rousseau stated that the people will become united under the banner of a nation when they realize that this is the best way to ensure their survival. As a consequence, laws will govern their behavior and will monitor their actions.[1]

With time, regulation became more complex and instead of having one law governing different fields, the legislator developed specified legislation to regulate every sector. Today, there are a vast number of different laws regulating different behavior. The corporate field, being one of huge controversy, has seen its regulation drastically change over time.

Economists initially believed there was no need to regulate the market. The state did not have to intervene because the market was something strong that regulated itself. Nor did companies need to be regulated or monitored. Nothing adverse could really result from the lack of regulation because everything would "even itself out" in the end.[2]

But their opinion changed radically with the realization that this theory did not consider every aspect of the economy that our world is based upon. They had to witness a market crash to believe in the need for regulation.[3] In Australia, our corporation law has been underpinned by similar ideas and has evolved over time. After the phase of deregulation in the 1980s, which was attended by huge corporate collapses, a new phase of regulation appeared. Corporation law was codified and new regulators were created to ensure a better outcome. But this codification did not escape criticism. The present Federal

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[1] Jean Jacques Rousseau, *Social Contract and Discourses* (GGH Cole trans, Reprint 1993) 190-191 [trans of: *Contrat Social et Discourses*].
[2] Birdsall S Viault, *Modern European History* (McGraw-Hill Trade, 1990) 163.
[3] Peter Kivisto, *Illuminating Social Life: Classical and Contemporary Theory Revisited* (Pine Forge Press, 2nd ed, 2001) 233

Government announced in 1997 that Australia's corporate law would be given a new economic focus to ensure that the law is "not out of touch with modern commercial practice". [4]

It is interesting to observe that similar comments were made in the wake of the *Corporate Law Simplification Act 1995* (Cth). Ken Robson summarized the situation in the following terms:[5]

> *"We are now approaching some 10 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."*

But the reasons behind the implementation of different regulatory approaches have varied, and different theories have been created to explain why there is a need to regulate. This chapter discusses some of the major theories.

2.2. Normative analysis as a positive theory

Until the early 1960s, the most prominent theory of regulation was what Noll and Joskow termed the "Normative analysis as a positive theory" (or NPT). This theory had been around since the time of Adam Smith. It regards market failure as the motivation for the entry 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 was monopoly, followed at some distance by externalities.[6]

The main problem with this theory is that until the 1960s it had not been systematically tested. There was an assumption that the regulatory activities usually compressed the gap

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[4] Andrew Clarke, "Business Judgment Rule: Good Corporate Governance or Not?" (2000) 12 *Australian Journal of Corporate Law 85, 86.*

[5] K Robson, *Annotated Corporations Law* (5th ed, LBC Information Services, 2000) iii.

[6] Baldwin, R, Scott, C and Hood, C, *A Reader on Regulation* (Oxford University Press, 1998) 95.

between price and marginal cost which would otherwise exist. The first real test of this theory was Stigler and Friedland's 1962 analysis of the effects of regulation on electricity rates. According to the NPT, restricting entry and imposing maximum rates in the electricity field should have resulted in lower than usual rates. However, the authors found otherwise. The 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. [7]

2.3. Economic theory of regulation

The economic theory of regulation (ET) was introduced by an article of George Stigler in 1971. The most important element of this theory is its fusion of two concepts: the analysis of political behavior with the larger body of economic analysis. Politicians, like the rest of humankind are presumed to be self-interested maximizers. This will mean that interest groups will influence the regulatory process by giving financial or other types of support to politicians and regulators.[8]

Simultaneously with Stigler, Richard Posner added an important element to this theory and, after a few years, he gave the theory its name. The biggest subsequent developments of ET were made by Peltzman in 1976 and Gary Becker in 1983. 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:[9]

- Firm, compressed and well-organized groups will benefit more from 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

[7] Ibid 95-96.
[8] George J Stigler, "The Theory of Economic Regulation" (1971) 2(1) *Bell Journal of Economics and Management Science* 3.
[9] Baldwin, Scott and Hood, above n 6, 103.

optimal distribution arising from shifts in demand or cost conditions. At any one time, the price structure will cross-subsidize high-cost consumers from rents generated by prices of other groups.

- Because the political payoff to 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 from regulation.

The theory principally targets the behavior of established regulatory bodies by asking: who will be favored by these regulators and what is the reason behind an amendment of their policies? But the question of why the regulatory body was established in the first place cannot be ignored. The reply that ET gives 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.[10] But other theories appeared in an attempt to find other explanations for the same problem.

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 following hypothesis: the entity that is regulated is a rational single actor who will decide whether to comply with regulation by appraising the expenditure and benefits which compliance produces for the entity at a particular time.[11]

Scholz considers regulation as a "prisoner's dilemma game". The motivations of the parties involved are the following: the firm desires to minimize regulatory costs while the regulator's desire is to maximize compliance outcomes. Scholz notes that these

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[10] Ibid 105.

[11] George Gilligan, Helen Bird and Ian Ramsay, *Regulating Directors' Duties: How Effective are the Civil Penalty Sanctions in the Australian Corporations Law* (Centre for Corporate Law and Securities Regulation, 1999) 9.

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 deterrent 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 benefit of mutual cooperation.[12]

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, the firms will be able to spend their 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 minimize harm in ways not directly considered in the regulation.[13]

The TFT strategy will prompt an "egoistic cooperation" from the regulated community, on one hand, while the regulator will follow an enforcement strategy that is at the same time "vengeful and forgiving".[14] But there are situations that challenge this theory and demonstrate its weakness. One weakness is the danger of capture. Another is the situation where the regulator is dealing with irrational actors: here TFT will definitely cause regulatory failure if its sanctions are limited to purely deterrent penalties.[15] This is where the strategic regulation theory comes into play.

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[12] Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, 1992) 2.
[13] Ibid 27.
[14] John T Scholz, "Cooperation, Deterrence, and the Ecology of Regulatory Enforcement", (1984) 18 *Law and Society Review* 179, 179.
[15] Ayres and Braithwaite, above n 12, 30, 69-70.

2.5. Strategic regulation theory

In *To Punish or Persuade: Enforcement of Coal Mine Safety*, 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 enforce 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. [16]

Because punishment usually depletes the resources of regulators without always having a deterrent effect, 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 can be imposed with a certain amount of discretion. The power to punish permits 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.[17]

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.[18]

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[16] John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York State, 1985), 117-118.
[17] Ibid.
[18] Ayres and Braithwaite, above n 12, 36.

2.5.1. Example of Pyramid

The information costs discussed mean that the regulator with an "enforcement pyramid" may have superior resources with which it can bargain. Compliance is most likely when an agency displays an explicit enforcement pyramid. Braithwaite and Ayres describe such an enforcement pyramid in their *Responsive Regulation: Transcending the Deregulatory Debate.*[19]

As depicted in Figure 2.1, the base of the pyramid represents the attempts to coax compliance by persuasion. The next stage of enforcement is the warning that actions might be taken if the violation continues. If this fails to secure compliance, civil penalties will come into play followed by criminal prosecutions. If these methods do not work to secure compliance then the regulator might suspend temporarily the offender's license to operate. If all fails, permanent revocation of the license is the last step taken by the agency. This escalation of sanctions is sketched in the form of a pyramid.

[19] Ibid, 35-36.

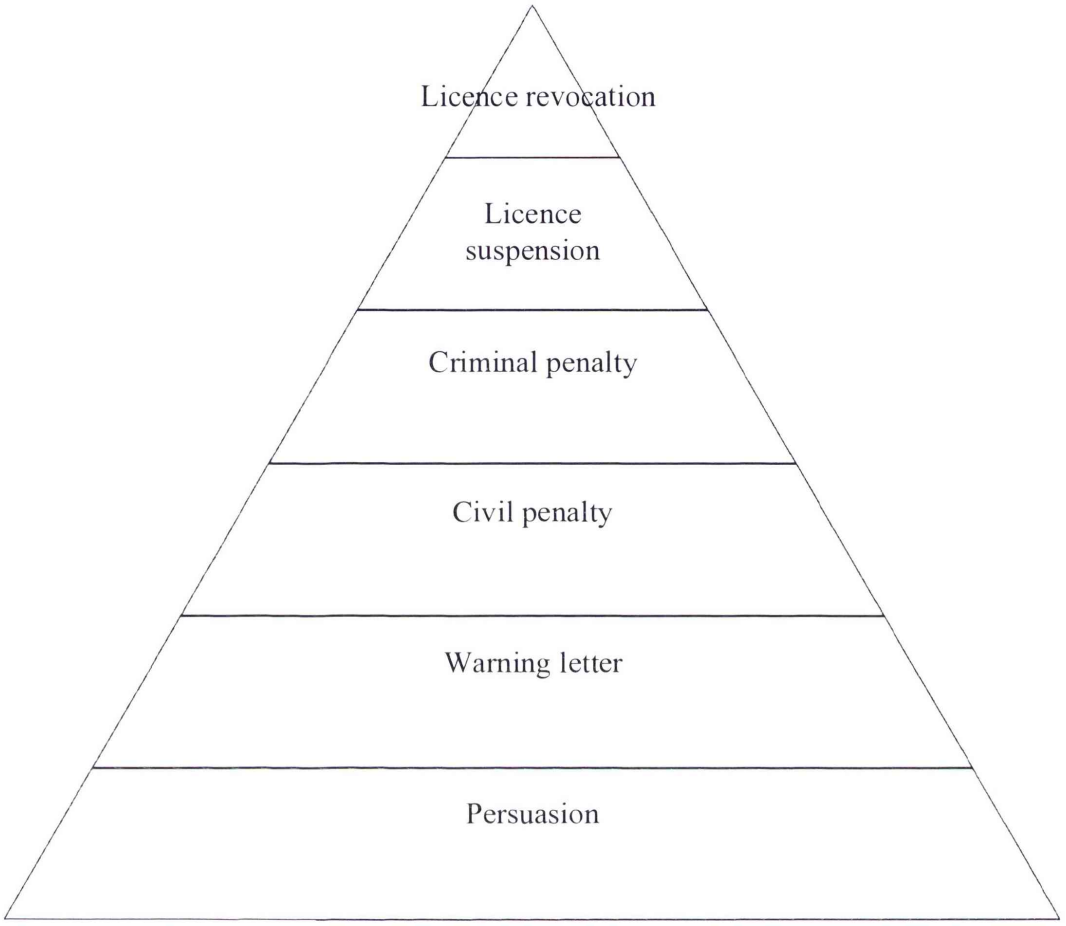


Figure 2.1: Enforcement pyramid (Braithwaite and Ayres)

The width of each layer represents the proportion of enforcement activities at that level. The explanation for the varying size is simple. If the regulator can plausibly threaten to match any non-compliance by moving successfully up the pyramid, then most of the regulator's work will be done effectively at the bottom layers of the pyramid. The lighter sanctions will dissuade the regulated entity from continuing its illegal activities because it will not want the regulator to use its strong sanctions. Put another way, when there is an

equilibrium between harsh and soft sanctions, the regulator attains the result needed by speaking softly.[20]

In summary, the basic idea of responsive regulation 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 start with dialogue and then go up in severity.

2.5.2. Regulatory Tripartism

The pyramid model proposed by Ayres and Braithwaite can be criticized 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 cooperation also encourage the evolution of capture and corruption. Ayres and Braithwaite's solution to these problems is "Regulatory Tripartism". They define Tripartism as a regulatory policy that promotes the participation of public interest groups in the regulatory process by giving them:[21]

- access to all the information available to the regulator;
- a seat at the negotiating table with the firm and the agency when deals are being done; and
- the same rights to sue or prosecute under the regulatory statute as the regulator.

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.[22] But for some, this two-dimensional pyramid is not enough.

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[20] Ayres and Braithwaite, above n 12, 35- 36.
[21] Ibid 55, 57.
[22] Ibid.

2.5.3. Criticism of the Braithwaite theory

The enforcement pyramid is based on the concept that the regulator has discovered that the regulated person has breached the legislation. 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. Accordingly in such instances, the law is not broken. The law enforcers will not be able to do anything to stop the regulated entity because there is no breach. The law becomes ineffective and just symbolic because its aims cannot be realised. The regulators need to encourage compliance with the spirit of the law rather than compliance with the words of the law. If this is not done, the regulated entity will always try to discover ways to accomplish compliance with the letter of the law while totally undermining the policy behind the words.[23]

On the other hand, Grabosky, when looking at the pyramid, is not satisfied with the two dimensions mentioned in para 2.5.2. He gives the pyramid a new horizon. Unlike the pyramid of Ayres and Braithwaite, which is two dimensional, his pyramid is three-dimensional space. A given regulatory instrument joins elements of state, self-regulation and third party activity, all of them depicted in one way or another in the pyramid.[24]

Grabosky's pyramid provides a graphical representation of entire regulatory systems, permitting us to see its coercive properties as well as visualize the mix of its constituent institutional forms. It also allows a comparison of system in terms of both coerciveness and institutional composition.[25] In all system, the role of public should be felt because it leads to a better form of what has become known as restorative justice.

2.6. Restorative justice

Barton argues that for informal justice to be restorative, it has to be about "restoring victims, restoring offenders and restoring communities" through the participation of many stakeholders. [26] In some ways, restorative justice is superior to criminal judicial

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[23] Doreen McBarnet, *Crime, Compliance and Control* (Burlington, 2004),192-193, 284.
[24] Peter N Grabosky, "Discussion Paper: Inside the Pyramid: Towards a Conceptual Framework for the Analysis of Regulatory Systems" (1997) 25 *International Journal of the Sociology of Law* 195, 198.
[25] Ibid.
[26] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), 11.

system because such an approach empowers victims, permitting them to face their tormentor and reach closure. It may also allow primary stakeholders in criminal justice (namely the victim, the offender and their respective circles of support and care) to deal with matters in the way it is right for them.[27]

But restorative justice is not without criticism. It has been argued that: [28]

- Restorative justice might not provide any benefits to some victims. Victims of white-collar crimes might not realize they were victims in the first place, and even if the victim is aware of his/her status as a victim a minority of cases are followed by arrest).
- If restorative justice works, the following question remains to be answered: will its practice really have a major effect on the crime rate?

- Restorative justice practices might increase victims' fears of revictimization. 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 might worsen the stigmatization and shaming of offenders. The process of restorative justice is "already heavy with shame", since victims and their supporters express the consequences of the crime committed.

- Restorative justice relies on a kind of community that is not adaptable to industrialized societies. It is more suitable in rural areas.

- Restorative justice might oppress the offender 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.

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[27] Charles K B Barton, *Restorative Justice: The Empowerment Model* (Federation Press, 2003), 16.
[28] Braithwaite, above n 26, 137-164.

- Restorative justice might widen nets of social control.

- Restorative justice might fail to promote social justice.

- Restorative justice can lead to capture of the restorative business regulatory practices by business.

- Restorative justice has the potential to extend unaccountable police power. It can even compromise the separation of powers between legislative, executive and judiciary systems.

- Restorative justice practices might trample certain rights because procedural safeguards are poorly articulated.

But even with these criticisms, the restorative justice process becomes more possible when you try to use its premises as a regulatory sanction. Christine Parker applied this model to enforceable undertakings in order to determine whether enforceable undertakings can be considered as an application of restorative justice. She noted that that restorative justice prescribes a distinctive approach to the proper purpose and content of enforceable undertakings. It will ensure that enforceable undertakings will not just be seen as mere settlement negotiation but as a multi-party alternative dispute resolution.[29] However, even if restorative justice has its advantages and can satisfy some victims, its success depends on the regulatory policies in place. For this reason, some people like Malcolm Sparrow believe that the solution to the regulatory problem can be found in changing the behavior of regulators toward sanctions.

2.7. Problem-solving strategy and its effect on the behavior of regulators

Sparrow proposes a simple idea about what regulators need to achieve in order to ensure that sanctions are effective. He argues that regulatory and enforcement operations should be constructed around an explicit problem-solving strategy. Regulators should not amend

[29] Christine Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *The Modern Law Review* 209.

the regulation that is in place but should ameliorate the system by improving the management of the agency. Three elements should be present to achieve such a goal: [30]

- A clear focus on result. This means 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 the detection by the system of important hazards, risks and patterns of non-compliance. The emphasis should be on risk assessment and developing organizational capacity for designing and implementing effective and efficient solutions for each problem. To this end they 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, lobbies, unions and other governmental agencies are necessary to create a sense of shared purpose and more effective intervention.

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

As one can see, this problem solving theory is straightforward and reflects common sense, but can it overcome the tensions that exist between the enforcement and preventive camps in an agency?

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[30] Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brooking Institution Press, 2000) 1, 100.

2.7.1. Cooperation between enforcement and prevention teams

The failure to understand the problem-solving theory can create a tension between enforcement and voluntary compliance 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 then focusing on enforcement. This is accentuated by the fact that when practitioners discuss problem solving, they will put 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.[31]

Problem solving should not be considered alone. Combined with enforcement strategies, it will probably have a greater effect than it would on its own. Voluntary compliance is by no mean 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 organize their activities around the failures rather than around opportunities for intervention. But when adding problem solving to the equation the results will definitely be better.[32]

2.7.2. Need for proactive strategies

A proactive strategy is essential for solving any problem and regulators need to be proactive on different levels. They need to extend their different views. Sparrow argues that in order to identify all problems, they should look beyond existing workloads to uncover those predicaments represented only partially, or not at all. To succeed in this, they should create and pay more attention to techniques that will allow them to "see the invisible".[33]

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[31] Ibid.
[32] Malcolm K Sparrow, *License to Steal: How Fraud Bleeds America's Health Care System* (Westview Press, 2000) 216.
[33] Sparrow, above n 30, 191-192.

Regulators also need to adopt a proactive stance in terms in encouraging opinions and perspectives that might not normally be heard, since it is best when all groups are heard. To achieve this, regulators should engage 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 suggestions given, the regulators, who retain their discretion, can decide on the best solution to create a more effective regulatory system.[34]

2.7.3. Other problems with the problem-solving theory

With all the advantages of problem solving, this strategy is difficult to apply within a major regulatory agency for the following reasons:[35]

- 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 are also financial difficulties because problem-solving rarely has 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 difficult to achieve.

- Management fails to understand or support it.

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[34] Ibid.
[35] Ibid 208-209.

- Problem-solving brings an unfamiliar degree of discretion and an uncertain degree of authorizations. Teams are not sure what they can and cannot propose. This uncertainty will bring any project to a standstill. A guideline on the subject is needed.

- Staffs are 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.

- Project teams are generally incapable of sticking to the imposing approach. They wouldn't mind skipping stages they deem unnecessary.

- Engaging other people's opinion without giving them some powers will strike the participants as odd.

- Problem solving is considered by many as an alternative to enforcement and is seen like 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. Other strategies that also have their share of problems have surfaced.

2.8. Self-regulation

The theory of self-regulation permits regulated parties that are deemed trustworthy to conduct and report their own audits and inspections subject to verification. Some consider that self-regulation is better than regulation imposed by law.[36] 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

[36] Ayres and Braithwaite, above n 12, 101-132.

on their relationships not only with their current customers and shareholders but also with the wider community.[37]

Accordingly, it is essential for large organizations to implement a hierarchical and centralized management system that will answer stakeholder concerns and ensures employees' 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 complaint system that will recognize the pattern of complaints and how to resolve them.[38] 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 always the best solution. Sometimes it is not. Small businesses can 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 code of conduct. They would need to pass the costs of participation on to the consumer who may suffer as a consequence.[39]

Self-regulation is least effective among small businesses that do not communicate together. It works best when there are clearly defined problems but no high risk of serious widespread harm to consumers. A self-regulatory scheme will not be deemed a success unless industry participants are ready to sign up to it. For this reason, the more incentives there are for industry participants to join self-regulation, the higher the level of compliance will be.[40]

This leads to the following discussion of the advantages of positive sanctions.

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[37] Taskforce on Industry Self-Regulation, *Industry Self-Regulation in Consumer Markets: Report* (CanPrint Communications Pty Limited, June 2000) 22, 47.
[38] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge, University Press, 2002) 233.
[39] Taskforce on Industry Self-Regulation, above n 37, 29, 32.
[40] Ibid, 29.

2.9. Positive incentives in the sanctioning process

There is no doubt that the power radiating from negative sanctions is well established. But the effect of positive sanctions is less known even though the practice and ideology of reward has historically had a deep impact on the conceptualization of law. But its jurisprudence has somewhat lagged. The work of Foucault and others[41] has shown that the modern policing of people today is primarily conducted by normalizing social welfare[42] instead of punishment and coercion.[43] This will imply that modern social control depends less upon punishment and negative sanctions, and more upon rewards. Incorporation rather than segregation is the preferred mode for it allows continuous supervision and constant discipline.[44]

Rewards can play a positive role in compliance. They encourage regulated firms to abide by the law by giving them incentives to do so. Positive incentives can take the form of green stickers, grants, subsidies, bounties, fees and commissions, tax breaks or loan guarantees.[45]

The efficacy of the system of reward and punishment depends upon whether there is consistency between the perceptions of the people giving the rewards or punishments and the people receiving them. The assumption that congruence between the two exists is not warranted. Social welfare administrators, for example, have been reluctant to acknowledge that social benefit recipients may consider that the conditions attached to benefits as coercive. This problem depends on the way the parties involved see the rewards and the conditions attached to them.[46]

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[41] Michel Foucault, *Discipline and Punish* (London, 1977), Jacques Donzelot, *the Policing of Families* (Pantheon Books, 1979).

[42] There is a normalization of social welfare such as social work, education insurance, child care... All these can be seen as relying on the positive sanction of rewarding the individuals for their efforts.

[43] David Garland, "The Birth of the Welfare Sanction" (1981) 8 *British Journal of Law and Society* 29, 29.

[44] Ibid 109-110. used to be 43.

[45] Peter N Grabosky "Regulation by Reward: On the Use of Incentives as Regulatory Instruments" (1995) 17 *Law and Policy* 257.

[46] Arie Freiberg, "Reward, Law and Power: Toward a Jurisprudence of the Carrot", (1986) 19 *Australian and New Zealand Journal of Criminology* 91, 92.

The use of reward as a sanction may have some advantages, but the notion itself is regarded with some doubt and there is a confusion regarding its application. There is a risk that grantees might consider the reward as their right and regard the conditions attached to it as coercion. This would nullify all the advantages of a reward system.[47] Accordingly a question will appear: Should the withholding of a reward be considered a negative sanction? Some authors believe that there is no doubt about this matter. The withholding of a reward might be considered as a punishment and would thus become a form of coercion.[48]

But this is not the only problem faced by the regulator. The regulation it implements will be subject to criticism if it is considered unreasonable.

2.10. Unreasonableness of regulation

In 1977, Bardach and Kagan began a study of the pro-regulation movement that was at its height at this time. They noticed that a good deal of 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 is unintended and incidental to the accomplishment of a larger purpose, it may still be felt as unreasonable by the individual subjected to it. But what is considered unreasonable? Bardach and Kagan argue that "unreasonableness" involves economic inefficiency: [49]

- Regulator's requirements are unreasonable if compliance would not yield the desired benefits.

- A regulatory requirement is also considered unreasonable if it would entail costs that will clearly exceed the resulting social benefits.

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[47] Ibid.
[48] Denis H Wrong, *Power: Its Forms, Bases and Uses* (Blackwell, 1979) 80.
[49] Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982) ix, 6.

- Lastly, unreasonableness means cost- ineffectiveness.

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.

2.11. Loopholes in legislation

Even when legislation put into place ambitious regulatory goals and rights, regulators may have difficulty enforcing them. The rules will have loopholes; some elusive danger that will escape regulation. In response to new dangers, regulators devise new rules to plug the loopholes and to 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.[50]

Prichard and Jordan observe that since some of the companies always manage to escape regulation, regulators react by asking for stronger powers and the problem of unreasonableness can surface.[51] Such a need to expand the powers of regulatory agencies is usually 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.[52] As a result, a vicious circle can appear: see Figure 2.2 below. In this model, the regulator responds to the criticism by creating more and more legislation, which leads to more loopholes in the law and additional unreasonableness.[53]

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[50] Julia Prichard and Louis Jordan, *Maximizing Performance in Insurance Operation* (Woodhead Publishing, 1999) 4.
[51] McCoy and Mott, "Filling Changes Seen if SEC Follows Ecology Rules Set in Steel Case" (1979) *National Law Journal* (Nov) 26, 26-27.
[52] A perfect example can be found in the collapse of HIH Insurance Ltd and the Royal Commission that followed it; Jean J Du Plessis, "Reverberation after the HIH and Other Recent Australian Corporate Collapses: The Role of ASIC" (2003) 15 *Australian Journal of Corporate Law* 225.
[53] Bardach and Kagan, above n 49, 21-23.

However, this is not the only problem that can arise. When a legislature responds with regulation that is centralized, detailed and programmed, certain advantages and disadvantages appear, because such regulation will tend to assume that certain uniformities exist in the problems that are to be controlled. In reality, the world that needs 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 consequence can be unreasonableness (because the imposing of uniform law will not make sense in some instances) and unresponsiveness (because there will be a failure by the regulator to listen to the arguments of the regulated entities that exceptions should be made sometimes).[54]

2.12. Tough regulation and legalism

A move toward more aggressive and legalistic enforcement no doubt has its advantages, making regulation more effective in some regards. When regulated entities know that harsher penalties might be applied by the regulator they will generally be induced into complying with the law. This might in turn lead to a reduction in the number of unlawful acts.[55] But tough regulation can also be unreasonable. Stringent regulation is designed to cope with "bad apples" and unusually hard cases, which in reality constitute a minority of all the problems in the domain of regulatory supervision. Most firms, being "good apples", are accordingly subjected to unreasonable regulation. If this population is large, then such harsh regulation will appear even more unreasonable because it raises the costs of business, leading to lost opportunities for the progress of that business.[56]

Bardach and Kagan observe that the inspectors generally tend to look at the set of rules listed in the regulation and expect them to be followed. But, they argue, those rules might not be the most serious rules and the inspector's attention will thus be diverted to

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[54] Ibid 58.
[55] Ayres and Braithwaite, above n 12, 36.
[56] Bardach and Kagan, above n 49, 92-93.

trivial matters. The rules may also be expensive to implement and not very relevant.[57] This could lead the inspector to fail to observe a source of potential harm that escapes the rule. This blindness can also afflict the regulated entity whose management may concentrate on the set of rules noted in the legislation and devote time and money to serious problems.[58] Accordingly, greater communication between regulated entities and the regulators is needed, because such legalism can lead to resentment on the part of the regulated entities, ultimately tending to destroy cooperation.

This resentment will be even more palpable when businesses start noticing that the regulator tends to deal predominantly with big businesses in a non-prosecutorial method. Peter Grabosky and John Braithwaite have found that there is reluctance by many agencies to take on major companies. The tendency for the regulatory agencies is to neglect the sharks and concentrate their effort on small businesses.[59]

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

[58] Bardach and Kagan, above n 49, 105.

[59] Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press in association with Australian Institute of Criminology, 1986), 215-216.

2.13. Resentment from regulated entities

The resentment and hostility from regulated entities can cause the following vicious circle:

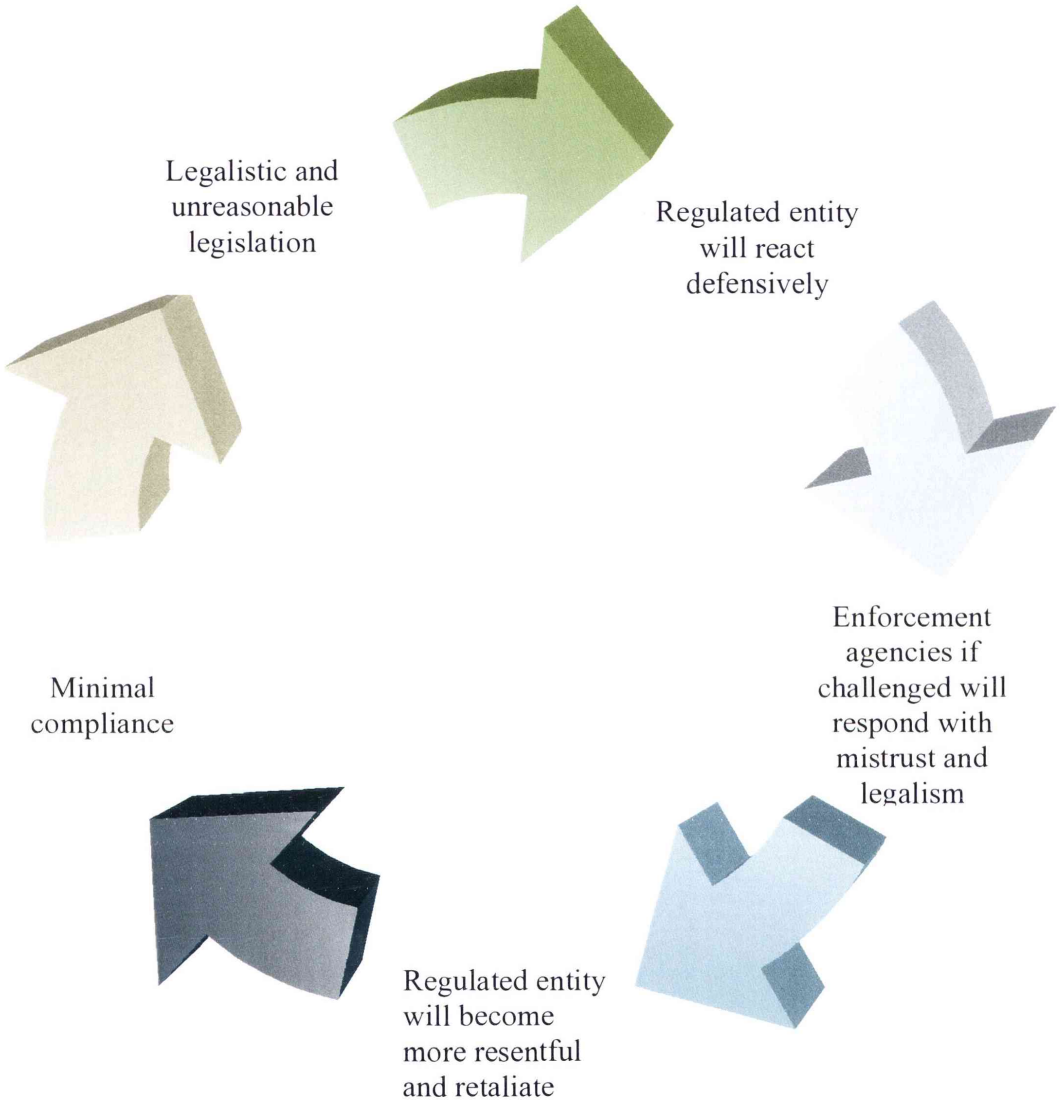


Figure 2.2: Vicious cycle resulting from legalistic and unreasonableness legislation.[1]

Resentment toward the regulator can blossom if the regulated entity believes that the rules imposed are unreasonable or excessively legalistic. For instance, if regulated

[1] This figure is based on information given by Bardach and Kagan, above n 49, 105. This author took the information and formulated it in the form of Figure 2.2.

entities have a fine imposed on them when they believe that they acted responsibly, the result can be counter-productive. Some business managers can respond by taking the position that they will act no more responsibly than the agency's rules require them to. This will lead to minimal compliance and more legalistic and unreasonable legislation.[2]

2.14. Social responsibility of regulators: Application of the triple bottom debate

Albert Einstein was an advocate of world peace. One week before his death he signed his last letter to Bertrand Russell in which he agreed that his name should appear on a manifesto urging all nations to give up nuclear weapons.[3] Ironically, it was his formula on the equivalence of mass and energy that provided the foundation for the creation of the atomic bomb. Sometimes, actions begun in the hope of ameliorating the system lead to the opposite effect.[4]

Sadly, regulations do not escape such a reality. They are implemented in the hope of improvement, but may sometimes cause more problems. Regulation may diminish the regulated entities' capacity for social responsibility, instead of developing it.[5] In the end, triple bottom line should be applied to regulators. The advocates of triple bottom line paradigm encourage managers to think in terms of not just the good old fashioned financial bottom line, but in terms of two additional "bottom lines", namely the so-called "social bottom line" and "environmental bottom line".[6] If we apply this principle to regulators, the social responsibility of regulators should not stop with implementing new rules designed to protect the system, but it should draw upon the conscience and talent of those they seek to regulate. Cooperation between the regulator and the regulated entity is essential.[7]

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[2] Eugene Bardach and Robert A. Kagan, above n 49, 105.
[3] J J O'Connor and E F Robertson, *Albert Einstein*, <http://www-groups.dcs.st-and.ac.uk/~history/Mathematicians/Einstein.html> at 5 June 2005.
[4] Turn the Tide, *Listen to the voice of Albert Einstein*, <http://turnthetide.info/id54.htm> at 6 June 2005.
[5] Eugene Bardach and Robert A. Kagan, above n 49, 322
[6] Wayne Norman and Chris MacDonald, "Triple Bottom Line: A critique", (2004) <http://www.businessethics.ca/3bl/> at 12 December 2005.
[7] Eugene Bardach and Robert A. Kagan, above n 49, 323.

Today, laws have developed a number of sanctions and penalties that will be examined in Chapter 3. Self regulation, unreasonableness, restorative justice, problem solving and strategic regulatory theory are all notions that will be revisited in later chapters in the context of the study of the use of enforceable undertakings.

Chapter 3 : Background to penalties available to ASIC

3.1. Creation of ASIC

As a consequence of the 1 July 1998 enactment of the *Financial Services Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth), the Australian Securities Commission (ASC) was renamed the Australian Securities and Investments Commission (ASIC). This change of name indicated to the public that the regulator now had broader responsibilities for investors' protection in the financial sector.[1] The day-to-day responsibility for administration and enforcement of corporations law rests with ASIC by virtue of s 11 of the *Australian Securities and Investments Commission Act* (Cth) (*ASIC Act*).

ASIC regulates companies and securities and futures industries in Australia. The *ASIC Act* also contains provisions for monitoring and regulating financial services, which closely follow the consumer protection provisions of Pt V of the *Trade Practices Act 1974* (Cth). The consumer protection provisions applicable in relation to financial services are found in the *ASIC Act* rather than the *Trade Practices Act*. This change shifted the administrative responsibility for consumer protection from the ACCC to ASIC.[2]

3.2. Objectives and powers of ASIC

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 is required:

> *"(a) to maintain, facilitate, and improve, the performance of the financial system and the entities within that system in the interests of commercial*

[1] Michael Adams and Jeremy Green, *Changes in Liability for the Superannuation Industry*, Research Report (Faculty of Law and Technology Sydney on behalf of Fund Executives Association Ltd, 2001) pt 1, 7.
[2] Ibid 7-8.

certainty, reducing business costs, and the efficiency and development of the economy."

Paragraphs (b)-(g) of s 1(2) set out the other goals ASIC should strive for when performing its functions and exercising its powers. However these will not be studied here because they are beyond the scope of this thesis. Part 2 of the *ASIC Act* details ASIC's responsibilities when protecting consumers in relation to financial services. Part 3 describes the investigation and information-gathering powers of ASIC. This regulatory body conducts investigations into companies suspected of contravening the corporation's legislation. [3] The *ASIC Act* sets out four grounds upon which ASIC may commence a formal investigation:

- a contravention of the *Corporations Act 2001* (Cth) and the *ASIC Act*;[4]

- a contravention of a law of the Commonwealth or of a State or Territory being a contravention that:[5]

    - relates to the management or affairs of a corporation or managed investment scheme; or

    - entails fraud or deceit and relates to a corporation or a managed investment scheme, securities or financial products.

- where the Minister asks ASIC to investigate a certain matter in the public interest;[6] and

- where ASIC has been handed a report of a receiver or liquidator lodged under ss 422 or 533 of the *Corporations Act*.[7]

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[3] *ASIC Act 2001* (2001), Pt 1-3.
[4] *ASIC Act*, s 13.
[5] *ASIC Act*, s 13.
[6] *ASIC Act*, s 14.

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 environment is maintained for traders and investors. As a consequence, ASIC can order the yielding of books and the production of an explanation if the content of those books is not satisfying. ASIC can also ask for the disclosure of information about securities or financial product.[8]

When ASIC suspects or believes that a person might 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 should 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 certain rights he or she has. Any information received in such a way can be used by ASIC in criminal or civil proceedings.[9]

However ASIC should not just rely on the investigations it undertakes. There is a need for clear communication between the different regulators to ensure that all areas are covered properly. In the HIH case, the Royal Commission noted that ASIC limited its involvement in HIH's affairs because of a perception that the Australian Prudential Regulation Authority (APRA) was responsible for the well-being of the company. ASIC also assumed that APRA was closely and effectively monitoring the situation. It is clear today that this was not the case. Accordingly, Justice Owen noted that there is a need to review the liaison, coordination and exchange of information between APRA and ASIC on a regular basis.[10]

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[7] *ASIC Act*, s 15.
[8] *ASIC Act,* ss 29-39; Simon Fisher, Leanne Wiseman and Colin Anderson, *Corporations Law* (Butterworths Tutorial Series, 2nd, 2001) 11.
[9] *ASIC Act,* ss 19-24; George Gilligan, Helen Bird and Ian Ramsay, *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.
[10] Australia, HIH Royal Commission, *The Failure of HIH Insurance* (2003) vol 1 <http://www.hihroyalcom.gov.au/finalreport/Front%20Matter,%20critical%20assessment%20and%20summary.HTML> at 6 June 2005.

This coordination is needed between all regulators. Section 102 of the *ASIC Act* allows ASIC to delegate its functions and powers to certain people. ASIC has used this power on several occasions. For instance, in 2000, ASIC delegated to the ACCC the power to enter into an enforceable undertaking on its behalf when FAI calculated its GST wrongly.[11]

3.3. Penalties available to ASIC

It is evident that even with all the powers at its disposal, ASIC has not escaped criticism. The collapse of HIH Insurance Ltd brought the role of this regulator into the public eye.[12] This author will turn now her attention to the manner in which ASIC applies its enforcement powers.

ASIC can impose a number of sanctions on companies that breach the law. These sanctions are essential for the functioning of the regulatory system, since without them the regulator is powerless to uphold the law. But devising effective sanctions against corporations is a problem that has plagued legislatures in most developed nations.[13]

There is even an argument that the system of state-imposed punishment should be abolished altogether. There are numerous reasons behind this view and the most commonly noted one is that a state that imposes criminal sanctions usually provokes criminality. Criminal sanctions do not protect society from harm; rather punishment is destructive to society. It has also been noted that punishment is unfair because it is employed mainly against the underprivileged and deprived sectors of the community.[14]

Despite the merits of such arguments, this thesis is based on the view that state-imposed sanctions constitute an entrenched part of our social world. Its eradication is impossible.

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[11] ASIC, Enforceable Undertaking: FAI General Insurance Co Ltd, Document No 008547462 (18 August 2000).
[12] 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, 226.
[13] Mirko Bagaric and Jean Du Plessis, "Expanding Criminal Sanctions for Corporate Crimes: Deprivation of Right to Work and Cancellation of Education Qualifications", (2003) 21 *Companies and Securities Law Journal* 7, 7.
[14] Ibid 8.

But imposing penalties of itself is not enough: it is essential for sanctions to be enforced fairly and reasonably.[15]

This chapter aims to familiarize the reader with the penalties at ASIC's disposal, in order to examine the range of those penalties and the weaknesses and strengths they entail. The sanctions available to ASIC can be divided into the following four categories:[16]

- Criminal penalties:
    - Imprisonment
    - Fines
    - Community services orders

- Civil penalties:
    - Pecuniary penalties
    - Disqualification from managing a corporation for a specific period of time
    - Injunctions
    - Compensation to third parties
    - Community services orders

- Administrative penalties:
    - Infringement notices
    - Negotiated penalties
    - Publicity

- Quasi penalties:
    - Restricting rights and banning orders
    - Withholding licenses
    - Withholding financial benefits

[15] Eugene Bardach and Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982) ix, 6. The importance of the reasonableness of sanctions was discussed in Chapter 2 at para 2.17.
[16] Australian Law Reform Commission (ALRC), *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 78-79.

- Enforceable undertakings.

These are each considered below.

3.4. Criminal penalties

In the regulatory sphere, the criminal penalties available are imprisonment, fines and community services orders. The role of the criminal penalty is to give power to the agency (in our context, ASIC) to deal with those who have deliberately breached the established rules. In a regulatory context, criminal sanctions can be used as punishment of last resort.[17]

Braithwaite puts the criminal penalties near the top of the enforcement pyramid. Following his theory, this sanction should be employed only when lesser sanctions in the pyramid have failed.[18] But criminal penalties are not only used in for high-level or repeated offences. Criminal fines, for instance, are by far the most commonly used penalty in regulatory legislation and are applied to both low and high-level offences.[19] Where a person breaches the *Corporations Act*, criminal sanctions can apply. These sanctions are a fine of up to $200,000 and/or imprisonment for up to five years.[20]

3.4.1. Imprisonment

In most Western countries, imprisonment is the foundation of the system of punishment and of the harshest criminal sanctions. The offences for which imprisonment is the preferred option usually include some element of contempt and the giving of false or misleading information.[21]

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[17] Ibid 52.
[18] Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, 1992) 35-36.
[19] Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 8.
[20] *Corporations Act*, s 1311, sch 3.
[21] Bagaric and Du Plessis, above n 13, 17.

The main advantage of imprisonment as a sentencing option is that it almost certainly inflicts pain. However, imprisonment has at least one shortcoming, which will usually ensure that it is only used when necessary: prison costs too much. Every public dollar that is spent on housing prisoners is one less dollar the government can use in another field such as education or health. Furthermore, a Director of Public Prosecution (DPP) may not seek a criminal trial where there is little expectation of reaching a verdict beyond reasonable doubt. Additionally, there is also a legislature imperative that imprisonment should be used only as "last resort".[22]

In 1998, the Senate Scrutiny of Bills Committee found that imprisonment still plays an important part in punishing offences related to the provision of information in revenue matters, or in punishing offences that deal with the legislative power to investigate breaches or make determination. But it has also stressed that imprisonment should be reserved for the most serious offences.[23]

In the recent decision of *R v Williams*[24], the Supreme Court of New South Wales found that Raymond Williams had breached his duties as a director of HIH Insurance Ltd and was involved in a series of misleading statements. The sentence of the court was imprisonment for four years and six months. Other penalties can also be used by the ASIC like fines for example.

3.4.2. Fines

Monetary penalties can be used as criminal, civil or administrative penalties. To differentiate them, for the purpose of this research, the term "fine" will be used to denote a criminal monetary penalty, "pecuniary penalty" to denote a civil monetary penalty, and "monetary penalty" will be used when referring to both criminal and civil penalties.[25]

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[22] Rick Sarre, "Alternatives to the Criminal Courts: Some Considerations of Civil and Administrative Options in the Process of the Legal Regulation" (2001) 11 *Caribbean Law Review* 25, 28-29.
[23] Senate Scrutiny of Bills Committee, Parliament of Australia, *Scrutiny of Bills Eighth Report of 1998: The Appropriate Basis for Penalty Provisions in Legislation Comparable to the Productivity Commission Bill 1996* (1998) [2.17], [4.9].
[24] *R v Williams* (2005) 23 ACLC 601; [2005] NSWSC 315.
[25] ALRC, above n 16, 87.

Fines are the most common criminal sanction used in federal legislation. They are seen by legislators and law enforcers to be an appropriate deterrent and a flexible sentencing option. Under s 184 of the *Corporations Act*, it is a crime for directors to be reckless or dishonest and to fail to exercise their powers and discharge their duties in good faith. It is also an offence for the directors of the company to use their position or the information of the company dishonestly. A director can be fined or imprisoned for such a breach.[26] This is one of several sections in the *Corporations Act* dealing with criminal offences.

For instance, Ronald Wesley Searle, the director of Aluform Express Pty was fined $6000 on 18 January 2005 in the Downing Centre Local Court following an investigation started by ASIC. He pleaded guilty to two counts of lodging documents with ASIC which contained false and misleading information in contravention of the *Corporations Act*.[27]

The fine is perhaps the easiest and most convenient sanction to impose, but that does not mean it is the most effective sanction. There are certain difficulties that surround the application of this sanction including the following:[28]

- The real risk of being fined is small. As a result, corporations will simply ignore even large fines other corporations might have received in the past. This has an important implication: a fine will not have a deterrent effect.

- Corporations can easily shift the burden of the fine onto the consumer. As a consequence, shareholders, workers and consumers, rather than the responsible officers of the offending corporation, carry the burden of large fines.

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[26] *Corporations Act*, s 1311, sch 3.
[27] ASIC, "Sydney trucking director fined following ASIC investigation" (Press Release, 18 January 2005) <http://www.asic.gov.au/asic/ASIC_PUB.NSF/byid/6C9B32CD080C381BCA256F8D001CDD5C?opendocument> at 5 June 2005.
[28] Bagaric and Du Plessis, above n 13, 13-14.

- Fines can give the impression that offences are purchasable commodities or a cost of doing business.

- Large fines on corporations can affect innocent corporations that are associated with the fined company, and even innocent shareholders.

- A large fine can force a corporation into liquidation. The courts can thus be faced with a choice between putting the company into liquidation and imposing a penalty that does not mirror the seriousness of the offence.

- Fines are subject to evasion through the use of incorporated subsidiaries and other avoidance techniques such as asset stripping.

Some commentators have criticized this penalty by implying that its impact is limited. It is argued that if a fine is an efficient sanction which can be applied with no real difficulty, its impact can be easily forgotten.[29] This is especially the case with corporations where "sole reliance on a monetary sanction tends to diminish the significance of the non economic harm caused, such as irreparable damage to the environment, or death or injury sustained from a workplace accident".[30]

This problem demonstrates the need for an effective penalty to be developed for offences which are not serious enough to warrant imprisonment but are too serious to be dealt with by way of fine. There are also other problems related to fines. This penalty might have an unequal impact. The financial ease of cashed up firms allows them to pay a fine without any remorse. Firms with less money may not have the amount needed to pay the fine. As a result, a fine can easily be paid or can stay unpaid.[31]

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[29] Harding and Ireland, *Punishment: Rule, Rhetoric and Practice* (Routledge, 1989) 195.
[30] New South Wales Law Reform Commission, *Sentencing Corporate Offenders*, Issues Paper No 20 (2001) [3.8].
[31] John Coffee, "No Soul to Damn No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79 *Michigan Law Review* 386.

Even when a small corporation is fined and manages to come up with the money, the problem of equity arises: a fine that causes havoc in a small firm might have no effect on a multinational firm. This breaches the principle of equal treatment in the impact of sanctions, a principle which stems from the underlying concept of fairness.[32]

3.4.3. Community service orders

Community service orders are used as an alternative sanction and can be considered a criminal or civil penalty.[33] They have been used on several occasions by ASIC in the context of criminal prosecution. For instance, Paul Weston Hodges was sentenced on 25 October 2004 in the New South Wales District Court to 500 hours' community service in relation to 11 charges brought by ASIC. Hodges pleaded guilty to 10 counts under the *Corporations Law* for making a false statement to influence people to deal in securities, namely units in a scheme operated by Talk Australia Pty Ltd. He also pleaded guilty to one count under the *Corporations Law* of being a disqualified person acting in the management of a company.[34] Community service orders will be studied in more detail below in the context of civil penalties.

3.5. Civil penalties

The regulation of corporations in Australia was fundamentally reformed in 1993 with the introduction of civil penalties, which substantially reduced the role of the criminal law. As a direct consequence of this new addition to our system, criminal law is today more likely to be used as a last resort.

3.5.1. Introduction of civil penalties

The civil penalties regime was introduced by the Federal Parliament in 1993. It was hoped that it would be a significant enforcement tool in the hands of the ASC (now ASIC). At that time the main focus of civil penalties was the enforcement of directors'

[32] Bagaric and Du Plessis, above n 13, 14.
[33] ALRC, above n 19, 85.
[34] ASIC, "Internet radio station principal sentenced" (Press Release, 25 October 2004) <http://www.asic.gov.au/asic/ASIC_PUB.NSF/byid/03074E1786BD4DC6CA256F38000D9134?opendocument> at 6 June 2005.

statutory duties. On 1 July 1998, the Federal Parliament extended the application of civil penalties under the *Corporations Law* to a number of additional statutory provisions. In July 2001, with the move from the *Corporations Law* to the *Corporations Act* the regime was again expanded.[35]

Today, the civil penalty provisions in the *Corporations Act* include the basic duties of directors and other company officers such as the duty to act honestly in good faith and for proper purposes. They also include contraventions in relation to company accounts, certain capital transactions and the management of managed investment schemes. *The Financial Service Reform Act 2001 (Cth)* extended the application of the civil penalty provisions to cover the market misconduct provisions. These include provisions proscribing continuous disclosure, market manipulation, insider trading, false trading, market rigging and dissemination of information about illegal transactions.[36] But despite the advantages of such a sanction, reservations in relation to the use of the civil penalties exist.

3.5.2. Reservations about civil penalties

According to research undertaken by Gilligan, Bird and Ramsay, ASIC brought only 14 civil penalty actions between 1993 and September 1998. The authors believe that this relatively low number of civil penalty actions was caused by a complex set of operational factors. These factors were identified through a series of interviews with ASIC enforcement personnel, and are the following:[37]

- A number of alternative remedies are available, which are considered more viable and effective than civil penalties (from the point of view of ASIC investigators). These include management banning orders and enforcement undertakings (the latter sanction being the focus of this thesis).

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[35] Gilligan, Bird and Ramsay, above n 9, 7-8.
[36] Ibid.
[37] Ibid, vii.

- Many of ASIC's enforcement staff have a criminal law background and as a result tend to prefer criminal proceedings over civil penalties.

- The delays that can be associated with the use of courts in the area of enforcement leave the ASIC investigators frustrated and reluctant to use civil penalties. Sometimes the interpretation of certain judgments relating to civil penalty provisions unclear and might cause certain difficulties in the future.

- When the conduct of an offender breaches both a civil penalty provision and a provision of a *State Criminal Code*, there is an incentive to frame the legal proceedings as a breach of the *Criminal Code* because of the uncertainty surrounding the civil penalty provisions.

- The requirement to liaise with the DPP over significant enforcement matters can have a negative effect on the use of civil penalties:

    - The requirement means that the DPP has a veto over the use of civil penalties.

    - The DPP must ensure there is no criminal element in the matter at hand. This results in delays that can impact negatively on the opportunity for a civil penalty action.

    - ASIC and the DPP have different enforcement objectives that can cause discord between the two law enforcers.

In addition, the drafting of the civil penalty provisions is unclear in some instances. For example, the meaning of the words "civil evidence and procedures rule" in s 1317L of *the*

Corporations Act is opaque.[38] This section states that the court must apply the rules of evidence and procedure for civil matters in proceedings for a declaration of a contravention or a pecuniary penalty order.

A wide variety of civil evidence and procedure rules may apply in civil proceedings under the *Corporations Act* and the *ASIC Act*. As a consequence, a lack of clarity can appear which encourages procedural challenges. In recent civil penalty proceedings under the *Corporations Act* the courts have adopted some procedural rules that are more applicable to criminal proceedings. Such an approach ignores the requirement in s 1317L and blurs the distinction between civil and criminal proceedings.[39]

However, according to Moodie and Ramsay, ASIC has started to increase its use of civil penalties.[40] From January 2000 to September 2003, ASIC issued applications for civil penalty provisions in 11 cases.[41] This jump in number cannot be accounted for simply by the expansion of the civil penalty provisions since most of the proceedings related to alleged breaches of statutory duty by officers. The outcomes of those cases were mostly limited to two enforcements:[42]

- pecuniary penalties; and/or
- disqualification orders.

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[38] Tom Middleton, "The Difficulties of Applying Civil Evidence and Procedure Rules in ASIC's Civil Penalty Proceedings under the Corporations Act" (2003) 21 *Companies and Securities Law Journal* 507, 508.
[39] Ibid 507-508.
[40] Grant Moodie and Ian Ramsay, "The expansion of civil penalties under the Corporations Act" (February 2002) 30 *Australian Business Law Review* 61, 61.
[41] Michelle Welsh, "Civil Penalties and Compensation Orders under the Corporations Act 2001" (2004) 17(4) *Commercial Law Quarterly* 13, 20.
[42] Moodie and Ramsay, above n 40, 63.

The jump in numbers of civil penalty actions coincides with number of major company collapses such as One Tel, HIH, Harris Scarfe and Ansett.[43] The subparagraphs below consider the civil penalties imposed in these cases.

3.5.3. Pecuniary penalties

Civil pecuniary penalties are closer to criminal fines than to private law civil damages.[44] While civil damages are ordered to compensate a person for the harm caused to him or her, it is clear that s 1317G of the *Corporations Act* intends the pecuniary penalty to serve as punishment. After all, a pecuniary penalty is payable whether or not harm was caused by the unlawful action. In this regard, proceedings for a pecuniary penalty under s 1317G of the *Corporations Act* are more like criminal proceedings.[45]

As a direct result of the punitive purpose of this penalty, it has been argued that conventional civil procedural rules are not applicable to such an unconventional civil law penalty. Accordingly, the courts could treat the proceedings for such a sanction more like criminal proceedings, despite the requirement of s 1317(l) of the *Corporations Act* which clearly states that these proceedings should be treated as civil proceedings.[46] The ALRC has suggested that in some cases the courts might have treated the civil proceedings for a pecuniary penalty order more like criminal proceedings.[47] An example is *Australian Securities Commission v Donovan*.[48] In this case, the court found that the purpose behind pecuniary penalties is to punish. Cooper J added that the imposition of a pecuniary penalty also has the goal of general deterrence.[49]

Civil pecuniary penalties can be found abundantly in the *Corporations Act*. There are many similarities between this sanction and fines. Both are subject to the same

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[43] John D Adams et al, *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (CCH Australia Ltd, 2001) 1.
[44] Karen Yeung, *The Public Enforcement of Australian Competition Law* (ACCC, 2001) 67.
[45] ALRC, above n 19, 87-88.
[46] Middleton, above n 38, 516.
[47] ALRC, *Principled Regulation: Civil and Administrative Penalties in Australian Federal Regulation*, Research Paper No 95 (2002), pt A, ch 3 [3.58]-[3.59] <http://www.austlii.edu.au/au/other/alrc/publications/reports/95> at 6 June 2005.
[48] *Australian Securities Commission v Donovan* (1998) 28 ACSR 583.
[49] Ibid [37]-[38].

limitations: see 3.4.2 above. The similarities between those two monetary penalties could imply that the "criminal" or moral element of a fine is lost. The division between civil and criminal penalties is blurring considerably. [50]

3.5.4. Injunction

An injunction is a court order commanding or preventing an action. It is traditionally employed to restrain repetition of a conduct. Section 1324 of the *Corporations Act* provides that when a person has engaged, or is engaged, in conduct that constitutes or might constitute a contravention of the *Corporations Act*, ASIC can seek an injunction restraining that person from engaging in that conduct and requiring that person to do any act or thing.

The ALRC has observed that ASIC officers find injunctions very effective and useful when acting quickly against offenders.[51] For instance, in *ASIC v Drury Management Pty Ltd*,[52] ASIC sought an injunction against Drury Management Pty Ltd, Piet Cornelius Walters, Mark Samuel Evans and Ransom House Pty Ltd to stop them from managing investment schemes without a license. The court was willing to issue such an order. Other sanctions, like disqualification orders, are also popular with the regulator.

3.5.5. Disqualification order

ASIC can apply for the disqualification of a person from becoming a director for a certain period of time. In *ASIC v Adler*,[53] Santow J pointed out that a disqualification order is protective in nature and has a motive of personal and general deterrence, but is not punitive.[54] This position may have been altered by the decision of

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[50] ALRC, above n 16, 88-89.
[51] Ibid 90.
[52] *Australian Securities and Investments Commission v Drury Management Pty Ltd* [2004] QSC 68 (Unreported, Jones J, 29 March 2004).
[53] *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); ASIC v Adler* (2002) 42 ACSR 80.
[54] Ibid [56] (iv)-(v).

Rich v ASIC.[55] The joint judgment of Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ declared that disqualification orders can be punitive in nature.[56]

Traditionally, disqualification orders protect the public from the harmful use of corporate structures. They also stop the use of a corporation in a manner that is contrary to proper commercial standards. The protection of the public includes the protection of individuals that carry on business with the corporation, such as consumers, creditors, shareholders and investors. The public is also "protected" in that the period of disqualification might lead the offenders to reflect on their incriminating behavior. During that period, they might take the steps deemed necessary to ameliorate their knowledge of what is appropriate behavior, leading them to adopt appropriate behavior in the future. But such a result is not guaranteed.[57]

The public might also be protected by the imposition of disqualification order because their imposition demonstrates to the rest of the business community and the general public that the offending behavior is unacceptable and will not be tolerated by ASIC or the courts. This sanction can be imposed together with other sanctions.[58]

3.5.6. Compensation orders to third party

Compensation orders have never been sought in isolation from the two enforcements studied above (pecuniary penalties and disqualification orders). Proceedings for a compensation order under s 1317H of the *Corporations Act* are more like traditional civil proceedings because they are compensatory in nature. Accordingly, civil liability under s 1317H for breach of statutory duty is imposed only where damage has been caused; it is not punitive in nature.[59]

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[55] *Rich v Australian Securities and Investments Commission* (2004) 209 ALR 271;[2004] HCA 42.
[56] This case will be studied in more detailed in Chapter 7.
[57] Middleton, above n 38, 513-514.
[58] Ibid.
[59] Ibid.

3.5.7. Community service orders

Community service orders have been characterised as an alternative penalty option, not only for individuals but also for corporate offenders. They are a practical way to rectify the damage inflicted by a person and clearly have a number of advantages:[60]

- They permit the sentencing court to order the performance of a socially useful program adapted to the expertise of the offender.
- They help in stigmatizing corporate offences as anti-social.
- They stimulate internal discipline within a company in relation to that type of offence.
- They diminish the possibility that the costs of fines will simply be passed on to consumers.

But community service orders have also some disadvantages, including the following:[61]

- They are unable to guarantee institutional change.
- There is a danger that the court will not relate the community service order project to the offence in question.
- There is a risk of corporate cheating in the absence of adequate supervision.

These advantages and disadvantages apply equally to the community service orders that can be applied in criminal cases.

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[60] ALRC, above n 19, 90.
[61] Ibid 90- 91.

3.6. Administrative penalties

Administrative penalties in Australian law are largely understood as sanctions inflicted by the regulator without the intervention of a court or tribunal. The ALRC has distinguished three categories of penalty that are sometimes wrongly described as administrative penalties in Australian federal regulation. The first category is infringement notices. For the reason why the ALRC does not consider infringement notices to be real administrative penalties see 3.6.2 below.[62]

The second category is the "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. The third category of penalties is the financial administrative penalties usually found in taxation and customs legislation. In these cases, the legislation determines whether there has been a breach. The application and the method of calculation of monetary administrative penalties are predetermined by the relevant legislation.[63] The sanctions relevant to these three categories are studied below.

3.6.1. Infringement notices

As mentioned above, the ALRC considers that infringement notices by themselves are not really administrative penalties. They are, in reality, an administrative device to dispose of a matter that could be a criminal or non-criminal offence. When such an offence is committed, the relevant regulator may choose one of the following two enforcement methods:[64]

- Starting either prosecution or civil penalty proceedings against the alleged offender.

- Issuing an infringement notice giving the offending party the chance to discharge or expiate the breach through payment of a specified amount.

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[62] Ibid 58.
[63] Ibid 59.
[64] Ibid 58-59.

An infringement notice can be seen as a type of "instant justice".[65] It is a notice authorized by law setting out particulars of an alleged offence. It gives the alleged offender a choice between paying the penalty stated in the notice to expiate the offence or electing to have the matter dealt with by the court. The notice will also specify the time and method of payment and the consequence if the alleged offender fails to respond to the notice.[66]

The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* gave ASIC the power to accept infringement notices in relation to alleged contraventions of the continuous disclosure provisions of the *Corporations Act*. Section 1317DAB of the *Corporations Act* states that an infringement notice gives ASIC an alternative to starting proceedings for civil penalties under Part 9.4B of the *Corporations Act*. Infringement notices are arguably the start of a significant departure from the separation of powers doctrine that implies that only a court may impose a penalty. Their use is often justified on the grounds that they are low cost, efficient way for regulators to deal with minor offences.[67] They are also simple methods to allow wrongdoers to discharge their obligations without facing the judicial system.[68]

3.6.2. Advantages and disadvantages of infringement notice

Some of the advantages of infringement notices have been noted by the ALRC as the following:[69]

- An infringement notice is a less harsh and discriminatory way of dealing with minor offences.

- It is speedy and it reduces expenses.

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[65] Mirko Bagaric, "Instant Justice ? The Desirability of Expansion of the Range of Criminal Offences Dealt With on the Spot" (1998) 24 *Monash University Law Review* 231.
[66] *Corporations Act*, ss 1317DAD, 1317DAE.
[67] *Brian William Mcquade v Marion City Council* (1998) 100 ACrimR 203, 206, discussing the *Expiation of Offences Act 1996* (SA).
[68] ALRC, above n 16, 94, 396.
[69] Ibid 397-398.

- It eliminates delays in court.

- It ensures proportionality between the seriousness of the offence, the enforcement procedure and the penalty.

However, the ALRC noted some disadvantages with infringement notices:[70]

- The sanction escapes the scrutiny of the court.

- There is always the risk that an innocent person might pay the infringement notice penalty to avoid the expense of contesting proceedings.

- There is the possibility of discriminatory enforcement against vulnerable members of the community.

- There is a possibility of "net widening" (eg by the automatic issue of an infringement notice in circumstances where a simple warning would have been more than enough).

Mirko Bagaric has observed that infringement notice schemes might underrate crime by decreasing the moral and social stigma of breaking the law.[71] Richard Fox has criticized the "one size fits all" approach to justice of infringement notice schemes, arguing that there is a risk of injustice in individual cases.[72] Only time will tell if infringement notices will cause injustice and trivialize crime.

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[70] Ibid 398-399.
[71] Bagaric, above n 65, 234.
[72] R Fox, "Infringement Notices: Time for Reform" (1995) 50 *Trends and Issues in Criminal Justice* 1, 5.

3.6.3. Negotiated penalties

As seen in this study so far, ASIC has a variety of concessionary arrangements at its disposal to improve compliance. This includes negotiating a sanction with the party who committed the unlawful act. For instance, ASIC announced on 27 March 2003 that it has reached an agreement with AMP Ltd (AMP) to resolve an investigation started by ASIC in relation to announcements made by AMP to the market between July and September 2002. This agreement led to the settlement of the civil proceedings started by ASIC. Under the settlement, AMP undertook the funding of a training program to the value of $100,000 in relation to continuous disclosure obligations under the *Corporations Act* and the *ASX Listing Rules*.[73]

Courts, regulators and lawyers have all observed that negotiated outcomes are preferable to litigation. The advocates of negotiated penalties emphasise its informality, low cost, ease of access and speed of operation. But some concerns have been voiced. There is some controversy over the fairness, transparency and accountability of negotiated penalties. These principles are essential because they ensure that no one has been taken advantage of. The regulator might appear to have the upper hand in relation to the regulated entity who, in turn, hopes that the regulator's discretion will be exercised in its favour. However, sometimes the regulated entity will not be easily "bullied" into an agreement. It might even be fully aware of the relevant legal rules. Accordingly, it may have the upper hand and commit all the "bullying".[74]

The reality is that the penalty will not always be fair and the fairness will really depend on the defendant and the regulator. The sanction imposed for relevant and similar facts might yet differ, depending on the regulator. The advocate of negotiated penalties might argue that either party can at any time invoke the formal court process in order to determine the matter. But in reality the regulated entity can face significant pressure to agree to a settlement with the regulator or risk a harsher penalty and significant costs for

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[73] ASIC, "AMP agrees to $100,000 Community Education Contribution" (Press Release, 27 March 2003) <http://www.asic.gov.au/asic/ASIC_PUB.NSF/byid/1AAF72D9009BDE3DCA256CF500796EDE?opendocument> at 7 June 2005.

[74] ALRC, above n 16, 248-249.

an uncertain outcome. In such situations, it can be difficult to characterize the resulting settlement as one based on consent. There is also a lack of transparency in negotiated settlements. This might strengthen the belief that penalties negotiated out of court are not adequately grounded in fact and legal principle.[75] But one of the advantages of negotiated penalties for the regulate is that they attract little publicity. Publicity of itself can be seen as a sanction.

3.6.4. Publicity

The Law Commission of Canada has noted that publicity can be a "soft sanction". This implies that publicity operates as a penalty in a formal and/or informal manner. For instance, it can simply be part of a regulator's interaction with its regulated community, which includes issuing warnings and information, or it may be a result of another penalty action such as publicity that accompanies a trial.[76]

Accordingly, publicity in Australia can be a formally legislated sanction and it can also operate in an informal manner. For instance, ASIC has the power to use publicity against those who commit anti-competitive practices. It can also use publicity in matters related to consumer protection and corporate governance. Formal adverse publicity orders may be made under s 12GLB of the *ASIC Act*. Such an order will require the offender to disclose or publish information related to the offence as the court directs.

ASIC can also take advantage of the informal power of publicity. Media releases are commonly used by ASIC to inform the public of the actions taken against those who breach the regulations. ASIC also publishes undertakings on its website.[77] Media exposure can be used to bolster the responsiveness of organizations to legislation and to increase compliance. Brent Fisse and John Braithwaite have noted that the mere threat of adverse publicity can be a strong deterrent for a corporation. If the reputation of the firm is blemished, the loss of reputation may lead to financial losses. Accordingly, the

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[75] Ibid.
[76] Law Reform Commission of Canada, *Sanctions, Compliance Policy and Administrative Law* (1981) 73.
[77] <http://www.asic.gov.au> at 2 June 2004.

corporation will tend to comply with the law. In such a manner, publicity can put pressure on the regulated community. The level of this pressure will depend on the resources available to the offender. [78]

However, there are some problems caused by publicity. Publicity, before adjudication, has attracted the most condemnation from the regulated community and is a subject of contention in court. Some parties have even sought to have some regulator held accountable for issuing press releases before a final decision was handed down. They argued that such conduct should result in lower penalties. The Federal Court has rejected this argument unless the respondent was able to show that any adverse publicity was the result of unfair and incorrect reporting.[79]

Another problem might arise when a regulator issues a press release prior to adjudication informing the public that it is commencing investigation against a firm or individual. If the regulator is unsuccessful in its investigation, the chances are that it will not publish a press release stating that the investigation has ceased, a court has not imposed a penalty or that there was no wrongdoing unless directed by legislation. Maybe a reform in this area is needed to ensure the fairness of the system.[80]

3.7. Quasi-penalties

Quasi penalties are defined by the ALRC as administrative actions that require the exercise of discretion that goes beyond a mechanical application of the relevant legislation.[81] Accordingly, they are not real administrative penalties, but they can be seen as quite effective penalties.

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[78] Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983) 261.
[79] *Smiles v Federal Commissioner of Taxation* (1992) 35 FCR 405, 454.
[80] ALRC, above n 16, 94- 95.
[81] Ibid.

3.7.1. Banning orders

Banning orders are a common enforcement tools used by ASIC under the *Corporations Act*. For example, ASIC's *Annual Report of 2002-2003* shows that 16 people were banned from becoming directors of a company and two of those 16 individuals were given a permanent ban. For the rest, the ban varied depending on the gravity of the offence. ASIC also banned 39 people from offering financial services, and for 20 of them the ban was permanent.[82]

Banning is an effective method to stop a breach of the law. It ensures protection of the public in the future and has a devastating effect on the person that is subject to the ban.[83] The regulator will sometimes inflict an equally harsh sanction to protect the community: withholding of a license.

3.7.2. Withholding licences

Licences are used when close monitoring of an entity's activities is deemed necessary. The most important feature of licensing regimes is the development of a specific relationship between the license holder and the regulator. As a consequence, the conduct of the license holder is restrained not only by rules of general application but by the conditions of the license and the relation created by the license. The main goal of having a licensing regime is to ensure that minimum standards are kept within the area of activity in order to protect public safety, the environment, consumers, or the effective functioning of systems such as the financial markets.[84]

The most powerful administrative sanctions in licensing regimes are cancellation, suspension or variation of a license. There is no legal right to the renewal or non-revocation of a license. However, the value of licenses is now recognized to be such

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[82] ASIC, *Annual Report*, 2002-2003, 23.
[83] *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 [56] (iv).
[84] ALRC, above n 16, 121-122.

that there is a reasonable expectation of their renewal or a right to hearing before revocation.[85]

Grabosky and Braithwaite have pointed out that regulators rarely take action to remove or suspend a license. This is explained by the fact that such an action has severe consequences.[86] Due to the ongoing relationship between the issuer of a licence and the license holder and the seriousness of the penalty, Braithwaite has used this sanction in his pyramid: see Figure 2.1 in Chapter 2. Due to its severity, the withholding of a license is used as a sanction of last resort.[87] Another sanction that is available to the regulator is withholding financial benefits.

3.7.3. Withholding financial benefits

As mentioned in Chapter 2, there is a debate about whether the withholding or changing of a benefit allocated to an individual or company is in fact a penalty or merely an issue of entitlement.

3.7.4. Enforceable undertakings

Enforceable undertakings are a relatively recent enforcement penalty used by ASIC, the ACCC and APRA. Accordingly, this thesis will concentrate on the use of this new remedy that is hailed by some as being a mechanism unique to Australia (although some similar types of agreements exist overseas).[88]

As noted in Chapter 1, an enforceable undertaking is a promise enforceable in court. The content of the undertaking accepted by the regulator can be seen as very flexible. The regulator will usually try to include into the undertaking any promise that it sees fit to solve the problem. For this reason, a view of the other penalties was essential because an undertaking can include, for example, a promise to stop being a director of a company for

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[85] Ibid 98-99.
[86] Peter N Grabosky and John Braithwaite, *Of Manners Gentle; Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, 1986), 187.
[87] Ayres and Braithwaite, above n 18, 35-36.
[88] This point will be developed in more detailed in Chapter 4 of this thesis.

a certain period of time. This voluntary ban will probably have a similar effect to a banning order. The only real difference is that the ban is not imposed by the regulator. It is voluntarily given by the promisor.

Accordingly, most of the other promises given by the promisor in an undertaking will probably be related to some of the sanctions studied above. Again, the major difference between those sanctions and the content of the promises given by the promisor is that the undertakings are accepted on a voluntary basis while the other sanctions are imposed by the regulator. Enforceable undertakings became available to ASIC in July 1998. Sections 93AA & 93A of the *ASIC Act* regulate this penalty.[89]

ASIC's Practice Note 69 points out that an enforceable undertaking will not be considered as a substitute for a possible criminal prosecution. It also notes that enforceable undertakings will not be used in the beginning of an investigation for the simple reason that not enough circumstances and facts are known to reach a proper decision.[90] Both ASIC and ACCC emphasize that they only accept enforceable undertakings where there is evidence of a breach that would in any other case justify litigation. But even if there is a general belief that enforceable undertakings are working well, some writers have voiced concerns about this penalty.[91]

For instance, Yeung has noted some concerns in relation to the "constitutional values" of enforceable undertakings. Although her observations specifically addressed s 87B of *the Trade Practices Act* (the use of enforceable undertakings by the ACCC) her concerns apply to undertakings accepted by other regulators such as ASIC. These concerns are the following:[92]

- Although the enforceable undertaking provisions are drafted in extremely broad terms, they are not unlimited. There is a danger that undertakings

[89] The content of ss 93AA and 93A will be discussed in Chapter 4 of this thesis.
[90] ASIC, *Practice Note* 69 <http://www.cpd.com.au/asic/pn/pn069.pdf> at 28 December 2003.
[91] ALRC, above n 19, 591-593.
[92] Yeung, above n 44, 114.

will be accepted for purposes that are not authorized by the legislative grant.

- It is well established today that administrative power cannot lawfully be used for penal purposes. As a result, it is essential that community service undertakings seek only to "fix" the effects of a suspected contravention, rather than seek to punish the suspected wrongdoer.

- The private nature of enforceable undertaking negotiations limits the transparency of the enforcement process and may raise questions concerning the extent to which the regulator is accountable for the exercise of its powers in such matters.

- The private nature of the process will exclude third parties from decisions that may have a significant impact upon them.

- There is concern about the fairness of enforceable undertakings accepted by ACCC. There is, after all, a scope for inconsistencies and unequal treatment that might be apparent when suspected contraventions are being resolved by enforceable undertakings.

All these limitations noted by Karen Yeung will be looked at when studying the enforceable undertakings accepted by ASIC from 1998 to 2004 in the next chapters. But it is interesting to note that enforceable undertakings can be seen as a new penalty that can allow the regulator to issue remedies that are not necessarily traditional in nature. The regulator can pick the remedy that suits the situation best. It is apparent that there is a trend today by the judges and regulators to think "outside the square". For instance in *The Queen v Leighton Contractors Pty Ltd,*[93] a building construction company was convicted of breaches the Victorian Occupational Health and Safety Act which had

[93] *The Queen v Leighton Contractors Pty Ltd* (unreported judgement, County Court Vic, Gebhardt J, 27 May 2004).

resulted in the death and serious injury to a number of workers. Gebhardt J ordered the company to pay $325,000 in fines, an additional$70,000 to two charities and a further $90,000 into trust funds of the deceased worker's children. However his Honour did not stop there but also ordered the directors of the company to meet with Victorian Work Safe representatives three times a year and to report these meetings in the company's annual report. Furthermore, the company agreed to assist in the implementation of a new Industry Standard for the construction of bridge beams by contributing $40,000 to the development of a training program for workers involved in similar construction, and it also undertook to approach two Melbourne universities to discuss the improvement of Occupational Health and Safety training associated with the design of temporary structures for bridge construction.

Chapter 4 The introduction of enforceable undertaking into our system

4.1. Negotiation

Alternative dispute resolution (ADR) has been anecdotally hailed as the Prince Charming and savior to a court system in distress.[1] By foregoing the opportunity to punish some breaches of the law, the regulators lighten the load faced by the court system. ADR also allows the regulators to use their scarce resources to provide better protection to the public. Negotiation will not be effective if one side does all the taking and no giving. A compromise should be present. It is all about give and take.[2]

There is a certain inevitability about the shift from formal punishment to negotiation in the business world. As companies have become bigger and more powerful, regulators have found it increasingly difficult and costly to use the courts to impose sanctions severe enough to "sting" giant organisations.[3]

Negotiation between equals is increasingly replacing law enforcement. This mode of action has been refined over the years and today we have established different types of compromises. One of these methods has been recently introduced to ASIC and it is called enforceable undertaking.[4]

4.2. Enforceable undertaking

As noted in para 3.7.4, enforceable undertakings are flexible penalties. This flexibility has enabled the regulator that has this remedy under its disposal to secure a timely and a cost-effective outcome that would not otherwise be achievable by a court order. Accordingly, the enforceable undertakings will offer tangible benefits for affected parties

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[1] Patricia M Wald, "ADR and the Courts: An Update" (2000) 46 *Duke Law Journal* 1445, 1445.
[2] John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985) 114.
[3] Ibid.
[4] Ibid 115.

and they will arguably achieve an improvement in the market conduct of the involved entity.[5]

The consultations instigated by the ALRC have shown that enforceable undertakings' provisions appear to be quite popular with regulators.[6] Accordingly, many government agencies have requested the introduction of this penalty into their system on both State and Federal level.

4.3. On a Federal level

The enforceable undertakings provisions were first introduced on a federal level in Australia. Many saw the advantages that accompanied the sanction and as a result, in less then 12 years, this sanction became available to more than one regulatory agency.

4.3.1. Introduction of enforceable undertakings to the ACCC

The enforceable undertaking provisions were made available to the ACCC in 1993 (Section 87B of the *Trade Practice Act 1974* (Cth)). 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 could achieve acceptable compliance with potential offenders through negotiation and settlement. Enforceable undertakings serve to legitimate and formalize such agreement.[7] When the Bill inserting s 87B into the *Trade Practices Act* was introduced, the then Attorney-General explained the purpose behind s 87B in his second hearing speech, as follows:[8]

> *"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 action which will lessen the otherwise undesirable effects of*

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[5] ASIC, *Annual Report 1998-1999*, 34.
[6] Australian Law Reform Commission (ALRC), *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002), 254.
[7] Christine Parker, "Restorative Justice in the Business Regulation? The Australian Competition and Consumer Commissions' Use of Enforceable Undertakings" (2004) 67 *The Modern Law Review* 209, 214.
[8] Australia, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2405 (Hon Michael Duffy, Trade Practices Legislation Amendments Bill 1992, Second Reading Speech).

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 Commission, Allan Fels, noted that he expected that the introduction of s 87B will have a moderating effect on the overall use of litigation. This statement implied that the level of court enforcement action would decline in favour of enforceable undertakings. Accordingly, contraventions of the Act would be solved without resorting to expensive and potentially long litigation.[9] Alan Fels 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."[10] The Commission's power to accept an enforceable undertaking appears broadly defined. Section 87B (1) of the *Trade Practices Act* states that:

" The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X)."

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[9] Karen Yeung, *The Public Enforcement of Australia Competition Law* (Dickson, 2001), 20.
[10] *Bills Digest No. 164 1999-2000 Aviation Legislation Amendment Bill (No 2) 2000,*

Additionally, enforceable undertakings are not solely used as a substitute for litigation. The ACCC also accepts some enforceable undertakings as a supplement to litigation and to settle court proceedings rather than proceed to a final hearing.[11] In retrospective, s 87B constitutes a form of intermediate sanction that provides a more formal and more powerful deterrent than simple administrative resolution in seeking compliance, but without the degree of legal and financial severity and publicity and protracted of litigation.[12] The Figure below characterizes this system.

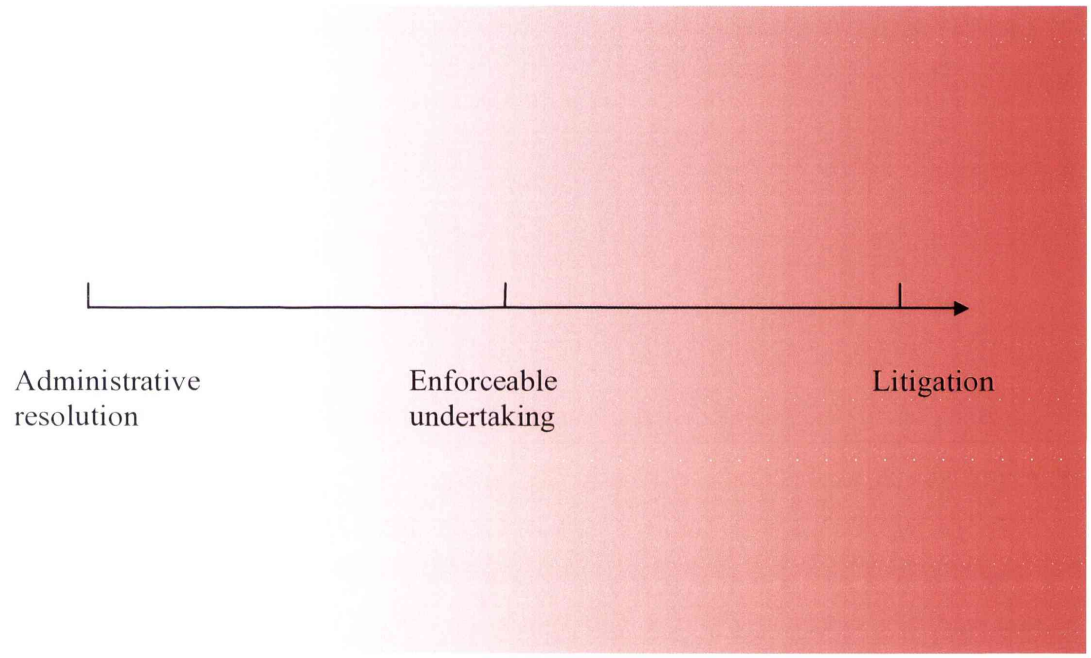


Figure 4.1: From a lesser sanction to a harsher one

The terms of enforceable undertakings are binding to the parties which agree to enter into these undertakings. Accordingly, the promisor cannot alter the terms of the undertaking. He/she may not withdraw or vary the content of the undertaking except with the consent of the Commission.[13]

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[11] Yeung, above 8, 19.
[12] 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, <http://www.cccp.anu.edu.au/Parker_ACI_2805031.pdf> at 31 December 2004.
[13] *Trade Practices Act 1974* (Cth), s 87B.

Section 87B(2) states that:

> *"The person may withdraw or vary the undertaking at any time, but only with the consent of the Commission."*

As noted above, section 87B of the *Trade Practices Act 1974* allows the ACCC to accept written undertakings in the exercise of its powers under the Act and for the enforcement of such undertakings in the Federal Court. Accordingly, a breach of an enforceable undertaking will not be considered by itself as an offence. The ACCC has to enforce an undertaking in court in case of a breach of the undertaking by the promisor and the court will decide if the undertaking should be enforced. Section 87B(3) and (4) states that:

> *"(3) If the Commission considers that the person who gave the undertaking has breached any of its terms, the Commission may apply to the Court for an order under subsection (4).*
>
> *(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."*

Accordingly, the court has more than one remedy available to it if the ACCC presents an application to enforce the terms of the undertaking. The court is not bound by the content of the undertaking and it can choose any remedy that it finds appropriate. It can decide on enforcing the terms of the undertaking or use another remedy that is more appropriate

to the circumstances of the case. The Commission regards s 87B as an important compliance tool in situations where there is evidence of a breach or potential breach of the Act that might otherwise justify litigation. The ACCC has issued a guideline for the use of enforceable undertakings. This guideline sets out the circumstances under which the ACCC will enter into an enforceable undertaking and also describes the content of an undertaking and its effect;[14] enforceable undertakings are posted on the ACCC's website.[15] The ACCC's enforceable undertaking power seems to be working well and has been copied in a number of other regulatory regimes.[16]

4.3.2. Introduction of enforceable undertakings to ASIC

As noted in Chapter 3, enforceable undertakings are available to ASIC. This regulator was given the power to accept enforceable undertakings in July 1998 by the *Financial Sector Reform (Amendments and transitional Provisions) Act 1998* (Cth).[17]

Item 11 of this Act allowed ASIC to accept a written undertaking, which may be enforced by a court where the court finds that the undertaking has been breached. The Explanatory Memorandum noted that under s 93A, the Commission will be given the power to accept a written undertaking without first having to go to court.[18] As a consequence of the passage of the *Financial Sector Reform (Amendments and transitional Provisions) Bill 1998* (Cth), the provisions that are related to enforceable undertakings are today contained in ss 93AA (generally) and 93A (in relation to registered managed investment schemes) of the *ASIC Act 2001* (Cth).[19]

ASIC's *Practice Note 69* sets out ASIC's views on the policy and the interpretation and operation of s 93A and 93AA of the *ASIC Act*. Part A describes the circumstances under

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[14] ACCC, *Section 87B of the Trade Practices Act: A guideline on the Australian Competition and Consumer Commissions use of enforceable undertakings* (Australia, August 1999).
[15] ACCC, <http://www.accc.gov.au/content/index.phtml/itemId/6029/fromItemId/3673> at 7 January 2005.
[16] Parker, above n 7, 210.
[17] *Financial Sector Reform (Amendments and transitional Provisions) Act 1998* (Cth), amending *of the Australian Securities Commission Act 1989* (Cth), Item 11.
[18] Explanatory Memorandum, *Financial Sector Reform (Amendments and transitional Provisions) Bill 1998* (Cth).
[19] *ASIC Act 2001* (Cth), s 93AA and 93A.

which ASIC will accept enforceable undertakings while Part B gives certain examples of acceptable and unacceptable terms in an enforceable undertaking. Part C identifies the consequences of a breach of the terms of an undertaking by the promisor, while Part D explains the circumstances under which ASIC will agree to vary or withdraw an enforceable undertaking.[20] The provisions that relate to enforceable undertaking in the *ASIC Act* and in the *Trade Practices Act* are similar in content.[21] 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).*
>
> *(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."*

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[20] ASIC, *Practice Note* 69 <http://www.cpd.com.au/asic/pn/pn069.pdf> at 28 December 2003.
[21] ALRC, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 101.

Accordingly, the rules that apply for the ACCC's undertakings are applicable to the undertakings accepted by ASIC. There is however one difference; the decisions of ASIC to enter into an undertaking are not open for judicial review. Section 244 of the *ASIC Act* means that the Administrative Appeal Tribunal does not have the power to review a decision of the Commission whether to accept or not to accept an enforceable undertaking made under ss 93A and 93AA of the *ASIC Act.*[22] However, a judicial review for procedural fairness of a decision by the ACCC to accept an undertaking may be available under the *Administrative Decisions Judicial Review Act 1977* (Cth).[23]

In *Australian Petroleum Pty Ltd v ACCC,*[24] the Federal Court held that a decision made by the ACCC refusing to negotiate a variation or withdrawal of an undertaking given in relation to a merger can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) because such a decision to withhold consent is a decision within the meaning of s 3 of the *Administrative Decisions (Judicial Review) Act.* In *Australian Petroleum Pty Ltd v ACCC*, Lockhart J held that undertakings are "an instrument" made under the *Trade Practices Act* and that undertakings have "the capacity to affect legal rights and obligations; and in fact will affect them". However, the decision did not specifically address whether the initial decision to accept an undertaking was reviewable.[25]

Lastly, ASIC, like the ACCC, has a register on its website that lists all the enforceable undertakings agreed upon. The existence of the enforceable undertakings' register makes it easier for the public to access the undertakings and ensures a certain transparency to the dealings of ASIC.[26] Again, due to the apparent success of the enforceable undertakings

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[22] *ASIC Act 2001* (Cth), s 244.
[23] Parker, above n 7, 242.
[24] *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 73 FCR 75.
[25] ALRC, *Review of Other Decisions by Regulators*, <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/23.Review_of_other_decisions_by_regulators.html#heading12> at 31 December 2004.
[26] ASIC, <http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Enforceable+Undertakings+Register?opendocument#registers> at 7 January 2005.

provisions available to the ACCC, the penalty was also made available in 2000 to more regulators, such as APRA.

4.3.3. Introduction of enforceable undertakings to APRA

APRA has been given the power to accept enforceable undertakings under s 262A of the *Superannuation Industry (Supervision) Act 1993* (Cth). The *Financial Sector Legislation Amendment Act (No.1) 2000* provided the enforceable undertakings provisions to APRA[27] with item 36 of this Act inserting a section that allowed this regulator to accept enforceable undertakings. This provision is similar to section 87B of the Trade Practices Act. Section 262A of the *Superannuation Industry (Supervision) Act* states:

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

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[27] *Financial Sector Legislation Amendment Act (No.1) 2000*, amending *Superannuation Industry (Supervision) Act 1993* (Cth).

As a consequence, section 262A of the *Superannuation Industry Act* allows the regulator to accept undertaking in relation to matters where the regulator has a function or power under the Act.[28] Even though the provisions of the Act are similar to those applying to the ACCC and ASIC, there is a major difference. While ASIC prides itself for the transparency with which it operates when accepting enforceable undertakings, APRA's undertakings are not always available to the public. APRA may not disclose names and other sensitive information relating to particular cases and some of the undertakings are kept secret to protect the promisor from negative publicity.[29] Another regulator was also keen to see the introduction of enforceable undertakings as a sanction in its system, namely, the Civil Aviation Safety Authority (CASA).[30]

4.3.4. Introduction of enforceable undertakings to CASA

As of July 2003, CASA has the power to accept enforceable undertakings under s 30DK of the *Civil Aviation Act 1988* (Cth). The *Civil Aviation Amendment Act 2003* in Division 3B introduced enforceable undertakings to this regulator.[31] The Explanatory Memorandum to this enactment notes that the provisions of the abovementioned Act are modelled after s 87B of the *Trade Practices Act*.[32] Accordingly, s 30DK of the *Civil Aviation Act* has a similar content to s 87B of the *Trade Practices Act*. It states that:

> *"(1) CASA may accept a written undertaking given by the holder of a civil aviation authorisation in connection with a matter:*
> *(a) arising under this Act or the regulations; and*
> *(b) in relation to which CASA has a function or power under this Act or the regulations.*
> *(2) The period for which the undertaking applies must not exceed 6 months. However, CASA may accept a further undertaking from the holder.*

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[28] *Superannuation Industry (Supervision) Act 1993* (Cth), s 262A.
[29] The Parliament Of The Commonwealth Of Australia, The Senate, *Notice Paper*, No. 122, Wednesday, 3 December 2003, 53, <http://www.aph.gov.au/Senate/work/notice/2003/snpf_122.pdf> at 31 December 2004.
[30] ALRC, above n 6, 101.
[31] *Civil Aviation Amendment Act 2003*, amending *Civil Aviation Act 1988* (Cth).
[32] Explanatory memorandum, Civil Aviation Amendment Act 2003.

(3) The undertaking must not require, or have the effect of requiring, the holder to pay money to CASA.

(4) CASA must publish details of the undertaking on the Internet.

(5) The holder may withdraw or vary the undertaking at any time, but only with the consent of CASA.

(6) If CASA considers that the holder has breached any of the terms of the undertaking, CASA may apply to the Federal Court for an order under subsection (7).

(7) If the Federal Court is satisfied that the holder has breached a term of the undertaking, the Court may make all or any of the following orders:

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

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

(c) any other order that the Court considers appropriate."

The Director of CASA, Mike Toller has noted that there is a gap in the tools available for CASA; for instance, CASA did not in the past have a pyramid of enforcement. Its sanctions will start with formal counselling. They will go from there to suspension, cancellation or a certificate which threatens the livelihood of a business. For this reason, a scheme for voluntary enforceable undertaking was tabled before Parliament in 2003. Accordingly, enforceable undertaking will allow the regulator take the middle ground between the use of soft and drastic measures.[33]

[33] Toller, "Scandalously Competent", (Paper presented at National Press Club Speech, 21 February 2001), <http://www.iasa.com.au/folders/Safety_Issues/FAA_Inaction/scandalouslycompetent.html> at 7 January 2005.

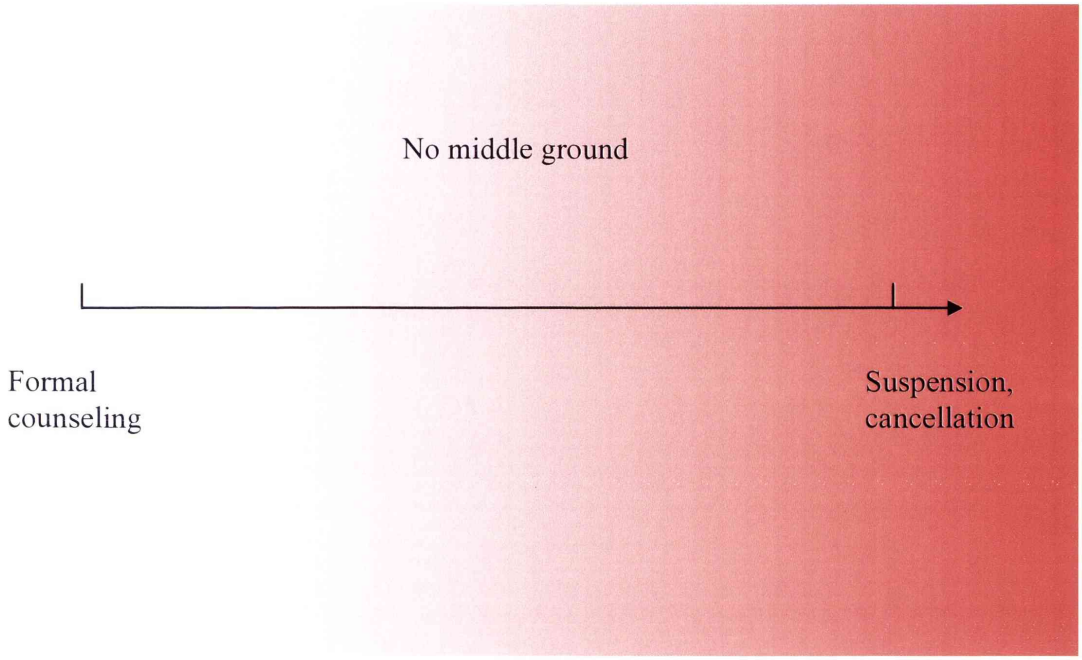


Figure 4.2: The situation before the introduction of enforceable undertaking to CASA

The enforceable voluntary undertakings available to CASA give it the power to accept a written undertaking from an authorized holder in relation to compliance with civil aviation safety legislation. As with the ACCC, ASIC and APRA, such undertakings are completely voluntary.[34] Section 30DK (4) of the *Civil Aviation Act 1988* notes that CASA must publish details of the undertakings on the internet; as a result, the transparency of the dealings of the regulator is facilitated. So far, CASA has used this sanction 3 times.[35]

Nevertheless, there is one major difference between the use of undertaking by this regulator and the use of undertaking by ASIC, APRA and the ACCC. With CASA, the period for which the undertaking applies must not exceed six months.[36] This limitation in time does not apply to other regulators. Other than that, the provisions that deal with enforceable undertaking for all these regulators are quite similar as can be seen when reading s 30DK.

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[34] *Civil Aviation Act 1988* (Cth), s 30DK.
[35] CASA, <http://www.casa.gov.au/hotopics/action/evu/index.htm> at 7 January 2005.
[36] Ibid.

To facilitate the use of enforceable undertakings, CASA has issued information about how and when it will utilize such a sanction. Chapter 5 of CASA's enforcement manual explains the meaning and use of enforceable voluntary undertakings. It also points out that these enforceable voluntary undertakings are remedial in nature.[37] Their purpose is to diminish the risk to aviation safety by having the holder of a civil aviation authorization voluntarily modify their practices, behaviour, attitude or skills, to insure future compliance with the effect and intent of the aviation law.[38]

The manual is more developed and detailed than ASIC's *Practice Note 69*. It also has a section that describes the negotiation process that will lead to an enforceable voluntary undertaking. The CASA seems determined to fill the gaps and uncertainties that the other regulators have found in their dealing with the enforceable undertakings' provisions. In 2003, the enforceable undertakings provisions were also provided to yet another regulator.

4.3.5. Introduction of enforceable undertakings to the Australian Communications Authority

Part 6 of the *Spam Act 2003* (Cth) gave the Australian Communications Authority (ACA) the power to accept enforceable undertakings. The enforceable undertakings provisions in this Act are modelled upon s 87B of the *Trade Practices Act*.[39] Section 38 of the *Spam Act* states that:

> *"(1) The ACA may accept a written undertaking given by a person for the purposes of this section in connection with a matter relating to:*
> *(a) commercial electronic messages; or*
> *(b) address-harvesting software.*
> *(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the ACA."*

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[37] CASA, Enforcement Manual (CASA, reviewed in June 2004), 5.6, <http://www.casa.gov.au/manuals/regulate/enf/009r005.pdf> at 7 January 2005.
[38] Ibid, 5.3.
[39] Explanatory Memorandum, Spam Bill 2003, 100

Section 39 of the *Spam Act* follows what is stated in s 87B (3) and (4) of the *Trade Practices Act*. It notes that:

> *"(1) If the ACA considers that a person who gave an undertaking under section 38 has breached any of its terms, the ACA may apply to the Federal Court for an order under subsection (2).*
> *(2) If the Federal Court is satisfied that the person has breached a term of the undertaking, the Court may make any or all 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."*

Part 6 of the *Spam Act* came into effect on 10 April 2004.[40] Accordingly, enforceable undertakings are now a new sanction although the ACA has not yet formulated a guide for their use. Hopefully it will follow the lead of ASIC, the ACCC and CASA and devise a guideline that will be applied when accepting an enforceable undertaking to limit certain uncertainties that can be found in the legislation.

4.4. On a State level

Enforceable undertaking is also used at the State level in Australia. Some of the departments that can use enforceable undertakings are the following:

- The New South Wales Department of Fair Trading.

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[40] *Spam Act 2003* (Cth), s 2.

- The Queensland Electrical Safety Office.

- The Chief Executive Officer, Queensland Department Industrial Relations.

4.4.1. Introduction of enforceable undertaking to the New South Wales Department of Fair Trading

The New South Wales Department of Fair Trading can use enforceable undertakings under s 73A of the Fair Trading Act 1987 (NSW). This section permits the Director-General to accept a written undertaking given by a person in connection with an alleged breach of the Fair Trading Act 1987 (NSW). The person may withdraw or vary the undertaking at any time, but only with the consent of the Director-General.[41] Section 73A of the *Fair Trading Act 1987* (NSW) is modelled upon s 87B of the *Trade Practices Act*. It states:

> *"(1) The Director-General may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Director-General has a function under this Act.*
> *(2) The person may withdraw or vary the undertaking at any time, but only with the consent of the Director-General. The consent of the Director-General is required even if the undertaking purports to authorise a withdrawal or variation of the undertaking without that consent.*
> *(3) If the Director-General considers that the person who gave the undertaking has breached any of its terms, the Director-General may apply to the Supreme Court for an order under subsection (4).*
> *(4) If the Supreme 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 State an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach,*

[41] *Fair Trading Act 1987* (NSW), s 73A.

(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."

Accordingly, it has the same features as section 87B of the *Trade Practices Act*. The 1999-2000 Annual Report of the Department of Fair Trading noted that new powers, such as enforceable undertakings, have been given to the Department. These new powers will ensure a greater flexibility in combating illegal market practices. The Director's General Report also noted that when accepting an enforceable undertaking the traders will undertake to carry out or desist from certain conduct. Enforceable undertakings are also seen as a method that obviates the need for expensive legal action. In case of breach of such undertakings, they can be enforced in the Supreme Court.[42] However there is no requirement in the law that all enforceable undertakings should be available to the public, such as through the internet. Other State Departments also have the power to use enforceable undertakings.

4.4.2. Introduction of enforceable undertakings to the Queensland Electrical Safety Office

The Chief Executive of Queensland Electrical Safety Office has the power under s 49 of the *Electrical Safety Act 2002* (Qld) to accept a written undertaking for alleged contraventions of the provisions of the abovementioned Act. Enforceable undertakings are only available at the discretion of the chief executive in relation to breaches of the obligation provisions in Part 2 of the Act.[43]

Enforceable undertakings are defined as written undertakings between alleged offenders and the department's chief executive, detailing the future actions they would pursue over alleged contraventions of their obligations. The goal of such a sanction also revolves

[42] Department of Fair Trading, *Annual Report 1999-2000*, 4.
[43] *Electrical Safety Act 2002* (Qld), s 49.

around the notions of prevention and deterrence. A promisor might agree, for example, to:[44]

- Provide publicity or educative programs to help deter other offenders;

- Perform certain actions or introduce programs to prevent future breaches.

The enforceable undertakings provisions that are present in Part 3 of the *Electrical Safety Act 2002* (Qld) are also modelled after s 87B of the *Trade Practices Act*. When the *Electrical Safety Bill 2002* (Qld) was first introduced, the Minister observed that the main benefit of enforceable undertakings was that such arrangement could be publicised in order to deter other obligation holders from breaching those obligations. The outcomes of such a remedy can be practical and broader in range. They are also implemented on a relatively cost neutral basis.[45]

But the introduction of this sanction did not escape criticism. The *Electrical Safety Office Review* observed that the Chief Executive should be careful when accepting undertakings and ensure that obligations under the undertaking are reasonable, clearly expressed and not unfairly obtained. The content of the undertaking should be tailored to the particular circumstances of the case and crafted so as to achieve the desired outcomes. There should also be a positive commitment on the part of the alleged offender to stop the particular offending conduct.[46]

There are a few major differences between the undertakings accepted by the chief executive and the undertakings accepted by ASIC and the ACCC. The undertakings accepted by the chief executive office are considered as an alternative to prosecution.[47]

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[44] Queensland Government Department of Industrial Relations, *Electrical Safety Act, the Guide* (2002), 17, <http://www.eso.qld.gov.au/legislation/act02.pdf> at 31 December 2004.
[45] Queensland Parliamentary Library, *The Electrical Safety Bill 2002* (Qld), (Queensland Parliamentary Library, 2002), 22, <http://www.parliament.qld.gov.au/parlib/Publications_pdfs/books/2002024.pdf> at 31 December 2004.
[46] Ibid.
[47] Queensland Government Department of Industrial Relations, *Queensland Workplace Prosecutions*, Issue 5, November 2002, 8 <http://www.ronatkinson.com.au/publications/qld_pros5.pdf> at 31 December 2004.

This is not the case with ASIC and the ACCC where it has been stated clearly that undertakings will not be used in a case where there is ground for prosecution. The undertakings entered into with ASIC and the ACCC are only an administrative penalties. Another difference is that the breach of an undertaking accepted by the chief executive is by itself an offence.[48] This is not the case with the enforceable undertaking accepted by ASIC and the ACCC. Section 52 of *Electrical Safety Act 2002* (Qld) states that:

> *"The identified person for an operating electrical safety undertaking must not contravene the undertaking.*
>
> *Maximum penalty--1 000 penalty units."*

Accordingly, if the promisor does not comply with the terms of the undertakings, he or she will be fined.[49] Such a provision is not present in s 87B of the *Trade Practices Act* and ss 93A and 93AA of *ASIC Act*. For ASIC and the ACCC, the breach of an undertaking by itself is not an offence.

4.4.3. Introduction of enforceable undertaking to the Queensland Department Industrial Relations

The Chief Executive of the Queensland Department Industrial Relations also has the right to accept a workplace health and safety undertaking under Part 5 of the *Workplace Health and Safety Act 1995* (Qld). Sections 42D to 42I of Part 5 of the *Workplace Health and Safety Act 1995* (Qld) explain how such undertakings are to be accepted. The Queensland Department Industrial Relations defines an enforceable undertaking as a legal agreement in which a person or organisation undertakes to carry out specific activities to improve worker health and safety and deliver benefits to industry and the broader community.[50]

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[48] Queensland Parliamentary Library, above n 45, 23.
[49] *Electrical Safety Act 2002* (Qld), s 52.
[50] Enforceable undertaking,
<http://www.dir.qld.gov.au/publications/prosecutions/enforceable_undertakings/index.htm >
at 31 December 2004.

The main benefits of such provisions include the following: [51]

- The implementation of enforceable undertakings will take place on a relatively cost neutral basis

- The publication of an undertaking in the community might deter other duty holders from committing similar breaches

- The outcomes of undertakings are practical and they touch a broader area unlike traditional remedies because undertakings are not limited by what the legislation allows the courts to impose.

- The outcomes may include the requirements to:
    - Review the company's workplace health and safety performance,
    - Develop and implement an appropriate workplace health and safety management system,
    - Conduct or fund research into a workplace health and safety issue relevant to the industry,
    - Produce information products for dissemination throughout the industry or sector
    - Arrange independent externally valid evaluations or audits of the safety management system,
    - Implement specified projects, such as special training programs to address specific needs for workers, supervisors and management.

However a review of the *Workplace Health and Safety Act 1995* (Qld) observed that there is a lack of guidelines in relation to the provisions of undertakings. A solid policy framework needs to be developed to make the use of this sanction easier. A major difference between the enforceable undertakings accepted by The Chief Executive of the

[51] Queensland Department Industrial Relations, *Review of the Workplace Health and Safety Act 1995, Issues Paper* (December 2001), 24, <http://www.eso.qld.gov.au/hsdev-base/actreview_issuespaper.pdf> at 31 December 2004.

Queensland Department Industrial Relations and the undertakings accepted by ASIC and the ACCC is that the undertakings accepted by the chief executive office are considered to be an alternative to prosecution.[52] This is not the case for ASIC and the ACCC. The breach of an undertaking given by the Chief Executive of the Queensland Department Industrial Relations is an offence. Section 42G notes:

> *"The identified person for an operating workplace health and safety undertaking must not contravene the undertaking.*
>
> *Maximum penalty--1 000 penalty units".*

These provisions in the *Workplace Health and Safety Act 1995* are similar to the provisions the *Electrical Safety Act 2002*.[53]

4.5. Desire of some regulators to include enforceable undertaking into their system

Other regulators desire to have provisions similar to section 87B of the *Trade Practices Act* and seek the power to accept enforceable undertakings. Some of these agencies include Comcare, the New South Wales Office of the Legal Services Commissioner and environmental regulators.

4.5.1. Comcare

The *Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002* proposed the introduction of enforceable undertaking to Comcare. It should be noted that the desire to introduce enforceable undertaking is motivated by the hope that such a sanction will remove risks to health and safety of employees before an injury occurs. Enforceable undertakings

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[52] Sparke and Helmore, *Queensland: Workplace Health & Safety Amendment Bill,* (13 December 2002), <http://www.shelaw.com.au/vnews.php?id=43> at 31 December 2004.

[53] Explanatory Notes ,`Workplace Health And Safety and Another Act Amendment Bill 2002`(Qld). <http://www.whs.qld.gov.au/whsact/whsactamdb02exp.pdf> at 31 December 2004.

would ensure prevention of future breaches of the law.[54] Other agencies desire to introduce enforceable undertakings to legitimize a remedy they are already using.

4.5.2. The New South Wales Office of the Legal Services Commissioner

Practitioner undertakings are commonly used to resolve consumer and conduct disputes, especially where the complainant wants to seek a specific performance from their practitioner. However, while such undertakings are widely used, there is not one effective mean available for the New South Wales Office of the Legal Services Commissioner to enforce them.[55]

The New South Wales Office of the Legal Services Commissioner, relying on the procedure that is available to the ACCC to enforce undertakings under s 87B of the *Trade Practices Act,* has proposed to add such a power to its system. Such provision will include certain elements such as:[56]

- The ability of the Office of the Legal Services Commissioner and the Professional Councils to accept a written undertaking from a practitioner in relation to conduct the subject of a complaint;

- The requirement for the Office of the Legal Services Commissioner to consent to the withdrawal or variation of the undertaking by the practitioner; and

- The power to enforce an undertaking through an application to the Tribunal to order performance, recover any money received as a result of breaching a term of the undertaking, payment of compensation to the complainant for any damages suffered as a result of the breach, or anything else that the Tribunal feels is appropriate.

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[54] Ibid.
[55] Office of Legal Services Commission, OLSC Submission to Law Reform Commission Review 2000 (Sydney) <http://www.lawlink.nsw.gov.au/olsc1.nsf/pages/olsclrcsubmission_chapter5> at 31 December 2004.
[56] Ibid.

Such provisions will give the Office of the Legal Services Commissioner the ability to enforce an undertaking. They will also be of use to the Commission that in the past had had problems with enforcement. This is particularly so in certain cases where practitioners had entered into an arrangement similar to an undertaking to stall the complaint process but they avoided performing the terms of the agreement because they knew that such an arrangement could not be enforced. The Office of the Legal Services Commissioner observed that enforceable undertakings would address the frustration of complainants caused by this situation and assist in achieving a satisfactory outcome.[57] Enforceable undertakings are also seen by others as a means of educating the public.

4.5.3. Environmental regulators

Some commentators believe that environmental undertakings will allow environment protection agencies achieve better compliance with environmental laws. The sanction of enforceable undertaking might be useful in educating individual organisations and the wider community. It could also prevent the re-occurrences of breaches and might also lead to remedial action. Lastly, voluntarily undertakings have the potential to bring about positive results because they encourage organisations to take greater ownership of their problems and responsibility for finding solutions.[58]

After looking at the undertakings provisions in Australia at both the federal and state level, and noting the desire of other agencies to have enforceable undertakings in their system, it is appropriate to examine if other countries have penalties similar to enforceable undertakings, as the ALRC report noted that enforceable undertakings are unique in Australia.[59]

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[57] Ibid.
[58] Ibid
[59] ALRC, above n 6, 100.

4.6. Similar penalty overseas

The ALRC report noted that enforceable undertakings are unique to Australia. Is this statement a correct one? Are there any penalties similar to enforceable undertakings overseas? As it will be noted below, only New Zealand has adopted a system that is very similar to Australia.

4.6.1. Consent decrees in the United States of America

In the United States of America, a consent decree is a remedy similar to an enforceable undertaking. Like an enforceable undertaking, a consent decree may be defined as an agreement between involved parties. But the similarity stops there because this agreement has to be submitted in writing to a court. It is only when the consent decree receives the approval of a judge that it becomes legally binding.[60] In Australia, the enforceable undertakings are accepted at the discretion of the regulator without recourse to the court system. The regulator will only have to go before a court if an undertaking is breached.[61] Accordingly, the process of entering into a consent decree, even though it may commence in a similar fashion to an enforceable undertaking, will differ dramatically when the decree is placed into the hand of the court.

The use of the consent decree to settle antitrust cases is one of the Antitrust Divisions' most important enforcement tools. In 1974, due to abuses in the Department of Justice's (DOJ) handling of a Watergate-era consent decree involving the International Telephone and Telegraph Corporation, the *Antitrust Procedures and Penalties Act* (referred to as the *Tunney Act*) was passed. The *Tunney Act* sets out the requirements that should be looked at by the federal court before approving antitrust consent decrees.[62] The *Tunney Act* requires that the Justice Department file proposed decrees with the court and it gives the public sixty days to comment on a proposed decree. The public, including competitors who believe they are adversely affected, may file comments about the proposed decree. The court will then look at the consent decree and decide whether it should approve it.

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[60] *Antitrust Procedures and Penalties* [15 U.S.C. § 16].
[61] ASIC Act, s 93A(4).
[62] *More Efficient Antitrust Enforcement Under H.R 1086*, <http://www.lw.com/resource/Publications/ClientAlerts/clientAlert.asp?pid=1031> at 31 December 2004.

The court will usually accept the proposed decree if the decree will serve the public interest.[63]

The *Tunney Act* is intended to make the process of considering and approving consent decrees more transparent by allowing public input and by taking the public interest into consideration. However, the legislator did not define what public interest means. Accordingly, the courts were left to develop their own standards and they have formulated a non-statutory indicator that is based on the perceived advantage that the proposed settlement will bring to the public. The courts will usually look at the competitive impact of the decree and at its impact on third parties.[64]

There was a hope that this system would escape the problem of rubber stamping. However it is clear that this was not the case. In particular, a 1995 District Court Circuit decision suggested that a judge was obligated to accept an antitrust consent decree unless it "appears to make a mockery of judicial power."[65] It also held that a reviewing court's "function is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest."[66] As a result, the courts have rarely disapproved of proposed consent decrees and recent decisions interpreting the *Tunney Act* have been criticized for prohibiting intervention by the court except in the most extreme circumstances.[67]

In the light of this apparent reality, a proposal to reform the *Tunney Act* was introduced in the US Senate in 2003 aimed at bolstering the courts' ability to scrutinize antitrust consent decrees. This legislation would have prohibited a court from entering a proposed consent judgment "unless it finds that there is reasonable belief, based on substantial evidence and reasoned analysis, to support [DOJ's] conclusion that the consent judgment

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[63] The *Tunney Act*, 15 U.S.C. § 16.
[64] American Bar Association (ABA), *Antitrust Consent Decree Manual: Section of Antitrust Law* (ABA, 1979) 8.
[65] *United States v. Microsoft*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).
[66] Ibid 1460 (D.C. Cir. 1995).
[67] Hogan & Hartson LLP, *Congress Completes Action on Important Changes to U.S. Antitrust Laws*, (2 June, 2004), <http://affi.org/HHAntitrust.pdf> at 31 January 2005.

is in the public interest." However, the Antitrust Section of the American Bar Association (ABA) and some in the business community, opposed this provision because it would have substantially undermined the ability of parties to enter into binding consent decrees with the government.[68]

The ABA Antitrust Section was most concerned that the language of "substantial evidence" could have been interpreted to require courts to engage in a lengthy review of each proposed decree, including evidentiary hearings. If such reviews became the norm, parties would have a significant disincentive to enter into settlements with the DOJ because the potential delay, cost, and uncertainty of litigation would be offset by concerns about the potential delay, cost, and uncertainty in a *Tunney Act* proceeding. The reason for entering into the consent decree would be undermined. In response to these criticisms, the Senate deleted this proposed amendment to the Act.[69]

The final Tunney Act amendments included a few provisions that are likely to have little impact on the use of consent decrees. It was stated that the purpose of both the *Tunney Act* and these amendments was to "ensure" that antitrust consent judgments are "in the public interest," and to repudiate the District Court Circuit's language stating that the role of the court was limited to "determining whether entry of ... consent judgments would 'make a mockery of the judicial function.'" As a result, this provision is likely to have little, if any, practical effect on the ability of parties to enter into consent agreements with DOJ. It is hoped though that the court will scrutinize the consent decrees before agreeing to them.[70]

While the variation and withdrawal of an enforceable undertaking in Australia is at the discretion of the regulator that accepted it, the change or withdrawal of a consent order is at the discretion of the court. The party seeking modification bears the burden of establishing, to the satisfaction of the Court, that a significant change in circumstances

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[68] Ibid.
[69] Hogan & Hartson LLP, *Congress Completes Action on Important Changes to U.S. Antitrust Laws*, (June 2, 2004), < http://affi.org/HHAntitrust.pdf> at 31 January 2005.
[70] Ibid.

warrants revision of the consent decree, and the proposed revision is suitably tailored to the changed circumstances.[71] The *Tunney Act* states that the modification of a consent decree may be warranted when the changes in factual conditions will make compliance with the US consent decree unworkable or substantially more onerous, or when the change in factual conditions could not be foreseen at the time of the entry into the consent decree.[72] Even though the consent decree provisions defer from the enforceable undertaking provisions, both remedies save agency resources. A similar remedy to enforceable undertaking can also be found in the United Kingdom.

4.6.2. Enforceable undertaking in the United Kingdom

In the United Kingdom, there is a penalty similar to the Australian enforceable undertaking and it is also called an enforceable undertaking. To differentiate the enforceable undertaking in the United Kingdom from the enforceable undertaking in Australia, this thesis will refer to the undertaking accepted in the United Kingdom as the UK undertakings. The UK undertakings are accepted in many areas and by many agencies and are considered to be an effective way to deal with breaches of the law.[73] Like in Australia, the UK undertaking is an agreement where the alleged offender will undertake to do or not to do certain things. There is no involvement of the court except when there is a need to enforce the undertaking due to a breach of the terms of the undertaking by the alleged offender. Unlike the Australian procedure, the breach of an undertaking in the United Kingdom constitutes a criminal offence attracting a prison sentence of up to two years and/or a fine. The person may also be liable for any debt incurred by the company while he/she was in contravention of the undertaking.[74] One of the most popular UK undertakings arises in relation to alleged breaches of directors duties.

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[71] *Labor/Community Strategy Center V Los Angeles County Metropolitan Transportation Authority And Julian Burke*, Case NO. CV 945936 TJH (Mcx), <http://www.thestrategycenter.org/Decree/body_consent_decree.html> at 31 December 2004.

[72] Ibid.

[73] Chief Inspector Drinking Water Inspectorate, *Drinking Water for Wales Annual Report 2001*, (Department for Environment, Food and Rural Affairs, 2001) 11, <http://www.dwi.gov.uk/cymru/pdf/english.pdf> at 31 December 2004.

[74] The Insolvency Service, *Company Director's Disqualification Act 1986 and Disqualified Directors*, <http://www.insolvency.gov.uk/guidanceleaflets/cddadd.htm> at 31 December 2004.

Under the *Company Directors Disqualification Act 1986*, the court may disqualify an individual for a specified period. Such disqualification order will have the following consequences:[75]

a- The person must not act as a director of a company, as a member of a limited liability partnership, as a receiver of a company's property, or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless he/she has permission of the court;

b- The person must not act as an insolvency practitioners

The *Insolvency Act 2000* introduced new amendments to the *Company Directors Disqualification Act 1986.* Today, an individual can give an enforceable undertaking to the Secretary of State for Trade and Industry by which they promise not to do any of the deeds mentioned in paragraphs (a) or (b) above. Once the undertaking is accepted by the Secretary of State, it will have the same effect as a disqualification order.[76]

The UK undertakings were introduced into the system because of delays in getting cases of disqualification orders through the courts. Accordingly, since the UK undertakings do not require the courts' intervention, they result in earlier disqualification for those who agree to an undertaking.[77] However, when the promisor in Australia agrees to stop managing a company for a certain period of time, the ban in the undertaking is voluntary. In case of breach of the undertaking, the regulator will have to enforce it in court to make the ban compulsory.[78] This is not the case with the UK undertakings.

The Disqualification order or undertaking will be registered at Companies House, which

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[75] The Insolvency Service, *Disqualified Directors Hotline,*
<http://www.insolvency.gov.uk/guidanceleaflets/disqhotlinemarch04.htm> at 31 December 2004.
[76] Ibid.
[77] *Insolvency Bill 2000, Explanatory Notes,*
<http://www.publications.parliament.uk/pa/ld199900/ldbills/028/en/00028x--.htm> at 31 December 2004.
[78] ASIC Act, s 93AA.

monitors new directorships and provides details of disqualified directors on request. The Insolvency Service operates a 24-hour telephone hotline to enable the public to report breaches of these orders and undertakings.[79] Another difference between the Australian enforceable undertakings and the UK undertakings concerns variations to the undertakings. In the United Kingdom, the court may vary the undertaking on the application of a person who is subject to a disqualification undertaking.[80] As mentioned before, in Australia, the regulator will decide if the undertaking should be varied. The success of UK undertakings provisions has led to the introduction of similar provisions Northern Ireland.

4.6.3. Enforceable undertakings in Northern Ireland

Girvan J noted in one of his judgments[81] that the introduction of the undertakings provisions as a remedy for disqualification of directors in the Northern Ireland is desired. *The Company Directors Disqualification (Northern Ireland) Order 2002* introduced such undertakings to the Northern Ireland system. The undertaking will result in voluntary disqualification of the person who agreed to the terms of the undertaking. It will have the same effect as a court order and breaching it will create a criminal liability. The provisions of this Act are very similar to those in the UK.[82] Again the same differences that exist between the UK undertaking and the Australian undertakings will apply here. The last system that will be examined is the New Zealand system.

4.6.4. Enforceable undertakings in New Zealand

In New Zealand, the *Securities Amendment Act 2002* amended the *Securities Act 1978* and thereby gave the Securities Commission new powers to exercise its statutory functions. Now, the Securities Commission has the power to accept undertakings from

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[79] The Insolvency Service, *Company Directors Disqualification Act 1986 and Disqualified Directors: Effect of disqualification orders and disqualification undertakings,* <http://www.insolvency.gov.uk/pdfs/cddaddweb.pdf > at 31 December 2004.
[80] *Insolvency Act 2000* (United Kingdom), clause 5.
[81] The Department of Economic Development v Thomas Stewart Roche, Malcolm William Taylor and Raymond Nardone, GIRJ3062, <http://www.austlii.edu.au/~andrew/bailii/NIECA/Data/new/GIRJ3062.rtf> at 3 May 2005.
[82] *The Company Directors Disqualification (Northern Ireland) Order 2002*, s 4.

issuers of securities or others, and to enforce these undertakings if they are not complied with.[83] The New Zealand enforceable undertakings introduced in December 2002 are written undertakings that are offered by a party (or parties) to the Commission, and accepted by the Commission, under section 69J of the *Securities Act*. They are enforceable in the Courts if a party fails to fulfill the undertaking.[84]

Enforceable undertakings are a flexible procedure enabling the Securities Commission to work with a person considered to be engaging in inappropriate conduct in order to develop remedies that prevent further harm to particular investors or for the integrity of the market. The procedure also allows for the compensation of persons who have sustained harm; it also facilitated and improved future compliance with securities laws.[85]

Securities Commission Chairman Jane Diplock noted that the written undertakings are a flexible and effective enforcement tool. The Commission used this power for the first time on 18 June 2003 when it accepted written undertaking from NZIFL 3 Limited, NZ Forestry Investment Limited and Mr Ross Anthony Collin. The use of undertakings seems to have become popular in New Zealand; since then, 14 undertakings were accepted by the Commission. The Commission will generally publish the enforceable undertakings on its website.[86] Accordingly, the New Zealand enforceable undertakings have the same effect as the Australian undertakings.

4.7. In brief

As it can been seen from the above paragraphs, enforceable undertaking in Australia is widely available to regulators on both State and Federal level in Australia. Their use will probably spread to a range of other regulators because they are seen as a practical, speedy and less costly mode of regulation. Similar remedies to enforceable undertakings are to be found in other parts of the world. The New Zealand undertakings are similar to the

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[83] *The Bulletin: The Quarterly Newsletter of the New Zealand Securities Commission,* January 2003, n 22, 1, <http://www.sec-com.govt.nz/publications/bulletin/0103/bulletin_0103.pdf> at 31 December 2004.
[84] *Securities Act 1978,* s 69J.
[85] International Monetary Fund Monetary And Financial Systems Department, *Detailed Assessments Of Standards And Codes: Iosco Objectives And Principles Of Securities Regulation*, (June 2004, New Zealand), 13, <http://www.imf.org/external/pubs/ft/scr/2004/cr04417.pdf> at 31 December 2004.
[86] Securities Commission New Zealand, *Enforceable undertakings*, <http://www.sec-com.govt.nz/notices/enforcement/index.shtml> at31 December 2004.

Australian undertakings. The undertakings in the United Kingdom and Northern Ireland begin the same way as undertakings in Australia, but they have a different effect when they are accepted by the Secretary of State as breaching such undertakings will be considered as a criminal offence.

The United States consent decrees have some similarity to the Australian undertakings; the major similarity is that in both procedures there is an arrangement between the regulator and the alleged offender. But the rest of the process totally differs from the Australian undertakings.

It might be useful for Australian legislators to ensure that there is conformity in the provisions of enforceable undertakings at both Federal and State levels. It will also be helpful for all regulators who have such enforceable undertakings at their disposal to issue a manual which outlines how enforceable undertakings are being used by their agency. Such a manual would lead to greater transparency in the use of undertakings. It will also remove doubts that the public might have about the application of such a penalty.

A closer look at the systems in the United States and the United Kingdom may be of interest to the Australian legislator because they embody certain advantages not available through the Australian enforceable undertaking. For this reason the consent decrees and the UK undertakings will be reviewed in more detail in later chapters.

Chapter 5 Enforceable undertakings and ASIC

5.1. Initiating enforceable undertakings

As noted in prior chapter, s 93A and 93AA of *ASIC Act* give ASIC the power to accept enforceable undertakings. This thesis concentrates on the use of such a penalty by ASIC because it is interesting to see how this regulator deals with the penalty that has been introduced into its system especially when other regulators are asking for similar powers to be given to them. Establishing the weaknesses and strength of this remedy and seeing if ASIC has the same problems in using the undertakings as the ACCC is essential to prevent regulators, who will have this remedy introduced into their system in the future, from falling into the vicious circle of ineffective penalties.

Enforceable undertakings have been used by ASIC in a variety of situations that range from lack of disclosure by companies to breaches of securities dealer's duties. *Practice note 69* states that ASIC may commence an enforceable undertaking in connection with a matter: [1]

- in relation to which ASIC has a function or power under the *ASIC Act 2001* (Cth); or

- concerning a registered scheme.

An enforceable undertaking may be initiated by a company, individual or responsible entity, or as a result of a discussion with ASIC. However ASIC cannot compel a person to enter into an enforceable undertaking. Similarly, a person cannot oblige ASIC to

[1] ASIC, *Practice Note* 69, [69.2] <http://www.cpd.com.au/asic/pn/pn069.pdf> at 28 December 2003; *Corporations Act*, ss 93A and 93AA.

accept such an undertaking. *Practice Note 69* states that ASIC will generally accept an enforceable undertaking in the following situations: [2]

- Where ASIC is considering beginning a civil or administrative action for a contravention of the legislation and it believes that the undertaking will realise the necessary regulatory outcome.

- Where ASIC considers that the alleged offender is likely to comply with the terms of the undertaking, or to acknowledge that ASIC has reason to be concerned about the alleged breach. That is, the character and reliability of the alleged offender will be taken into consideration when ASIC decides whether to accept an undertaking. This is a very important point because if the promisor does comply with the terms of the undertaking, ASIC will have to enforce the undertaking in court. If this type of enforcement becomes the norm, the sanction will lose the benefit of being fast and relatively cheap, and will become as expensive as litigation.

- Where the enforceable undertaking will lead to a complete settlement of existing, or potential, civil or administrative sanctions. ASIC will not agree to an undertaking for the main purpose of securing payment of a pecuniary civil penalty.

In short, the character of the alleged offender and the purpose that the regulator desires to achieve are important factors that ASIC considers when accepting or rejecting a proposed undertaking.

5.2. Circumstances in which enforceable undertakings are applied

Enforceable undertakings are commonly used by companies as a way to escape litigation. A glance at the record of enforceable undertakings accepted by ASIC over the years

[2] ASIC, above n 1, [69.2], [69.10]-[69.13] <http://www.cpd.com.au/asic/pn/pn069.pdf> at 28 December 2003.

shows they are not only given when ASIC has considered taking civil or administrative actions. They have also been used after the regulator has started or finished such actions.

5.2.1. Before and after court proceedings

In certain cases, ASIC may agree to enter an enforceable undertaking after the start of court proceedings. The result of this is to annex the undertakings to the court proceedings. The undertakings do not interrupt the continuing of court proceedings.[3]

In other cases, ASIC may accept an enforceable undertaking after finishing court proceedings. In *ASC v Nomura International Plc*,[4] the Federal Court made declarations that 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 1974* (Cth). This judgment was followed by an acceptance of an enforceable undertaking. In the undertaking, Nomura promised ASIC not to engage in the contravening action in the future. The undertaking was in no way contradictory to the judgment.[5]

On other occasions, ASIC has accepted enforceable undertakings in order to settle court proceedings. In November 2001, ASIC started proceedings against the trustee of the TWU Superannuation Fund. ASIC alleged 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 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.[6]

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[3] ASIC, Enforceable Undertaking: Landy DFK Securities Ltd, Document No 017029045 (1 July 2002).
[4] *Australian Securities Commission v Nomura International Plc* (1998) 89 FCR 301; (1998) 160 ALR 246.
[5] ASIC, Enforceable Undertaking: Nomura International PLC, Document No 008547314 (16 February 1999).
[6] ASIC, Enforceable Undertaking: TWU Nominees Pty Ltd, Document No 008547507 (14 March 2001).

5.2.2. During criminal proceedings

ASIC has stated adamantly that enforceable undertakings are not to be used in place of criminal proceedings.[7] But they have been used during criminal proceedings. For example, on 5 December 2002, ASIC filed criminal charges against Justin Nicholas Cardillo. Following the start of the criminal proceedings, ASIC accepted an enforceable undertaking that Mr Cardillo would not provide advice in relation to any financial product or act as a security dealer or an Australian financial service licensee until the hearing was over.[8] A question that is raised is why did ASIC negotiate with Mr Cardillo when it could have easily stopped him from committing such behaviour, for example, by applying for an injunction?

5.2.3. Conjunction with Administrative Appeal Tribunal proceedings

In other cases, ASIC used enforceable undertakings to remedy a banning order and the banning order that is contested before the Administrative Appeals Tribunal (AAT). The effect of an enforceable undertaking in these circumstances is to stop the appeal from proceeding.

In some situations, ASIC may forgo its initial decision to issue a banning order. For example, in August 1998, ASIC banned Mr. Barron from acting as a securities dealer or an investment adviser for two years. Mr. Barron disputed ASIC's finding and appealed the banning order before the AAT. The differences between Mr Barron and ASIC were resolved by the acceptance of an enforceable undertaking. ASIC agreed that its initial decision should be set aside. And in return, Mr Barron promised that he would not, for a period of two years commencing from August 1999, deal with securities or investment advice. Accordingly, the order was replaced with a voluntary ban, a much lighter sanction.[9]

ASIC sometimes simply adds an enforceable undertaking to a decision of the AAT. For example, on 10 July 1998, ASIC started an investigation into the creation of misleading appearances for the price of a certain company by Leigh Anthony Gardner. On 30 July

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[7] ASIC, *Practice Note* 69 <www.cpd.com.au/asic/pn> [PN 69.10].
[8] ASIC, Enforceable Undertaking: Justin Nicholas Cardillo, Document No 017029065 (5 December 2002).
[9] ASIC, Enforceable Undertaking: John Barron, Document No 008547393 (30 September 1999).

1999, ASIC issued a banning order of four years prohibiting Mr Gardner from acting as a representative of a dealer. Mr Gardner appealed to the AAT. Subsequently, ASIC accepted an undertaking by which the promisor agreed to take a course in Securities Industry Law and Ethics and to an AAT consent order in relation to a banning order of 12 months.[10]

5.3. Trends

In short, enforceable undertakings are flexible penalties. This flexibility has enabled the regulators that use them to secure timely and cost-effective outcomes that would not be achievable by court orders. This penalty also offers tangible benefits for affected parties and creates the prospect of lasting improvement in market conduct by the entity involved.[11] The consultations undertaken by the ALRC have shown that enforceable undertakings seem popular with regulators.[12] But is that true? And is ASIC using this sanction regularly and consistently? To answer this question, the author will concentrate on different angles:

- The number of enforceable undertakings accepted over the years by ASIC.
- A comparison with the number of enforceable undertakings accepted by the Australian Competition and Consumer Commission (ACCC).
- The number of enforceable undertakings accepted at State level by ASIC.
- Whether there is consistency in the structure of the undertakings used by ASIC's different State departments?

These points will be studied below.

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[10] ASIC, Enforceable Undertaking: Leigh Anthony Gardner, Document No 008547410 (14 February 2000).
[11] ASIC, *Annual Report 1998-1999*, 34.
[12] ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (2002), 254.

5.3.1. Enforceable undertakings done over the years by ASIC

From 1998 to 2004, ASIC accepted 227 undertakings.[13] This number may give the impression that the enforceable undertaking sanction is a popular one. After all, a comparison between the use of undertakings and the use of civil penalties shows that the use of undertakings far exceeds the use of civil penalties. As mentioned in Chapter 3, ASIC had only started 24 civil penalty actions prior to September 2003.[14] But a major difference between these two penalties is that while the number of civil penalty proceedings started by ASIC is on the rise, the number of enforceable undertakings is declining. As seen in Figure 5.1, the use of enforceable undertakings has considerately decreased since 2000. Figure 5.1 is based on statistics provided in ASIC's annual reports and covers the period from July 1998 to June 2004. The figures provided later in this chapter will cover annual periods using data sourced from ASIC's website. Accordingly, the numbers will vary from those in Figure 5.1.

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[13] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 3 May 2005. There are 227 undertakings listed in the register of enforceable undertakings. This number (227 undertakings) includes undertakings given by individuals by themselves, individuals and their companies and companies by themselves.

[14] Michelle Welsh, ASIC, "Civil Penalties and Compensation Orders under the Corporations Act 2001" (2004) 17(4) *Commercial Law Quarterly* 13, 20.

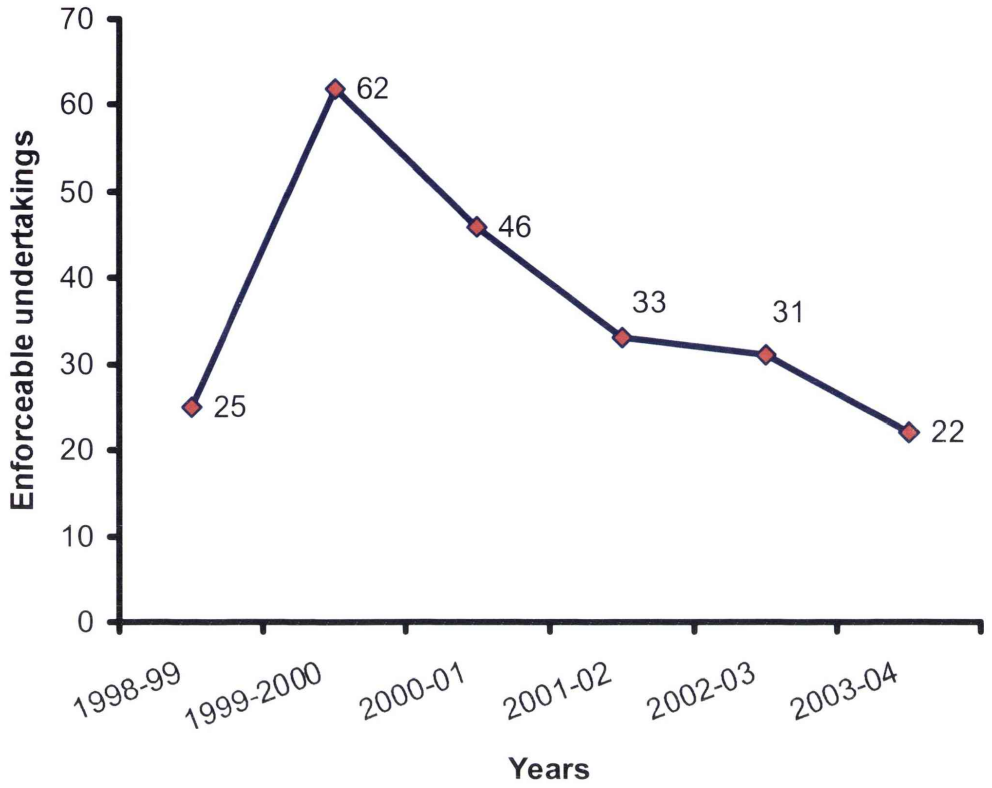


Figure 5.1: Numbers of enforceable undertakings accepted by ASIC between 1998 and 2004[15]

5.3.1.1. Period 1998-1999

From July 1998 to June 1999, 25 enforceable undertakings where accepted by ASIC.[16] This number is high because the enforceable undertakings' provisions had just been introduced into ASIC's system. Major adjustments were probably made and ASIC's enforcement team was still familiarising itself with the use of this new power. But the enforcement team did not seem resentful of the new addition and it willingly accepted it as a new way to address breaches of the legislation.

[15] The figures used are taken from ASIC's Annual Reports.
ASIC's *Annual Report 2003-2004* did not mention the number of undertakings accepted in that year. This author got the number from ASIC's enforcement undertakings' register that can be found at the ASIC website <http://www.asic.gov.au> at 3 May 2005.
[16] ASIC, *Annual Report 1998-1999*, 4.

The *ASIC Annual Report 1998-1999* reflects the way the regulator embraced this additional sanction, noting that enforceable undertakings: [17]

> *" provide quicker, cheaper remedies than court proceedings, and the undertakings may involve any action to which the parties agree. We obtained 25 enforceable undertakings covering disclosure, financial reporting, and compliance..."*

Some of the enforceable undertakings mentioned in the *Annual Report 1998-1999* include those concluded with investment advisers Count Group Pty, with Crown Casino Ltd and with Seven Network Ltd.

5.3.1.2. Period 1999-2000

From July 1999 to June 2000, ASIC seemed more at ease with the use of enforceable undertakings and the number skyrocketed. ASIC's *Annual Report 1999-2000* records that 62 enforceable undertakings were accepted.[18] This rise in use was impressive and could reflect the comfort and ease with which ASIC's enforcement team was now dealing with this sanction. It also forecast a future in which enforceable undertakings would play a major role in shaping the new image of the regulator.

The excitement surrounding the use of enforceable undertaking is apparent when reading the report. The *Annual Report 1999-2000* describes the enforceable undertakings as a mean of securing a quick and effective remedy. [19] This description reflects the desire of ASIC to take faster and more effective regulatory action against individuals and companies. It is clear from reading the report that the result of using undertakings was positive. For instance, it was noted that the undertakings secured from Westpac and Suncorp-Metway would produce better advice to investors than other enforcement action

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[17] Ibid 12.
[18] ASIC, *Annual Report 1999-2000*, 10.
[19] Ibid

ASIC might have taken.[20] Such observations justify the faith ASIC's enforcement team then had in enforceable undertakings and it clearly accounts for its popularity.

Enforceable undertakings seem to have allowed ASIC to achieve its goals. For example, one of the strategies and impacts desired by ASIC, as stated in the *Annual Report 1999-2000,* is to protect investors and consumers.[21] Of the 62 enforceable undertakings accepted, 52 dealt with retail investor and consumer matters. [22] The result of using enforceable undertakings seemed to complement the aims and goals of ASIC.

5.3.1.3. Period 2000-2001

The period from July 2000 to June 2001 can be considered as the beginning of a decline in the use of enforceable undertakings with only 46 accepted by ASIC.[23] This figure can be accounted in any of three ways:

- only a handful of people had agreed to enter into an undertaking with ASIC;
- Enforceable undertakings no longer satisfies the goals stated in ASIC's policies; or
- ASIC has found that enforceable undertakings were not very effective in certain circumstances.

Any one of these reasons may account for what came next.

The attitude toward enforceable undertakings in the *Annual Report 2000-2001* seems to have shifted slightly. The report notes that enforceable undertakings were used to target lesser alleged breaches. [24] This statement was not made in past reports, and seems to

[20] Ibid.
[21] Ibid 24.
[22] Ibid 10.
[23] ASIC, *Annual Report 2000-2001*, 27.
[24] Ibid.

reflect ASIC's desire to show that enforceable undertakings would not take the place of criminal and civil actions.

There seems to be an attempt by ASIC to justify the use of enforceable undertakings. For example, the report noted that an enforceable undertaking opens the doors for a wider range of remedies than do court proceedings. This was directly followed by an example of an undertaking demonstrating the truth of this statement.[25] The report also noted that an internet register of all enforceable undertakings had been created to allow the public and professionals to obtain the full text of all enforceable undertakings.[26] This would ensure transparency in the use of undertakings.

5.3.1.4. Period 2001-2002

From July 2001 to June 2002, the number of enforceable undertakings accepted by ASIC was even lower then in the year before. Only 33 were accepted by the regulator.[27] The reason behind this drop is apparent in the ASIC's *Annual Report 2001-2002* which responds to criticism that has been directed toward ASIC over the "decriminalisation" of corporate and securities offences.

The report states that criminal prosecution remains a central and successful weapon, alongside civil action to reduce damage to investors and consumers.[28] This focus on criminalisation might explain the lower number of enforceable undertakings used since the sanction had been considered by some as a new way to decriminalise certain offences. ASIC, in short, is trying to appease adverse public sentiment by showing that the system is not concentrating on what some might consider as light penalties. [29]

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[25] Ibid.
[26] Ibid 49.
[27] ASIC, *Annual Report 2001-2002*, 33.
[28] Ibid 24.
[29] Neil Andrews, "If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the Corporations Act and the Australian Securities and Investments Act" (2003) 15 *Australian Journal of Corporate Law* 154-155.

5.3.1.5. Periods 2002-2003 and 2003-2004

In the period that stretches from July 2002 to June 2003, the number of undertakings accepted by ASIC seems to have stabilised, with 31 undertakings entered into in that period.[30] This figure is similar to the one in the *Annual Report 2001-2002,* where 33 undertakings are recorded.[31] Sadly, enough this apparent stability was challenged in the next year. From July 2003 to June 2004, only 22 undertakings were accepted by ASIC.[32] Figure 5.1 charts this considerable decline in the use of undertakings during this period.

It is apparent from reading the *Annual Report 2003-2004* that ASIC no longer considered the enforceable undertaking as a penalty in its own right as it had in the past. Previous annual reports contain a paragraph entitled "Enforceable undertaking" giving the public information about the use of this penalty. In the *Annual Report 2003-2004*, this is no longer the case. ASIC mentions enforceable undertaking in passing only. It does not even refer to the number of undertakings entered into during that period. Enforceable undertakings are mentioned in the report only when talking about banning orders, civil penalties and court orders. It is clear that enforceable undertakings were no longer looked upon as favourably as in the past. But was this drop in the number of undertakings unique to ASIC or did the ACCC experience a similar decline? This chapter will concentrate now on the popularity of enforceable undertakings with the ACCC.

5.3.2. ACCC's use of enforceable undertakings

It is clear that enforceable undertakings are used extensively by the ACCC in different situations. However since 1997, the ACCC has been using them less frequently. This is despite a slight increase in their use during 1999, which can be explained by the ACCC's temporary jurisdiction to act against misconduct in relation to the introduction of a goods and services tax in Australia.[33]

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[30] ASIC, *Annual Report 2002- 2003,* 31.
[31] ASIC, above n 27, 33.
[32] ASIC, above n 13.
[33] Christine Parker, "Restorative Justice in the Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67 *Modern Law Review* 217- 218.

Following an internal review of enforceable undertakings, it was apparent that the ACCC's staff felt that undertakings were being over-used in certain instances where other methods would have been more appropriate.[34] In interviews completed by Parker, some ACCC interviewees confirmed a scaling back of the use of enforceable undertakings after 1998. Interestingly, a number of lawyer and industry interviewees commented adversely on the ACCC's apparent lack of willingness to use enforceable undertakings in certain situations. In some cases, the ACCC was willing to accept an enforceable undertaking but still went to court to obtain a consent order.[35] One might wonder if the ACCC's faith in undertakings is winding down. In this regard, both ASIC and the ACCC seem to be following the same trend, both of them having limited their use of enforceable undertakings in recent years.

5.3.3. Enforceable undertakings accepted at State levels

This downward trend in the use of enforceable undertakings by ASIC and the ACCC is mirrored in ASIC's enforcement departments in different States.

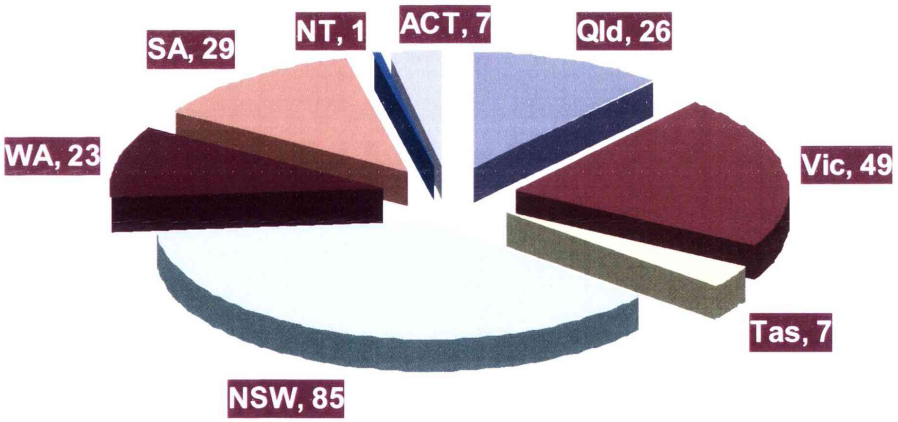


Figure 5.2: Apportionment of the use of undertakings by ASIC's State department from 1998 to 2004[36]

[34] D Watt, "Evaluation of the Use of s 87B Undertakings" (1998) 13 *ACCC Journal* 7, 7.
[35] Parker, above n 33, 217-218.
[36] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 3 May 2005.

As Figure 5.2 shows, ASIC's State departments that regularly use undertakings are New South Wales, Victoria, Western Australia, Southern Australia and Queensland. The Australian Capital Territory, Northern Territory and Tasmania apply this penalty only occasionally.

5.3.3.1. New South Wales

ASIC's department in New South Wales is the most active department in relation to applying the enforceable undertakings. This department has accepted 37.5% of all the undertakings given by ASIC from 1998 to 2004.

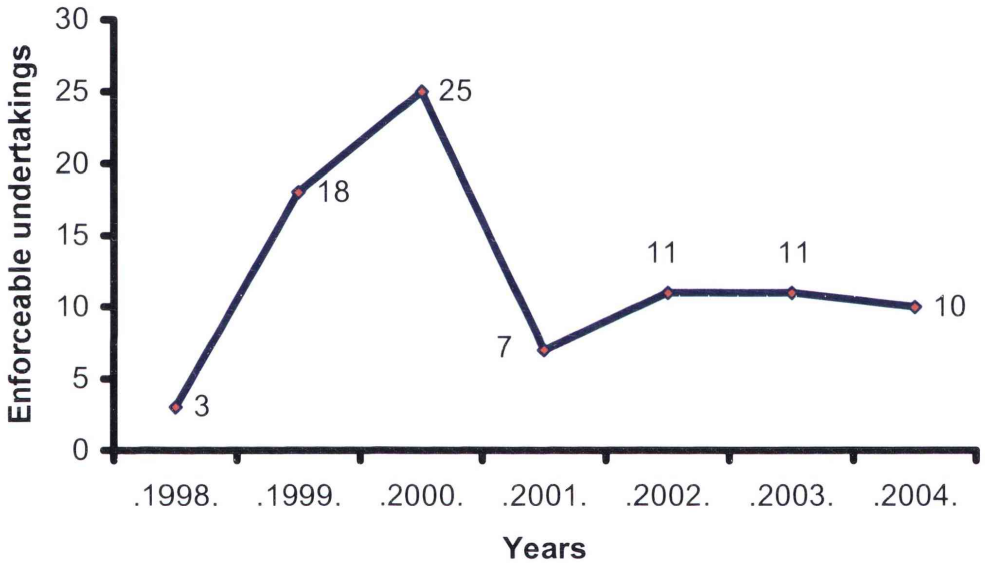


Figure 5.3: Enforceable undertakings accepted by the New South Wales department from 1998 to 2004[37]

As illustrated by Figure 5.3, following an initial surge in use the number of enforceable undertakings dropped considerably after 2000. This trend is evident at the national level, as seen in Figure 5.1. After 2000, the New South Wales department reduced its use of undertakings from 25 to seven. Unlike the situation seen in Figure 5.1, however, there is a consistency in the use of undertakings by NSW over the years 2002, 2003 and 2004.

[37] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 3 May 2005.

5.3.3.2. Victoria

ASIC's department in Victoria accepted 21.6% of the undertakings from 1998 to 2004. In this State, the use of enforceable undertaking has varied a lot over the years.

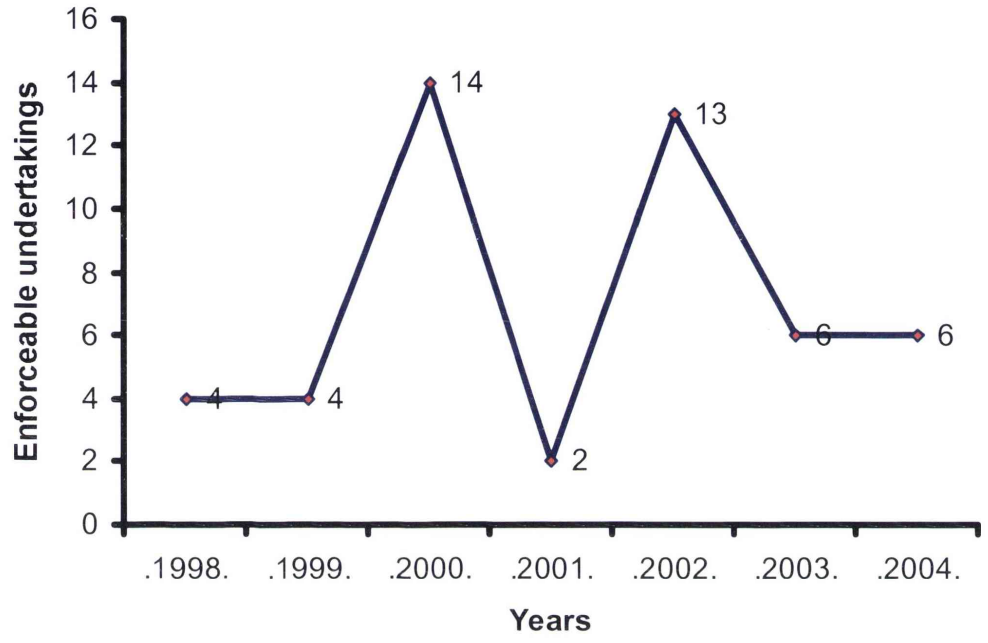


Figure 5.4: Enforceable undertakings accepted by the Victorian department from 1998 to 2004[38]

Figure 5.1, 5.3 and 5.4 are similar to each other in one regard: the number of undertakings accepted after 2000 drops considerably. But unlike these, the number of enforceable undertakings accepted by ASIC's department in Victoria went up in 2002. The reason behind this rise is unknown to the author. This jump in number was again followed by a huge drop in 2003. Today it can be said that Victoria has been using the penalty consistently since 2003, since it accepted six undertakings in 2003 and six in 2004. Time will tell if this consistency continues.

[38] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 3 May 2005.

5.3.3.3. *Western Australia*

From 1998 to 2004, the department of WA accepted 10% of the undertakings accepted by ASIC. The department is no longer using the penalty regularly.

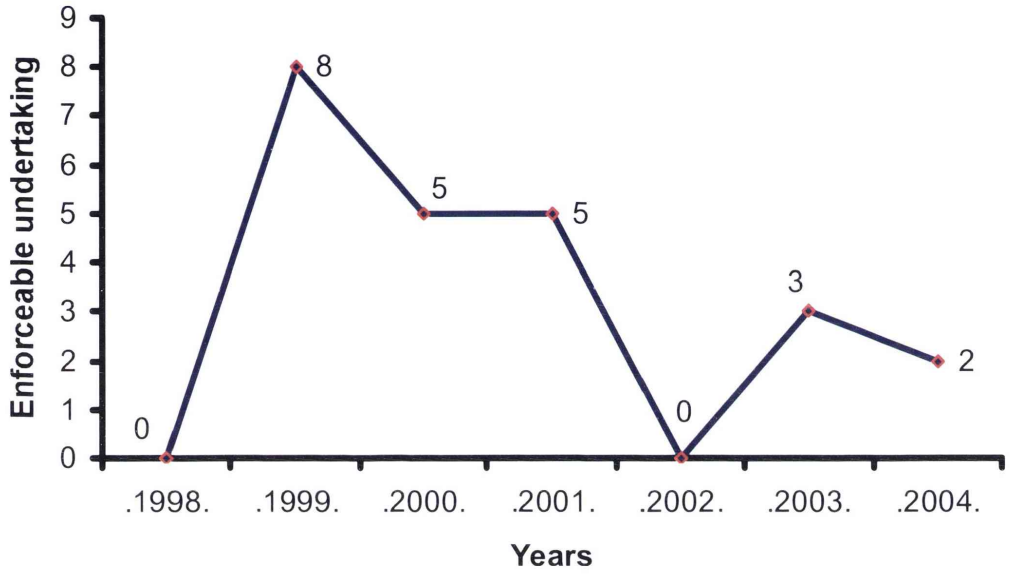


Figure 5.5: Enforceable undertakings accepted by the WA department from 1998 to 2004[39]

As it can be seen from Figure 5.5, after 1999 there is a drop in the use of undertakings by the department in WA. There is no regularity or consistency in the numbers of undertakings used over the years. But it is apparent that the department no longer finds it necessary to use the penalty. Unlike the departments in New South Wales and Victoria, the department in WA seems to use the undertakings only occasionally after 2002. No real explanation has been given by ASIC for this drop in use.

5.3.3.4. *South Australia*

ASIC's department in SA accepted 12.8% of the undertakings accepted by ASIC from 1998 to 2004. Today the use of undertakings by this department has diminished considerably.

[39] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 3 May 2005.

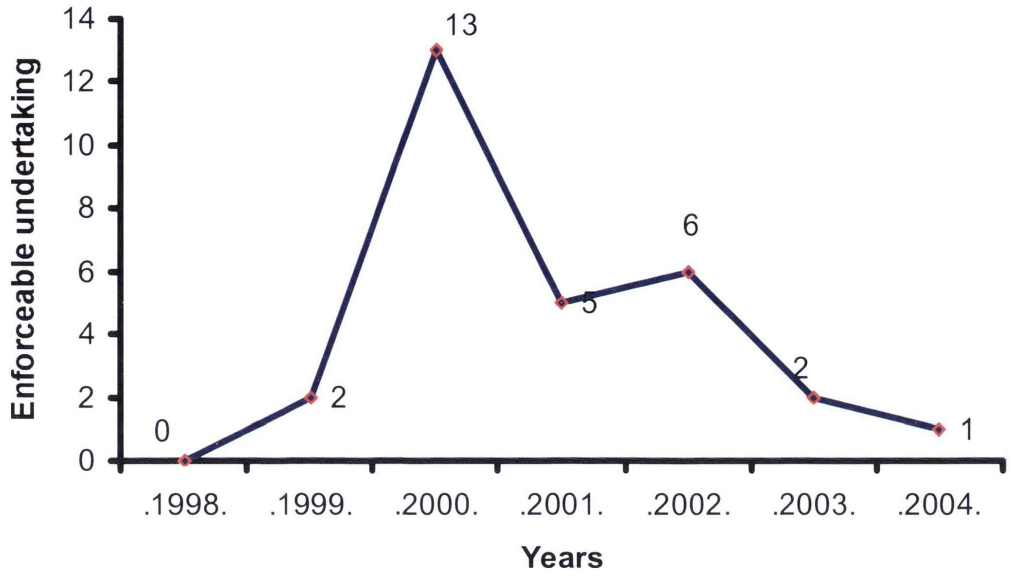


Figure 5.6: Enforceable undertakings accepted by the SA department from 1998 to 2004[40]

As was apparent in Figures 5.1, 5.3 and 5.4, Figure 5.5 illustrates a drop in numbers of undertakings after 2000. But unlike the departments in New South Wales and Victoria, the SA department is no longer regularly using undertakings, instead using them only occasionally. For instance, in 2004, there was only one undertaking accepted by this department.

5.3.3.5. Queensland

In Queensland, the number of enforceable undertakings accepted by ASIC has gone down considerably. The department accepted 11.5% of the undertakings from 1998 to 2004.

[40] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 3 May 2005.

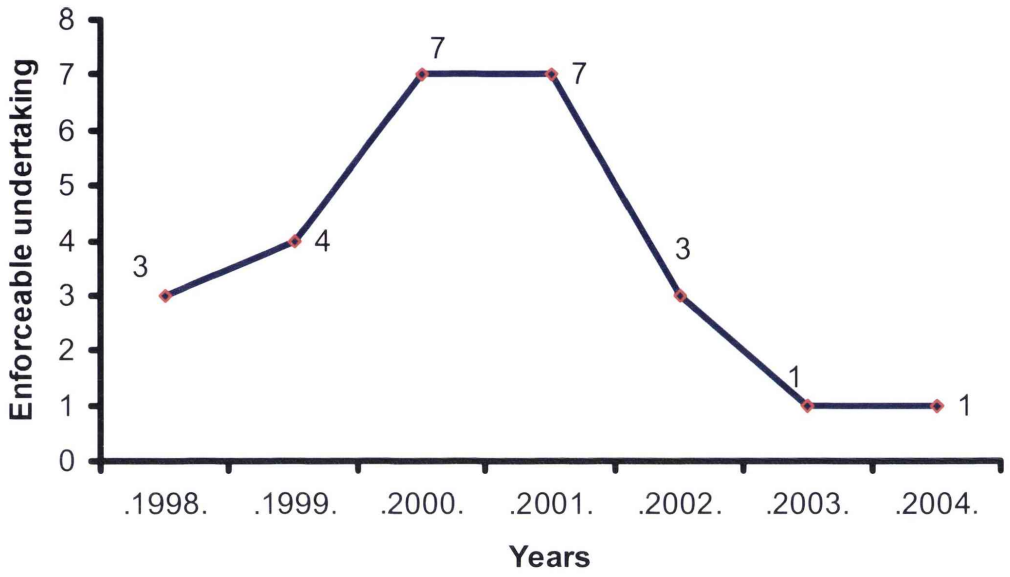


Figure 5.7: Enforceable undertakings accepted by the Queensland department from 1998 to 2004[41]

As with the department in WA, there was a consistency of the use of undertakings accepted by Queensland between 2000 and 2001. But this consistency was gone by 2002 and from this date forward, Queensland has accepted undertakings only occasionally.

5.3.3.6. In brief

The slump in the number of undertakings that can be seen in Figure 5.1 is reflected in all the States; with the number of undertakings accepted by ASIC's departments dropping considerably after 2000. After looking at Figures 5.3 to 5.7, it becomes clear that only two State departments are accepting undertakings on a regular basis, New South Wales and Victoria. The other departments use the penalty only occasionally. At present there is no real understanding of why the departments in Queensland, SA and WA are no longer using the undertakings as often as they used to.

[41] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 3 May 2005.

5.3.4. Consistency of the structure of the undertakings accepted by ASIC's different State departments

There is consistency in the structures of the undertaking accepted by ASIC's different department. Enforceable undertakings usually have the following structure:

- Background: name of the parties involved in the enforceable undertaking and description of alleged breach.

- Description by ASIC of the penalties available for such a breach.

- Acknowledgement by the alleged offender of ASIC's concern.

- Undertaking: Outline by ASIC of matters the promisor undertakes to do or not to do.

- Acknowledgment: see paragraph 5.3.4.1.

- Signature of parties: without the signature of the parties, the undertaking has no effect eg the following phrase can be used: [42]

  "Garrison acknowledges that this enforceable undertaking has no operative force until accepted by ASIC."

The structure outlined above may vary. For instance, on certain occasions, ASIC has added a definition section in the undertaking to clarify some terms. However, all enforceable undertakings have to contain an acknowledgement section.

[42] ASIC, Enforceable Undertaking: Garrisons Pty Ltd, Document No 017029005 (27 June 2001).

5.3.4.1. Acknowledgement

Practice Note 69 requires all enforceable undertakings to include the following standard terms:[43]

> *"X acknowledges that ASIC:*
>
> - *May issue a media release on execution of this undertaking referring to its terms and to the concerns of ASIC which led to its execution;*
> - *May from time to time publicly refer to this undertaking; and*
> - *Will make this undertaking available for public inspection.*
>
> *X acknowledges that this undertaking in no way derogates from the rights and remedies available to ASIC or any other person or entity arising from any conduct described in this undertaking.*
>
> *X acknowledges that ASIC's acceptance of an enforceable undertaking does not affect ASIC's power to investigate a contravention arising from future conduct, or pursue a criminal prosecution, or its power to lay charges or seek a pecuniary civil order."*

These terms can be found in the "acknowledgement" section of an undertaking. ASIC's State departments have not always followed these standard terms and they have sometimes added a few other terms to it. For example, one acknowledgment notes the following: [44]

> *"If a clause in this undertaking is invalid, illegal or unenforceable, then that clause to the extent of the invalidity, illegality or unenforceability*

[43] ASIC, above n 1, [69.33]
[44] ASIC, Enforceable Undertaking: Ashley James Brandon, Document No 017029019 (18 December 2001).

must be ignored in the interpretation of this undertaking. All other clauses of this undertaking remain in full force and effect."

By using such terms, ASIC is probably trying to ensure that if the courts, when enforcing the undertakings, have found that one of the clauses of the undertaking is illegal or invalid, they will not set aside the whole undertaking but only the illegal part.

In other cases ASIC has used a clause like the following in the acknowledgement: [45]

"Mortgage and General acknowledges that it has had the opportunity to obtain legal advice in relation to the content and effect of this undertaking."

In recent years, this clause has been used more and more often. By using it, ASIC is probably responding to one of the criticisms it has faced in the past, namely that enforceable undertakings have been used to "bully" people into following all directives without recourse to court proceedings.[46] By stating that the promisor has sought legal advice, ASIC might be seeking to silence these critics.

5.3.4.2. Internal contradictions in the enforceable undertakings

The content of enforceable undertakings can contain internal contradictions. *Practice Note 69* states that ASIC will not accept an undertaking if it contains a clause denying liability.[47] Even though such clauses are not included in the undertakings, some clauses may be formulated in a way that implies a denial of liability. For example, one undertaking states: [48]

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[45] ASIC, Enforceable Undertaking: Mortgage & General Financial Services Pty Ltd, Document No 017029060 (17 October 2002).
[46] Parker, above n 33, 210-211.
[47] ASIC, Above n 1, [69.31]
[48] ASIC, Enforceable Undertaking: Anthony Lasey Wilson, Document No 008547508 (21 March 2001).

> *"Wilson acknowledges ASIC's concerns set out in this Undertaking, but does not concede the contraventions of the Corporations Law, or the ASX Business rules [...]. Wilson does not concede that, in the circumstances, ASIC would be entitled to exercise the powers referred to in Paragraphs 1.9 and 1.10."*

The fact that Wilson is stating that he does not agree with ASIC can be construed as denial of liability. Sadly such clauses are quite common in enforceable undertakings. Some other undertakings contain unbelievable contradictions.[49] For example, Crown Casino Ltd (Casino) failed to comply with the continuous disclosure rules of the Australian Stock Exchange (ASX). The Casino privileged some people over others by briefing some financial analysts and journalist on its poor trading performance instead of disclosing this information to the ASX. In the enforceable undertaking, the Crown Casino Ltd neither denied nor admitted that it was in breach of the ASX continuous disclosure rule even though it was obvious that it did. ASIC stated that it accepted that the problem has risen because of poor compliance system which the undertaking was going to remedy to.[50]

In other cases, ASIC was willing to accept that ignorance of the law is a complete defence. The undertaking given by Keycorp Ltd revealed that its executives were involved in insider trading. The company undertook to compensate the people who have sold their securities to the insiders. It also agreed to run a compliance program to educate staff about insider trading. One would have assumed that executives of a company would be aware of what insider trading was.[51]

5.4. Summary

Even though the consultations undertaken by the ALRC show that enforceable undertakings are popular with regulators, it is apparent from Figure 5.1 that the number

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[49] Andrews, above n 29, 157-158.
[50] ASIC, Enforceable Undertaking: Crown Casino Ltd, Document No 008547289 (11 September 1998).
[51] ASIC, Enforceable Undertaking: Keycorp Ltd, Document No 008547388 (13 October 1999).

of undertakings given by the corporate regulator has declined considerably over the years. Only two of ASIC's State departments have been using this penalty on a regular basis since 2002. The ACCC has also limited the use of undertakings it accepts. Accordingly, enforceable undertakings are not really popular with the regulators.

There is a consistency in the structure of the undertakings that is marred by certain internal contradictions. ASIC's State departments generally use a similar structure when they accept an undertaking. There are certain minor variations. Sometimes, the undertakings include clauses reflecting the regulator's desire to respond to criticism it has faced in the past. In other cases, the undertakings themselves contain certain contradictions. The next chapters examine the goals behind accepting an undertaking.

Chapter 6 Instrumental goals of enforceable undertakings: theory

6.1. ASIC's use of enforceable undertakings

As mentioned in the methodology in chapter 1, it is essential to observe the goals achieved by the use of enforceable undertakings.[1] Accordingly, Chapters 7, 8 and 9 will familiarize the reader with the promises given in the undertakings, and the goals that those promises are supposed to realize. Although the overall purpose of enforceable undertakings is, like all enforcement powers, to secure compliance with the *Corporations Act*, it is essential to specify the particular purposes for which the power might lawfully be used. In its 1994 report, *Compliance with the Trade Practices Act 1974*, The ALRC recommended that administrative actions (such as enforceable undertakings) should achieve one or more of the following purposes:[2]

- prevention of similar offences from occurring again.
- protection of the public by stopping the offending conduct.
- corrective action.

However, an enforceable undertaking might have a negative impact on a corporation or individual. The punitive nature of this penalty has been acknowledged by the ACCC.[3] Yet the ALRC considers that punishment should not be a goal of administrative actions. It follows that it should not be one of the purposes of enforceable undertakings.[4]

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[1] Karen Yeung, *Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?* 7, 8 <http://www.aic.gov.au/conferences/regulation/yeung.pdf> at 28 January 2005.
[2] ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 38.
[3] ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) .
[4] Karen Yeung, *The Public Enforcement of Australian Competition Law* (ACCC, 2001) 116.

Punishing a contravener for unlawful conduct is, under the Australian Constitution, regarded as a judicial function to be carried out by a court, not the regulator. Therefore, in the absence of express legislation authorization empowering ASIC to accept undertakings for the purpose of punishing suspected offences, the use of enforceable undertakings for a punitive purpose is difficult to justify. Clearly, the content of the undertakings should not be punitive.[5]

In order to evaluate the purposes behind the undertakings, the author will now look at the promises given in an enforceable undertaking.

6.2. The undertaking

In an undertaking, a person promises to do or not to do certain actions. These promises play an important role in this study because they are the indicative factors that this thesis is based upon in considering the following matters: What are the goals behind the use of enforceable undertakings? Are those goals compatible with the recommendation of the ALRC?

The content of the undertaking depends on the gravity of the alleged offence. The most common undertakings are to:[6]

- stop committing the alleged offence;
- put a compliance program in place;
- agree to a voluntary self- ban;
- fulfill some education requirements;
- compensate affected parties;

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[5] Ibid.
[6] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 7 January 2005.

- be involved in community services; and

- disclose the undertaking to a certain category of people.

Other promises, like deregistration of a company and suspension or revocation of a license, may also form part of an undertaking. However, they are considerably less often used then the promises mentioned above, and will not be included in this study. They are mentioned here to highlight the public interest nature of the goal behind these promises. But what occurs when an undertaking is breached by the promisor?

6.3. Breach of the undertaking

In case the promisor breaches the undertaking, the regulator sometimes encloses another promise in the first undertaking. ASIC may state that if the alleged offender does not comply with the undertaking, more drastic undertakings will enter into play. For example, the alleged offender's license might be suspended or removed. On 22 June 2000, Neil John White and Glen Rainer Meuwissen gave ASIC an undertaking in relation to their alleged breach of the duties of a representative of a security dealer. In it, they promised to put in place a compliance program and to disclose the undertakings to their clients. However, ASIC added an extra clause to the undertaking stating that if a breach of the undertaking occurred in the future, both promisors would agree to a voluntary ban from dealing with securities or investment advice.[7]

In another undertaking, Insurance Brokers Ltd agreed to make an application to ASIC seeking the cancellation of its registration as an insurance broker within 14 days of a breach of the enforceable undertaking. They also pledged not to apply to be registered as an insurance broker for a period of two years from the date on which the application referred to was lodged with ASIC.[8]

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[7] ASIC, Enforceable Undertaking: Neil John White and Glen Rainer Meuwissen, Document No 008547449 (22 June 2000).
[8] ASIC, Enforceable Undertaking: Insurance Brokers Ltd, Document No 017029008 (5 September 2001).

It can be clearly seen that there is an escalation in the gravity of the additional promise. In this case, ASIC started with a relatively light undertaking (implementing a compliance program). But if there was a breach of this promise it will be willing to move up the enforcement pyramid toward a tougher sanction such as voluntary ban.

The inclusion of such clauses in an undertaking might seem unconventional at first glance. Why would ASIC put such a clause into an undertaking when it could go directly to court and enforce the undertaking in case of its breach? Such a clause probably shows ASIC's desire to exhaust all possible means before going to court. Accordingly, even if such clauses are not included in an undertaking, the chances are that the regulator will resolve the breach of an undertaking without going to court but by initiating further negotiations. This can explain the low number of undertakings that are enforced in court.

For instance, Perpetual Plantations of Australia Pty Ltd entered into an undertaking with ASIC on 10 February 2003. The company allegedly operated unregistered investment schemes. It promised in the undertaking 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.[9] But Perpetual failed to comply with the terms of the initial undertaking. Accordingly, the company proposed to ASIC to wind up all its unregistered schemes in May 2005. ASIC agreed to this proposal.[10]

It is interesting to note that the same strategy is followed by the ACCC. This regulator first gives an undertaking when there is evidence that the law has been breached. If the

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[9] ASIC, Enforceable undertakings: Perpetual Plantations of Australia, Dee Dee Fleming (formerly Margaret Dianne Fleming) and Donald Brownlie Fleming, Document Nos 017029077, 017029078, 017029079 (10 February 2003)..

[10] ASIC, "South Australian pistachio plantation scheme to be wound up" (Press release, 23 December 2004) <http://www.asic.gov.au/asic/ASIC_PUB.NSF/byid/B8B19F36ADCB3091CA256F720082AD52?opendocument> at 6 May 2005.

undertaking is not complied with, the ACCC will enter into negotiations with the alleged offender and if the consultations fail, the breach will lead to an action in court.[11]

After that second step is taken, and the corporate regulator still believes that the promisor has not complied with the undertaking, ASIC may apply for the court to issue any order it considers appropriate, including any of the following:[12]

- An order directing the person to comply with the terms of undertaking.

- An order directing the promisor to pay the Commonwealth an amount of any financial benefit obtained directly or indirectly and that is reasonably attributable to the breach.

- An order directing the person to compensate any other person who has suffered loss or damage as a result of the breach.

- Any order the court finds appropriate to apply to the case.

If the alleged offender does not follow the court order, such behavior will be considered as contempt of court.

6.4. Braithwaite's pyramid

When observing this scheme of events, it is hard not to notice that the more serious the alleged offence, the harsher the undertaking. Accordingly, it is possible to apply Braithwaite's pyramid to enforceable undertakings.[13]

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[11] ACCC, *Section 87B of the Trade Practices Act* (1999) 12.
[12] ASIC, *Practice Note 69*, [69.34].
[13] Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, 1992) 35-36.

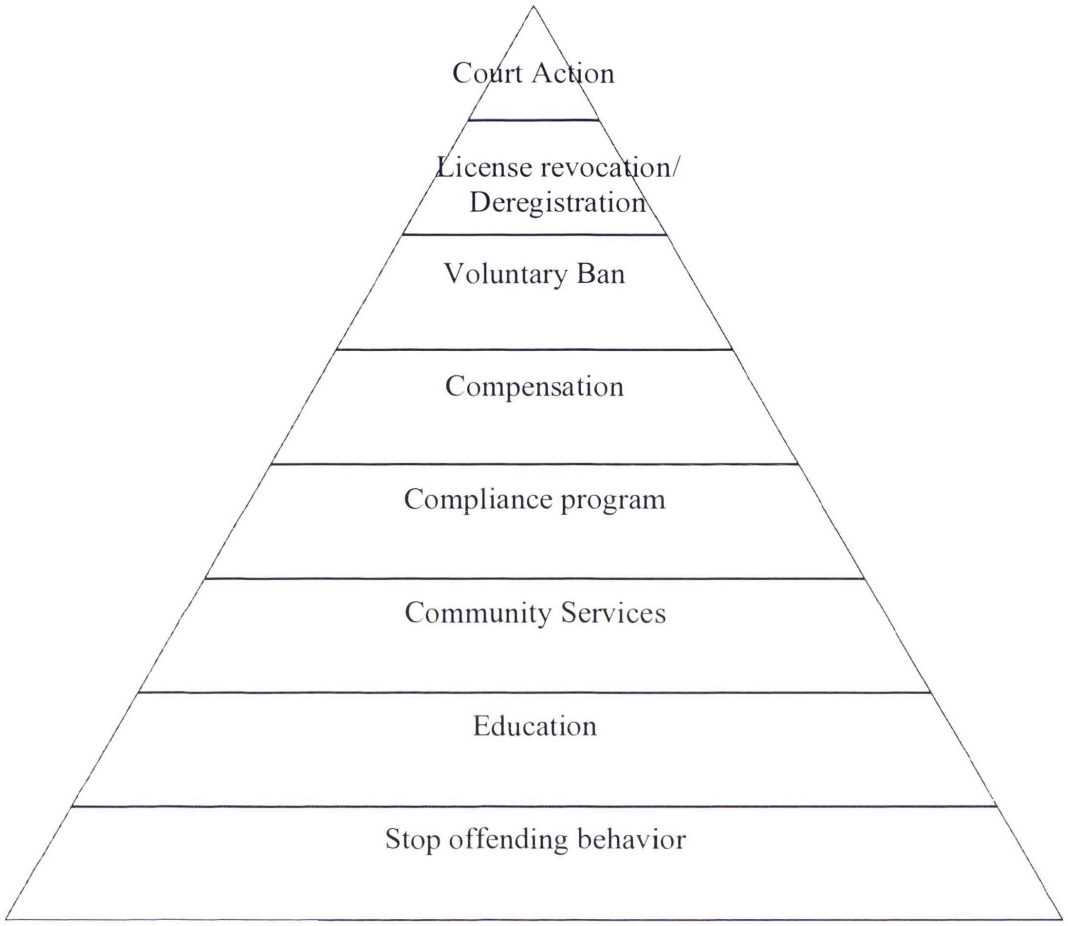


Figure 6.1: Pyramid of undertakings[14]

But when studying the undertakings in more details, it is easy to see that the first seven categories of promise depicted in Figure 6.1 seldom come alone. There is usually a certain interaction between them. For example, the promise to stop the offending behavior is usually present in all undertakings, as a kind of common denominator among them. But it is very rare that a promisor just undertakes to stop the alleged offence. Usually this promise accompanies other promises such as putting a compliance program in place.

[14] All the sanctions that are present in the pyramid are promises to do or not to do certain things.

6.5. Interaction of promises

The six remaining promises in Figure 6.1 interact when faced with certain alleged offences. Figure 6.2 is the author's graphical expression of this interaction.

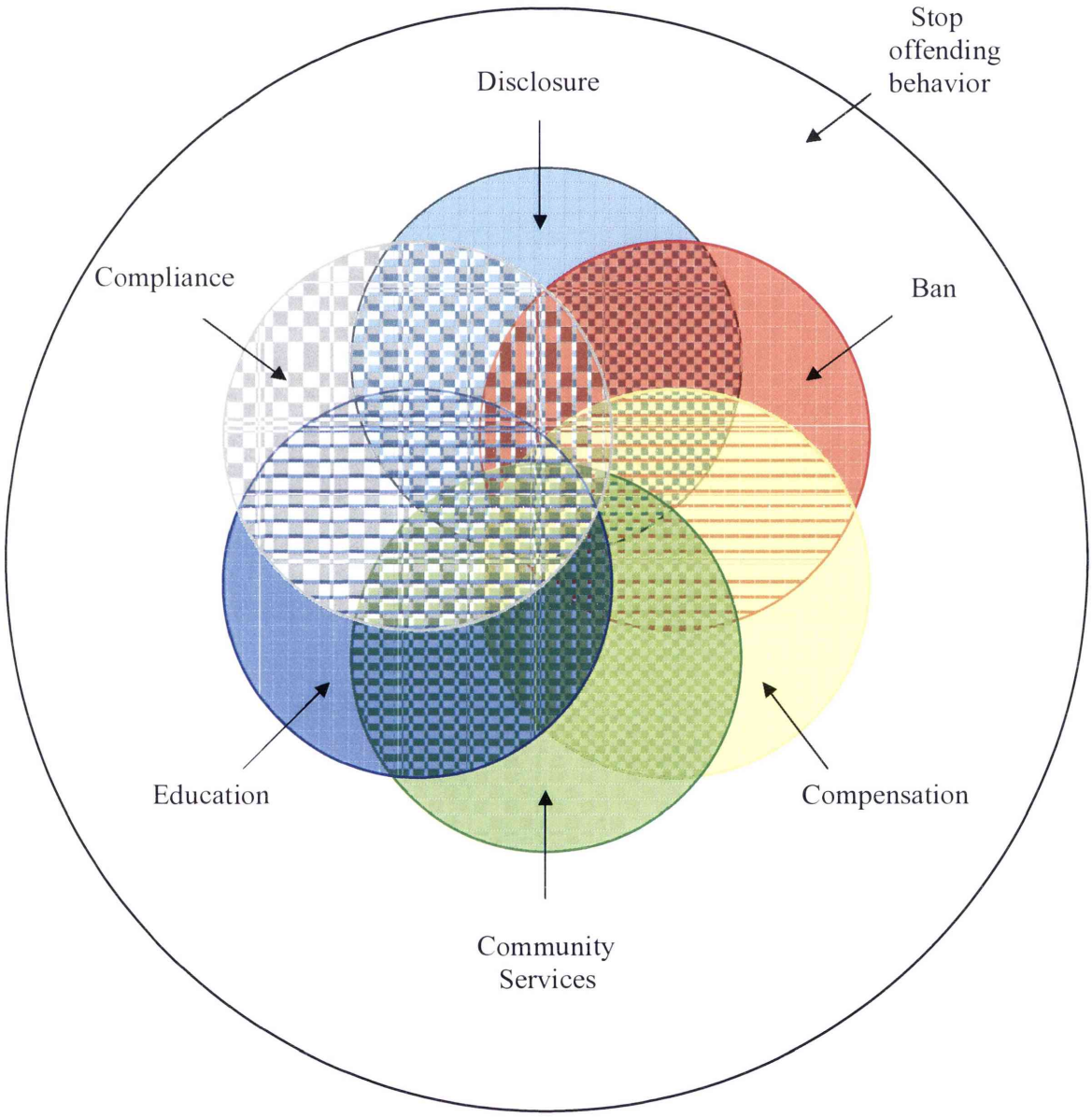


Figure 6.2: The interaction of the different promises in undertakings

These promises will be studied in more detail in later chapters and they will illustrate the purposes behind the use of enforceable undertakings.

6.6. Integrated pyramid of enforceable undertakings

The fact that these promises are seldom found alone has led this author to adapt the pyramid in Figure 6.1, resulting in the pyramid depicted in Figure 6.3.

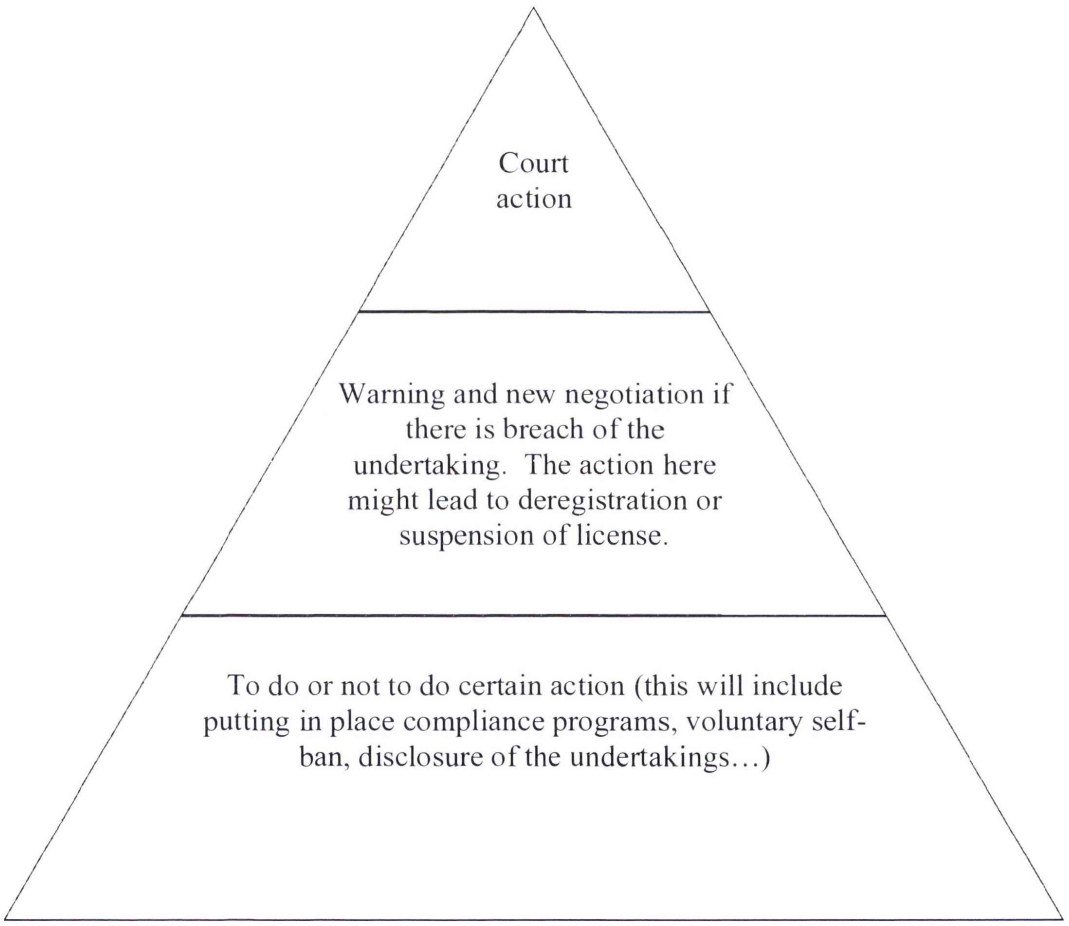


Figure 6.3: Integrated pyramid of enforceable undertakings based on Braithwaite's pyramid of enforcement

In the base of the pyramid are the initial attempts of the regulator to coax compliance by persuasion. For example, ASIC may try to secure the cooperation of the alleged offender by asking it to do certain actions that will prevent the occurrence of the alleged breach in the future.

The next stage of enforcement (represented by the middle layer) is a warning that action may be taken if the violation continues. For example, ASIC may put into the undertaking a clause stating that in case the undertaking is not complied with, the promisor will have to apply for deregistration or revocation of license.

If this step fails to secure compliance, the regulator will go to court (represented by the top layer). At this stage, ASIC will enforce the undertaking in court and the alleged offender will be forced to comply with the enforced undertaking. As depicted in Figure 6.3, there is an escalation in severity of the penalty. The corporate regulator moves from voluntary compliance with the undertaking to court order rendering such compliance compulsory.

6.7. In brief

As mentioned, the next chapters will show the effect of the promises given in the undertaking on the alleged offender and on the public. The promises that will be of most interest are the following:

- The requirement to put a compliance program in place.
- Voluntary ban.
- Education.
- Compensation.
- Community service.

- The requirement to disclose the undertaking to a certain category of people.

The goals behind these promises will be compared with the goals stated by the ALRC to determine whether ASIC is applying the penalty appropriately.

Chapter 7 Instrumental goals of voluntary ban and education

7.1. Introduction

This chapter studies two of the promises given by a promisor in an enforceable undertaking, namely voluntary ban and education. A ban is considered voluntary if no one is forcing the alleged offender to agree to it. The promisor accepts it and the breach of such a promise will not be considered an offence until ASIC enforces the undertaking in court.[1]

Usually, education will accompany the banning order in the undertaking. It is considered as an essential element for the eventual waiving of the ban. It is only when the promisor complies with the education requirement that he or she will be able to manage a company (if the ban is in relation to a breach of directors' duties) or deal with securities and/or investment advice (if the ban is in relation to a dealings with securities and/or investment advice).

As noted in Chapter 6, it is essential to discover the nature of the voluntary ban. Is it put in place for the protection of the public or for punishing the individual for the breach allegedly committed? Looking at the purpose of the voluntary ban allows the author to determine the goals behind the undertakings[2] and whether these are compatible with the ones prescribed by the ALRC report.[3]

The beginning of this chapter is oriented toward banning orders. After establishing the nature and goals behind this penalty, this author will look at voluntary bans in enforceable undertakings and compare the goals of these remedies. It will be apparent then that a look at the education requirement of some undertakings will be essential, not

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[1] ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 100.
[2] Karen Yeung, *Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?* 7, 8 <http://www.aic.gov.au/conferences/regulation/yeung.pdf> at 28 January 2005.
[3] ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 38.

only to note the purpose behind such a requirement but also how it can influence the nature of voluntary bans.

7.2. Banning orders in general

This chapter focuses on the disqualification of two types of people:

- directors; and
- people dealing with securities, financial services and/or investment advice.

If a disqualification order is made against any of these people, the person against whom the order is made will cease to be a director of a company (if the breach is in relation to directors' duties), or will cease his or her dealings with securities, financial services and/or investment advice (if the breach is in relation to dealing with securities, financial services and/or investment advice) for a certain period of time depending on the gravity of the offence.

The order of disqualification thus forbids a person from holding such an office for the duration of the disqualification order. But what is the nature of such a ban? Is it punitive or protective in nature?

7.2.1. Protection of the public?

In *Re HIH Insurance Ltd (in prov liq); ASIC v Adler*,[4] Santow J extracted 15 recommendations from the case law on ss 206C and 206E in the *Corporations Act 2001* (Cth) (and their predecessor sections in the *Corporation Law* and the *Companies Code*) to establish the nature of disqualification orders. The propositions, reproduced bellow, assume that such an order is protective rather than punitive:[5]

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[4] *Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80.
[5] Ibid 97-99

- Disqualification orders are put in place to shield the public from the detrimental use of the corporate structure or from an application of this structure in a way that is incompatible with proper commercial standards.

- The purpose of the banning order is to protect the public, because it seeks to look after the public interest by ensuring the transparency and accountability of companies and the suitability of the people who hold a director's position.

- Protection of the public also takes into account the protection of all the people who deal with the organization. This includes consumers, creditors, shareholders and investors.

- The banning order is protective against the misappropriation of the corporate structure.

- The order has a personal deterrence goal. But this purpose is not considered as a punitive one.

- One of the goals of the legislation is general deterrence.

- In assessing whether an individual should hold such an office in the future, it is essential to observe if the person understands the nature and role of the position he or she was holding.

- The length of the disqualification order will depend on the gravity of the contravention. Accordingly, longer period of disqualification will be considered when the contravention is serious in nature. An example of a serious offence is one involving dishonesty.

- In assessing the duration of the prohibition, the court will take into account the degree of seriousness of the offence, the propensity of the defendant to engage in

similar conduct in the future, and the likelihood of harm that may be inflicted on the public.

- The court should also balance the personal difficulties of the defendant with the need to protect the public from any repeat of the defendant's conduct.

- When deciding the length of the period of disqualification, some mitigating factors will be taken into consideration. The likelihood of the defendant reforming will be considered as an important mitigating factor.

- The court in *Commissioner for Corporate Affairs (WA) v Ekampre*[6] set out eight criteria that will play an influential role in deciding on the disqualification of the offender, namely:
    - the character and personality of the defendant;
    - the nature and type of the breaches;
    - the structure of the company and the type of its business;
    - the level to which the interests of shareholders, creditors and employees have been affected by the contravention;
    - the danger that the defendant might cause to the public if he or she continues in his or her position;
    - the honesty and competence of the defendant;
    - the difficulties the defendant might face and the hardship that might affect his or her personal and commercial interests; and
    - the knowledge and understanding of the defendant that any future breach will cause the start of future legal proceedings.

- Some factors will cause the imposition of long periods of disqualification ranging from 25 years to permanent bans. These factors include:
    - large financial losses;

[6] *Commissioner for Corporate Affairs (WA) v Ekampre* (1987) 12 ACLR 519.

- a high chance that the defendant will repeat the offending conduct;
- contraventions committed in sensitive fields where great financial damage can be caused;
- lack of remorse;
- disregard for the law and corporate regulations;
- if the intention of the defendant was dishonesty and his or her intent was to defraud the public; and
- past convictions and contraventions for similar activities.

- When the period of disqualification ranges from seven to 12 years, the offence is serious but is not considered as the "worst case". The factors that will be taken into consideration are the following:
  - serious incompetence and irresponsibility;
  - substantial loss;
  - the fact that the defendant had engaged in conduct with the goal of enriching himself or herself at other people's expense, but with lesser degrees of dishonesty;
  - disregard for the law and corporate regulation; and
  - the balance between lack of remorse and the possibility of reform.

- The factors leading to a period of disqualification of up to three years include:
  - even though the defendant made a personal gain from the offending conduct, he or she has repaid or partially repaid the misappropriated sums of money;

  - the defendant has no intention of holding a position as manager of a company again in the future (the age and stage of the career of the defendant will be scrutinized); and

- the defendant has voiced remorse and followed the advice of professionals and has not contested the proceedings started against him or her.

Most of the elements noted by Santow J show that the disqualification orders are designed to protect the public. But some propositions, such as the reduction of the period of disqualification, actually benefit the defendant rather than protect the public. Other elements recognize that the disqualification provisions have the objectives of personal and general deterrence. In summary, retribution, deterrence, reformation, remorse and protection of the public are all weighed up when deciding whether a disqualification order should be made. They will also play an important role in determining the appropriate period of disqualification.[7]

7.2.2. Punishment

In *Rich v ASIC,*[8] McHugh J stated that it was impossible to consider the disqualification provisions as purely protective in nature. This was based on the following three points:[9]

- If disqualification orders were only put in place to protect the public, then the fact that the defendant breached the law but was fit to manage a corporation should not lead to a disqualification order. In such an instance, the court should find that despite the misconduct there is no danger to the public and that the defendant should not be banned.

- Fixed disqualification orders can be seen as a way to punish the individual involved in the contravening act. It will not really protect the public. If this penalty was really protective in nature, the disqualification order should be made indefinite, with the burden on the defence to prove on a later date that the defendant is a fit person to manage a corporation.

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[7] *Rich v Australian Securities and Investments Commission*, (2004) ACSR 242, [2004] HCA 42, [41], [50]. In this Chapter ever time this author refers to *Rich v Australian Securities and Investments Commission,* the reference will be the same as the reference in this footnote.
[8] (2004) ACSR 242, [2004] HCA 42, [50].
[9] Ibid, [42].

- If the disqualification was purely protective in nature, the defendant should be allowed to show during the period of disqualification that he or she is now a fit person to manage a corporation.

On this analysis, disqualification orders are not just protective of the public:[10] they are also punitive in nature. But does this reasoning apply to voluntary bans present in the enforceable undertakings accepted by ASIC?

7.3. Goal behind voluntary ban and education

Between 1998 and 2004, approximately 127 enforceable undertakings[11] were accepted by individuals (some of which were accepted simultaneously by the companies they worked for).

When looking at the content of the enforceable undertakings given to individuals, it is apparent that two promises are common in such undertakings, namely:[12]

- to cease the alleged offence; and

- to agree to a voluntary ban.

Accordingly, when a director allegedly breaches his or her duties, ASIC may accept an undertaking in which the director promises to refrain from managing a company. If the alleged contravention is in relation to a person dealing with securities, financial services and/or investment advice, ASIC might give an undertaking in which the alleged offender promises to cease from dealing with securities and/or investment advice.

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[10] Ibid

[11] ASIC, *Register of Enforceable Undertakings* <http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Enforceable+Undertakings+Register?openDocument> at 10 February 2004. The observation made above can be seen when reading the undertakings. The number 127 is inclusive of two types of undertakings: undertakings entered into by individuals alone and undertakings accepted by individuals that entered into the undertakings with their company.

[12] Ibid.

Of the 127 undertakings[13] accepted by ASIC, individuals agreed to a voluntary ban in 71[14] cases. This is a huge number considering the following two elements:

- In most of the undertakings accepted simultaneously by the companies and individuals that worked for them, individuals' roles in these undertakings are usually limited to ensuring the compliance of their company with the undertaking.

- Not all the undertakings are in relation to alleged breaches of directors', securities dealers', financial services and investment advisers' duties. As a result, not all of them will include a voluntary ban.

Table 7.1 reflects the alleged offences that usually lead to the acceptance of a voluntary ban in an undertaking.[15]

Alleged offences	Number of undertakings containing voluntary ban	Percentage %
Breach of directors' duties	15	21.4
Breach of duties of a security holder, financial services or investment advisor	33	47.1
Dealing with securities, financial services or investment advice without a license	13	18.6
Miscellaneous	10	12.9
Total	**70**	**100**

Table 7.1: Alleged offences where a voluntary ban was agreed upon between ASIC and the promisor

[13] Ibid.
[14] Ibid.
[15] Ibid.

In most cases, it can be noted that the voluntary ban is in relation to alleged contraventions in relation to managing a company or in relation to dealing with securities, financial services and/or investment advice. As for the duration of the ban, it varies from one undertaking to the next. Table 7.2 shows that the durations of the voluntary bans can vary range from two months to permanent bans.[16]

Duration of the voluntary ban	Number of voluntary bans
Less then 6 months	4
Between 6 months and 5 years	38
Between 6 years and 10 years	8
Permanent	21
Total	**70**

Table 7.2: Duration of the ban

It can be noted from Table 7.2 that the majority of the voluntary bans are bans of between six months to five years in duration. It also might be observed that the period of the voluntary ban will vary depending on the gravity of the alleged offence. Usually, the criteria used to decide the period of a disqualification order will apply here. The following examples illustrate this:

- Michael Anthony Casey allegedly failed to act efficiently in the performance of his duties as a holder of a dealer's license. He acknowledged ASIC's concerns that he had acted carelessly and that he gave inefficient advice. He agreed to a voluntary ban of two months. ASIC pointed out in the undertaking that Casey will comply with the requirement of his job in the future and he will not be a danger to the public in the future.[17]

- Robert Marusco accepted an undertaking from ASIC by which he was banned for three years for breach of his directors' duties. It was noted in the

[16] Ibid. All the numbers shown in Table 7.2 are taken from looking at the undertakings present in ASIC's enforceable undertakings register.
[17] ASIC, Enforceable Undertaking: Michael Anthony Casey, Document No 008547357 (9 July 1999).

undertaking that he cooperated with ASIC and submitted certain material that helped ASIC in its investigation. He also showed his intention to ensure that he had the appropriate skills and qualification to work in the industry.[18]

- Michael Bradley Curtis allegedly breached his duties of a security dealer. His alleged contravention caused approximately $190,000 of losses to third parties. Compensation was made to the affected parties by Curtis. The duration of the voluntary ban was four years.[19]

- On 22 January 2003, Jean Jacques Pierre Georges Blandin De Chalain accepted an undertaking from ASIC. The alleged contravention had caused one of his clients to lose approximately $120,000. Due to the gravity of his offence, he promised not to deal with securities and/or investment advice for 10 years.[20]

- The alleged actions of Robert Andrew Street caused large losses to third parties possibly exceeding $700,000. He was also allegedly involved in the "Nigerian letter scandal". He agreed to a permanent voluntary ban in relation to dealing with securities and investment advice.[21]

- Robert Keith Ridley was a director of a company. ASIC alleged that he intentionally or recklessly allowed the company he worked for to breach the law. As a consequence, Ridley agreed to a permanent voluntary ban against dealing with financial service businesses.[22]

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[18] ASIC, Enforceable Undertaking: Robert Marusco, Document No 008457094 (10 January 2003).
[19] ASIC, Enforceable Undertaking: Michael Bradley Curtis, Document No 018457141 (18 February 2003).
[20] ASIC, Enforceable Undertaking: Jean Jacques Pierre Georges Blandin De Chalain, Document No 018457096 (22 January 2003).
[21] ASIC, Enforceable Undertaking: Robert Andrew Street, Document No 017029081 (31 March 2003).
[22] ASIC, Enforceable Undertaking: Hedley Goodridge Insurance Agencies Pty Ltd and Robert Keith Ridley, Document No 017029084 (24 April 2003).

But are such voluntary bans designed to protect the public or are they punitive in nature? To answer this question, the next paragraphs will consider the reasoning followed in *Rich v ASIC* (2004) which stated that disqualification orders are punitive in nature. This author will reflect whether these reasons are relevant in the case of voluntary bans. For this purpose, it is essential to note that the waiving of an undertaking will be possible in two circumstances:

- where there is a possibility to vary the undertaking; and

- by fulfilling the requirement of the undertaking.

Before addressing these two points, it is essential to note that voluntary bans are usually targeted toward the area where the alleged breach occurred. For instance, if the alleged offence occurred in the financial sector the ban will prevent the alleged offender from dealing in the financial sector.

An example is Robert Keith Ridley's alleged breach in relation to allowing the company he managed to deal with insurance when its license had expired. Ridley undertook not to apply for an Australian financial service license or to involve himself in the management of any entity that holding such a license or registered as a general insurance broker.[23]

7.3.1. Varying the accepted undertaking

In *Rich v ASIC* (2004), it was pointed out that if the ban was only protective in nature then the defendant will be able to apply for the waiving of the disqualification order by showing that he/she is now fit to be a director for instance.[24]

In the case of an enforceable undertaking, a promisor may withdraw or vary the undertaking with ASIC's consent. ASIC will usually consent to such a request to vary an

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[23] Ibid.
[24] *Rich v Australian Securities and Investments Commission* (2004), above n 7,[42].

undertaking where there has been material change in the circumstances.[25] Accordingly, if the promisor can, for example, prove that he or she is once again qualified to manage a company or to deal with security or investment advice, the regulator might be willing to vary the undertaking. As a consequence, the abovementioned argument of the Court of Appeal will not apply here. But what about the rest of the reasons noted in that case?

7.3.2. Fulfilling the requirements of the undertaking: Education, protection of the public and prevention

In *Rich v ASIC* (2004), the court also pointed out that if the disqualification orders were purely protective in nature, they should not be issued for a fixed period of time. They should be made for an indefinite period that will only be waived if the defendant proves at a later date that he or she were now a fit and proper person to manage corporations.[26]

In 35 of the 70 undertakings[27] that require the alleged offender to promise not to manage a company or deal with securities, financial services and/or investment advice, it can be observed that ASIC required the promisor to complete a certain course during or at the end of the period of voluntary ban. It is only when the promisor terminates the education requirement that he or she can manage a company or deal with securities and/or investment advice.[28]

The education that is required ensures that the individual will be more informed of his or her duties and obligations in the future. It is a prevention measure. It will also protect the public. Through educating of the individual, the chances of him or her repeating the alleged offence will be reduced. The promisor will be more equipped to deal with similar situations in the future.

If the promisor does not fulfill the education requirement, he or she will not be able to waive the ban. Accordingly, it might be said that the education requirement ensures that

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[25] ASIC, *Practice Note* 69, [69.36]-[69.39] <http://www.cpd.com.au/asic/pn/pn069.pdf> at 28 December 2003.
[26] *Rich v Australian Securities and Investments Commission* (2004), above n 7, [42].
[27] ASIC, above n 11.
[28] Ibid.

the individual is fit again, for instance to manage a corporation (if the ban is in relation to managing a company) or to deal with securities and/or investment advice (if the ban is in relation to dealing with securities and investment advice).

The voluntary ban will be for an indefinite period until the person fulfills the requirement of the undertakings. The person will have to prove his or her fitness to waive the ban by accomplishing the stipulations of the undertaking, in this case the education condition. The frequency of the use of education with voluntary ban can be seen in Figure 7.1.[29]

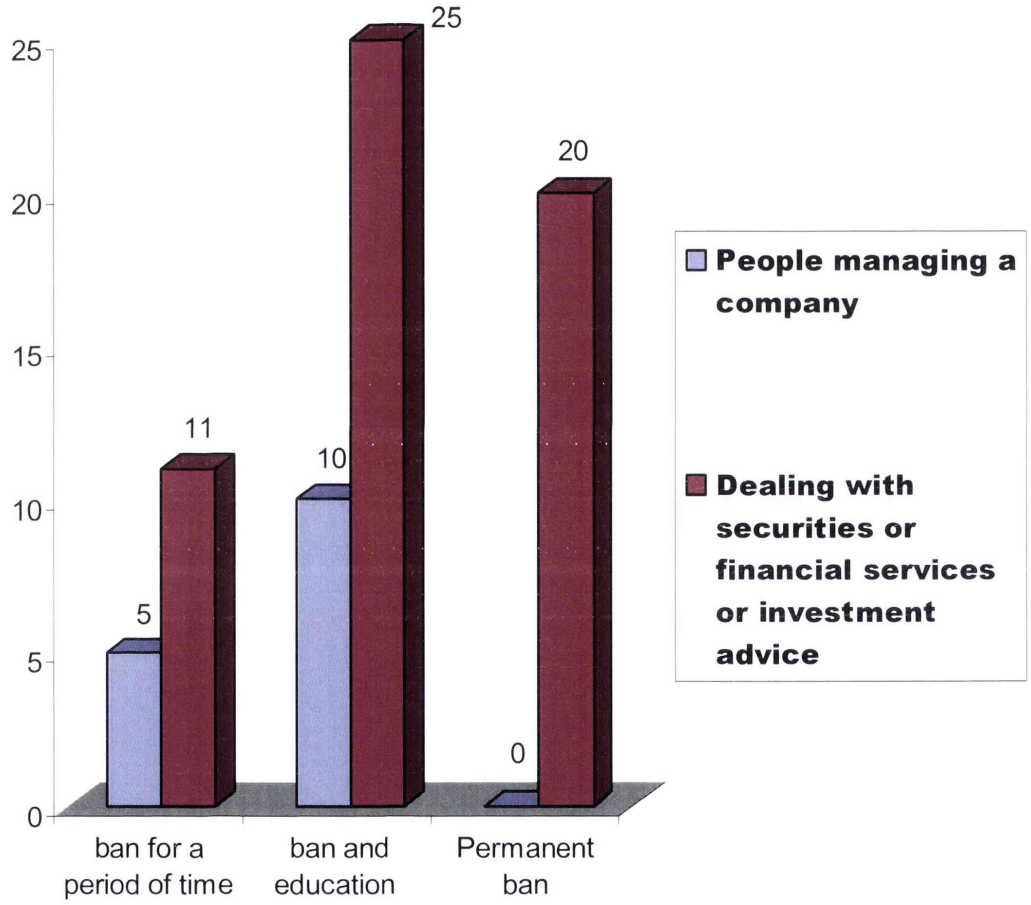


Figure 7.1: Voluntary ban and education in undertakings

Figure 7.1 indicates that there were 15 undertakings requiring the promisor not to be involved in the management of a company for a certain period of time. In 67% of the

[29] Ibid. The observation made above can be seen when reading the undertakings.

cases, the promisor had to fulfill an education requirement to make him or her fitter to manage a company. If the promisor refuses to fulfill the education requirement, he or she will not be able to manage a company. Accordingly the ban will be for a period that will only end when the person fulfills the education requirement.

For example, Robert 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. If he did not complete the Securities Institute of Australia Diploma of Financial Markets, Managed Investments stream or an equivalent of the course, his ban would be indefinite.[30]

As shown, 56 undertakings dealt with bans in relation to dealing with securities dealers, financial services and investment advice. Of these, 25 contained an education requirement. Twenty of them were permanent bans. In most cases, the permanent ban is given to people who are dealing with securities, financial services and investment advice without a license. Accordingly, their ban will be indefinite because they have no expertise in the area. If the banned individuals want to waive the ban they have to prove that there has been a change in their situation that will warrant the variation of the undertaking. Their ban can be seen as protective in nature rather than punitive. As for the fixed bans with an education stipulation, the ban is for an indefinite period that will be waived only when the promisor accomplishes the education stipulation.

For example, Marc Anthony Bissett agreed to a voluntary ban not to deal with securities and investment advice. The duration of the ban was two years during which the promisor undertook to complete a specific number of courses accredited by the Financial Planning Association of Australia or the Securities Institute of Australia. This course would ensure that in the future he would be fit to deal with securities and investment advice.[31]

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[30] ASIC, Enforceable Undertaking: Robert Marusco, Document No 008457094 (10 January 2003).
[31] ASIC, Enforceable Undertaking: Marc Anthony Bissett, Document No 017029044 (26 June 2002).

Accordingly, in 67% of the cases dealing with fixed period voluntary bans, the regulator sought to ensure the protection of the community and the prevention of the occurrence of the alleged offence in the future. ASIC required the people who entered into such an undertaking to complete a certain course to make them more eligible to carry out the duties that they will have if they enter again the field they were banned from.

This education process is very important because it shows that the voluntary ban is accepted by the regulator to protect the public and not to punish the individual. It is rare for ASIC to accept a fixed voluntary ban without pointing out that at the end of the disqualification period the person will have to take a relevant course to ensure his or her eligibility. The education that is required in some undertakings can be construed as an active approach to rehabilitate the banned individual and ensure public protection.[32] A person who is subjected to a ban should not be permitted to resume his or her duties without some form of supervision or education. Education will ensure that the public will be protected from inappropriate behaviour on the part of that individual in the future.[33]

In conclusion, voluntary bans in the enforceable undertakings can be considered protective in nature rather than punitive. The education requirement that accompanies the undertakings will ensure this reality. The only problem is that in 33% of the cases where a fixed voluntary ban is given, there is no education requirement. Accordingly, the following question arises: is the voluntary ban in these instances punitive in nature? The answer will be a positive one if one follows the arguments of McHugh J in *Rich v ASIC* (2004).[34] The voluntary ban should be indefinite with the burden on the promisor to prove that he or she is now fit to manage a company (if the ban is in relation to managing a company) or to deal with securities, financial services and/or investment advice (if the ban is in relation to dealing with securities, financial services and/or investment advice).

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[32] *Donald and Australian Securities and Investments Commission* AATA 622 (Unreported, S A Forgie DP, 2 July 2001).
[33] *Donald and Australian Securities and Investments Commission* [2001] AATA 366; (2001) 38 ACSR 10, [128].
[34] *Rich v Australian Securities and Investments Commission* (2004) ACSR 242; [2004] HCA 42, [42].

7.4. Enforceable undertakings in United Kingdom

As mentioned in Chapter 4, the United Kingdom has a penalty which is also called an "enforceable undertaking". This section will consider the power given in the United Kingdom to the Secretary of State to accept enforceable undertakings in relation to disqualification of alleged offenders from managing a company. This type of voluntary disqualification is very popular in the United Kingdom. Early indications suggest that where the system has operated since 2 April 2001, 75% of cases are concluded by way of statutory undertakings.[35] Northern Ireland has recently introduced such undertakings into its system following the United Kingdom's apparent success in that field.[36]

The undertakings are useful because they provide a new option that enables unfit directors to be disqualified earlier, and they also provide savings in court costs. But what is really of interest here is that all the disqualification orders and undertakings are present in a register that is accessible to the public. While all enforceable undertakings in Australia are available to the public through the enforceable undertakings' register on ASIC's website, the names of the individuals who have agreed to a voluntary disqualification are not recorded in the register of disqualified directors or people banned from dealing in securities and investment advice.[37]

This is not the case in the United Kingdom, where the names of all the people who have agreed to a ban are recorded in the register of disqualification orders. This makes it easier for the public to discover whether a person can manage a company or not.[38] It is advisable for Australia to introduce such a register to its system. This would ensure better protection of the public. Another difference between the two countries is that in the United Kingdom voluntary bans agreed to in an enforceable undertaking have a

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[35] 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> at 30 October 2004.
[36] *The Company Directors Disqualification (Northern Ireland) Order 2002*, s 4.
[37] ASIC <http://www.asic.gov.au> at 30 October 2004.
[38] The Insolvency Service, *Company Directors Disqualification Act 1986 and Disqualified Directors: Effect of disqualification orders and disqualification undertakings*
<http://www.insolvency.gov.uk/pdfs/cddaddweb.pdf> at 31 December 2004.

duration that varies between two and 15 years.[39] This is not the case in Australia, where voluntary bans can be permanent.

Due to the seriousness of the consequences of a voluntary ban, it may be advisable that the legislator in Australia regulates more closely the undertakings that contain provisions in relation to voluntary disqualification. But one thing should not be forgotten: while such undertakings in the United Kingdom are well regulated, none of the provisions in place there have introduced education into the undertakings given to company directors. This is a definite advantage of the Australian system, where protection of the public and prevention play an important role in the use of undertakings.

7.5. In brief

It can be observed that prevention and protection of the public will play an essential role when ASIC is considering accepting an undertaking. The voluntary ban is usually accompanied by the promise of the alleged offender to take a certain course of action after the ban period expires if he or she would like to manage a company or deal with security or investment advice in the future. In the cases where the ban is permanent, there is always the possibility for the alleged offender to request a variation of the undertaking. The only problem that might be raised is with the voluntary ban that is given for a fixed period of time with no education requirement. This type of undertaking might be seen as punitive in nature.

Since voluntary disqualification should have the same effect as a banning order, maybe it is best if such undertakings are recorded in the register of undertakings and in the register of banning orders. This would help in the protection of the public by making the undertaking widely known and by facilitating the research needed discover if a person is banned from managing a company or from dealing with securities.

In conclusion, the purpose behind the use of voluntary ban and education is usually consistent with the ALRC's recommendation in relation to the purposes of administrative

[39] The Insolvency Service, above n 38.

enforcement. The only problem that may arise is with the voluntary bans for a fixed period of time where no education is required.

Chapter 8 Disclosure and compensation in enforceable undertakings

8.1. Introduction

This chapter will concentrate on two promises given in an enforceable undertaking, namely:[1]

- disclosure of the undertaking to a certain category of people; and
- payment of compensation.

The disclosure of an undertaking to a certain category of people can be seen as a form of publicity put in place to advise certain people of the content of the undertaking. Since publicity might have some adverse effect on the people it targets, it is essential to study the purpose behind the use of publicity in the undertakings. In some cases, compensation accompanies the disclosure requirement. If ASIC discovers that the alleged offence has caused a direct loss to a third party, it sometimes seeks an undertaking by the alleged offender to pay compensation to the injured third party.[2]

As noted in the methodology, it is essential to discover the nature of the disclosure and compensation requirements. Are these promises put in place to protect the public or to punish the alleged offender? Is there a shaming element in the use of disclosure in an undertaking? Observing the level of the disclosure and the compensation pledged in an

[1] ASIC, Register of Enforceable Undertakings, <http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Enforceable+Undertakings+Register?openDocument> at 10 February 2004. The observation made above can be seen when reading the undertakings.
[2] Karen Yeung, The Public Enforcement of Australian Competition Law (ACCC, 2001) 120.

undertaking will allow a determination of the goals behind such requirements.[3] This will also illustrate if these goals are compatible with those prescribed by the ALRC.[4]

Accordingly, the beginning of this chapter will be oriented toward the purpose and effect of publicity. After establishing the nature and goals behind the use of publicity, the author will look at the disclosure requirement in enforceable undertakings and consider the goals behind this remedy. A look at the compensation requirement that is present in some undertakings will follow.

8.2. Adverse publicity in general

Adverse publicity is highly valued because it has the ability to expose and to police undesired behavior. In case of a breach of the law, public notices are of essence today for they provide adequate warning to the public. Since public approval has traditionally been prized for its ability to reward and encourage desirable conduct by the business community, many companies have introduced substantial reforms in the wake of their adverse publicity crises. As a result, regulatory agencies tend to use publicity in the following ways: [5]

- as a warning to stop a certain behavior;
- as a tool to educate the public of their rights and duties;
- as a way to bring witnesses foward;
- as a way of advising victims of avenues of redress;
- as a way to shame the offender; and

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[3] Karen Yeung, *Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?* 7, 8 <http://www.aic.gov.au/conferences/regulation/yeung.pdf> at 28 January 2005.
[4] ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68, 38.
[5] Brent Fisse and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (State University of New York Press, c1983) 1, 260.

- as a sanction.

Our perception of publicity has evolved through the ages. During primitive times, publicity was used as a stigma. But then society moved toward an even more complex pattern. A greater interaction within the community led to the use of publicity in a coercive way. Publicity became an effective way to control the behavior of individuals.[6] As it was noted in Chapter 3, today publicity on its own might be considered a penalty of its own. It might also be seen as an informal method to coerce the offender to cease his or her offending behavior. Accordingly, publicity is seen as a way to deter malpractice.[7]

On a number of occasions, the threat of adverse publicity has acted as a more powerful deterrent than the threat of fines or injunctive orders because the threat of adverse publicity has the potential to cause financial and emotional losses to the offender. It can also affect the offender's reputation.[8] But the effectiveness of publicity as a tool in the hand of regulators depends on the extent to which the entities, against whom this remedy is applied, are subject to the force of public opinion. If the offender does not care about public perception, the threat of adverse publicity will not dissuade him or her.[9]

8.3. Use of publicity by regulators

Evidence of the power of publicity can be seen in the way regulatory agencies have successfully applied the threat of adverse publicity to bring about the settlement of complaints without the need for a formal hearing. The willingness of defendants to settle out of court might be due to their desire to avoid the expense and uncertainty of formal litigation. Settlement is usually preferred to court proceedings because it attracts less

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[6] Francis E Rourke, *Secrecy and Publicity: Dilemmas of Democracy* (Johns Hopkins Press, 1961), 114.
[7] ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 95-97.
[8] Fisse and Braithwaite, above n 5, 261.Usually, fines and injunctions will pale into insignificance when faced with the financial, emotional and reputational losses of the order that resulted for example from the Food and Drug Administration publicity against Proctor and Gamble's Rely Tampons or Bon Vivant's Vichysoisse soup as noted by Fisse and Braithwaite in there book *The Impact of Publicity on Corporate Offenders*.
[9] ALRC, above n 7, 97.

negative publicity. It diminishes any injury to reputation because it gives the regulator only one occasion for an agency press release and media coverage on the content of the settlement, while a formal litigation will attract a series of newsworthy events such as the news created if a person goes to trial.[10]

In the media release that follows a settlement, the allegation announced is also less serious than the allegation that may have been made after the start of litigation. The language used by the agency can also be the subject of negotiations. Accordingly, it may be rendered less harmful. This can be observed when comparing the press releases that follow the regulatory announcement of the beginning of court proceedings and those that follow the acceptance of a settlement. For example, in 2000 ACCC took price exploitation proceedings against Video Ezy. The case ended with a settlement between those two parties. When comparing the press release that followed the initiation of litigation and the press release that followed the settlement, it is apparent that the terms used in the settlement were far less harmful than those in the litigation.[11] Table 8.1 illustrates the veracity of this statement by comparing the words used in each media release.

[10] Rourke, above n 6, 130.
[11] Warren Pengilley, "Video Ezy Case Settled: ACCC Price Exploitation Publicity Pre-Litigation Contrasted with the Realities of the Settlement" (2001) 17(2) *Australian & New Zealand Trade Practices Law Bulletin* 9, 10-11.

ACCC press release 26 May 2000 on initiation of litigation	ACCC press release 27 April 2001 on settlement of litigation (detailing consent order)
The charge: ACCC charged Video Ezy with unreasonably high prices for new release videos in the majority of its corporately owned stores	ACCC believed that it was reasonable for it to be concerned that there might be a possibility of price exploitation.
Goal: ACCC wants to protect consumer.	ACCC believes that the settlement provides significant redress to the affected consumers.
Extent of the charge: ACCC believes that 21 of its 33 stores used misleading advertisements.	Video Ezy acknowledged that it has made misleading statements in Townsville and Queensland stores.
One of the allegations: The ACCC considers that the alleged representations were not the invention of junior staff at Video Ezy but the management.	No comment on this issue.
Remedies targeted by ACCC: - Reduction in price - Refunds - Disclosure of the result of the litigation to customers - Stop the offending action - Pecuniary penalty	Remedies gotten in settlement: - Reduction of price - Compensation - Limited disclosure - No pecuniary penalty.

Table 8.1: Comparison of ACCC press releases[12]

Publicity can be used for different purposes that will range from shaming to bringing proceedings to a close through settlement. But is publicity always used in the same way

[12] Ibid.

in the undertakings? The undertakings accepted by ASIC are subject to two types of publicity:

- ASIC will publicize all the enforceable undertakings it has accepted;
- in some undertakings, the promisor will disclose the terms of the undertaking to a certain category of people.

These two types of publicity are discussed in more details in the next paragraphs.

8.4. Disclosure of the enforceable undertakings

All the enforceable undertakings accepted by ASIC should be made available to the public. Section 93A(6) of *ASIC Act* states that ASIC will make an enforceable undertaking available to the person who asks for it. This ensures that ASIC will not accept enforceable undertakings in confidence.[13]

8.4.1. Publicity through Register of Enforceable Undertakings

To make it easier for the public to access the enforceable undertakings accepted by ASIC, in 2000-2001, ASIC created an internet register of all the enforceable undertakings that have been accepted by it. The public can now get the full text of the undertaking from ASIC's website. This move is a good change, for it will ensure greater transparency of the enforceable undertakings.[14]

The internet register indicates which State has accepted the enforceable undertaking and which section of the *ASIC Act* was relied. It also shows the names of the parties involved, the document number of the enforceable undertakings and the date of acceptance of the undertaking. The register permits access to the undertaking's document and to the media releases related to it.[15]

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[13] *ASIC Act*, s 93A(6).
[14] ASIC, *Annual Report 2000-2001*, 49.
[15] ASIC, above n 1.

8.4.2. Promisor acknowledgments in the undertakings

Enforceable undertakings are usually divided in several sections. As noted in Chapter 5, in the acknowledgement section, the promisor will usually acknowledge that ASIC has the right to refer to the undertakings.[16] The following clause is common in the undertakings:[17]

> *"[...] acknowledges that ASIC:*
>
> - *may from time to time publicly refer to the undertaking;*
> - *may issue a media release on execution of this undertaking referring to its terms and the concerns of ASIC which led to its execution; and*
> - *will place a copy of the executed undertaking on a Public Register."*

The clause gives ASIC the option to mention the enforceable undertaking in the future. It also may record the enforceable undertakings in the public register and issue press releases that summarize the alleged offence that led to the undertaking. This type of publicity ensures the transparency of the undertakings. However, ASIC may, in certain circumstances, withhold some information in relation to an accepted undertaking.

8.4.3. Withholding of certain information

When accepting an undertaking, ASIC has the right to withhold certain information from public inspection at the promisor's request if ASIC is satisfied that:[18]

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[16] ASIC, *Practice Note* 69 [69.33] <http://www.cpd.com.au/asic/pn/pn069.pdf> at 28 December 2003.
[17] ASIC, Enforceable Undertaking: Plexus International Ltd, Document No 008547509 (30 March 2001).
[18] ASIC, above n 16, [69.27].

- The information is commercial in confidence;

- It would be against the public interest to publish it; or

- The information contains personal details of an individual.

When such a situation occurs, ASIC usually states that the information has been deleted. On only one occasion, ASIC has withheld the name of a person subject to the enforceable undertaking. When reading the media release, the reader discovers the reason why the information was withheld: the promisor was a 17 year old student. Because of the student's young age at the time he posted the notice that led to the enforceable undertaking, his name was withheld from publication.[19]

However, this chapter is interested in a different type of disclosure that might lead to adverse publicity in certain cases. Some enforceable undertakings will include a requirement for the alleged offender to inform a certain category of people of the undertaking. This type of publicity is in addition to that started by the regulator when the undertaking is accepted.

8.5. Disclosure requirement in enforceable undertakings

Of the 227 enforceable undertakings accepted between 1998 and 2004, 80 required the alleged offender to disclose the undertaking to different categories of people.[20] The situations in which such a disclosure will be required vary and depend mostly on the alleged offence and its impact on the public.

8.5.1. Areas where disclosure is used

Table 8.2 notes the alleged breaches that have led ASIC to include, in the enforceable undertakings, the requirement to disclose the undertaking to a certain category of people.

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[19] ASIC, Enforceable Undertaking, Document No 008547457 (14 July 2000), Press Release 00/305.
[20] ASIC, above n 1.

Alleged breaches that led to an enforceable undertaking	Total number of enforceable undertakings using disclosure	Percentage (%)
Breach of the duties of directors or securities dealer or investment adviser	9	11.25
Advising or dealing with securities without license	17	21.25
Fundraising/ investment offer in breach of the law	12	15
Unregistered investment schemes	3	3.75
Misleading advertisement/ information/ advice/conduct	25	31.25
Breach of disclosure provision	6	7.5
Miscellaneous	8	10
Total	**80**	**100%**

Table 8.2: Alleged breaches where ASIC used a disclosure requirement in the undertakings[21]

The most common breach that will usually lead to disclosure of the undertaking to a specific category of people is misleading advertisement, misleading statement or misleading conduct. This is followed by other alleged offences like advising or dealing with securities without a license and breaches of the law in relation to fundraising

[21] Ibid.

provisions. Such types of alleged offence will lead to different types of disclosures. ASIC usually will require the promisor to disclose the undertaking to:[22]

- the people affected by the actions of the alleged offenders;
- the general public;
- the staff of the alleged offender; or
- future employers of the alleged offender.

Table 8.3 shows which one of these categories is the most popular.[23]

Years	Disclosure of undertaking to staff	Disclosure of the undertaking to the people affected by the alleged offence	Disclosure of the undertaking to future employers	Disclosure of the undertaking to the general public	Total
1998	0	2	0	0	2
1999	1	5	0	5	11
2000	2	15	7	2	26
2001	0	6	2	0	8
2002	0	9	0	0	9
2003	0	6	0	4	10
2004	0	8	3	3	14
Total	**3**	**51**	**12**	**14**	**80**

Table 8.3: Disclosure to different categories in undertakings

As it can be seen from Table 8.3, some types of disclosure requirements in the undertakings are more popular than others. When accepting an enforceable undertaking, ASIC tries to find a way to undo the harm caused by the alleged offence. For example, in

[22] Ibid.
[23] Ibid.

cases of misleading advertisement, the regulator may require unequivocal corrective advertising which will reach the same target audience as the original campaign.[24] For this reason disclosure of the undertaking to the people affected by the alleged breach is the most popular of all the disclosure requirements. Over the years, it is apparent from Table 8.3 that there has been no consistency in the use of the disclosure requirements. This can be explained by observing that such a disclosure requirement is only included in an undertaking to achieve certain goals. Accordingly, ASIC will be assessing if such a requirement is needed on a case by case basis. Figure 8.1 is based on the information found in Table 8.3.

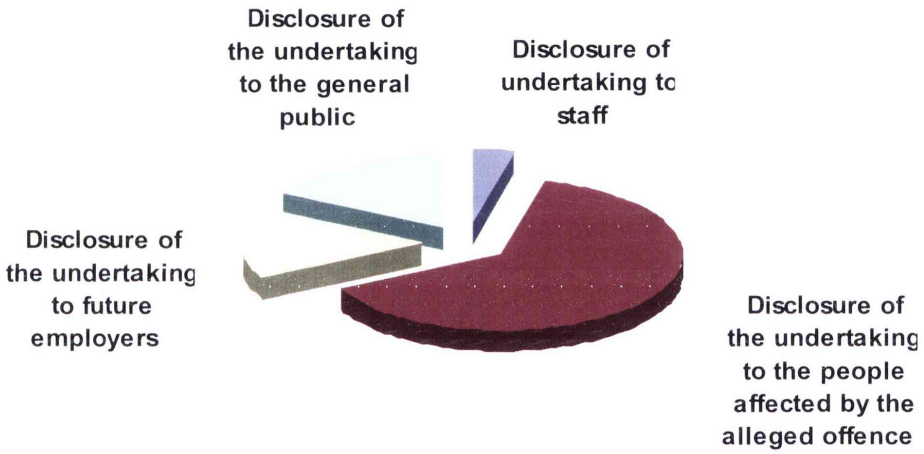


Figure 8.1: Different types of disclosure requirements

An explanation about the information found in Figure 8.1 is developed below.

[24] ACCC , *Section 87B of the Trade Practices Act* (1999) 6-7.

8.5.2. Disclosure of undertaking to people affected

As shown in Figure 8.1, in 64% of the undertakings, the promisor had to disclose the content of the undertaking to his or her clients. The disclosure will usually be targeted toward the people affected by the actions of the alleged offender.

This type of publicity can be seen as a type of corrective advertisement. In *ACCC v On Clinic Aust Pty Ltd,*[25] Tamberlin J stated:

> *"The purpose of corrective advertising is to protect the public interest. ... 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. 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 adverting 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."*

Accordingly, disclosure of the undertaking to the people affected by the actions of the alleged offenders will be required in an undertaking for corrective purposes only. The regulator will try to find a way to undo the harm caused by the promisor. As a consequence, in cases of misleading advertising, ASIC may require unequivocal corrective advertising which will reach the same audience as the original campaign.[26]

The courts, when enforcing such a requirement, check whether the corrective advertisement requirement is appropriate in the circumstances. For instance, in *ACCC v*

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[25] *Australian Competition and Consumer Commission v On Clinic Aust Pty* Ltd (1996) 35 IPR 635, 637, 431.
[26] Ibid.

Signature Security Group Pty Ltd,[27] 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, disclosure is required in the undertakings to protect the public by correcting the harm caused by the alleged breach. Corrective advertisement is a useful remedy where the harm caused has involved false representations and misleading and deceptive conduct. The cases where there has been disclosure to the people affected by the alleged conduct are set out in Table 8.4.[28]

Type of alleged offences that led to a disclosure requirement in the undertakings	Total number of undertakings that have a disclosure requirement toward people affected by the breach	Total number of enforceable undertakings using disclosure
Breach of duties	4	9
Dealing with securities or financial services without license	2	17
Fundraising/ investment offer in breach of the law	13	12
Unregistered investment schemes	3	3
Misleading advertisement/information/advice/conduct	18	25
Breach of disclosure provision	4	6
Miscellaneous	7	8
Total	**51**	**80**

Table 8.4: Matters where ASIC required the promisor to disclosure the undertaking to affected parties

[27] *Australian Competition and Consumer Commission v Security Group Pty Ltd* [2003] FCA 3 (Unreported, Stone J, 13 January 2003).
[28] ASIC, above n 1.

Table 8.4 shows that the requirement of disclosure to a certain category of people is usually used for corrective purposes, not for punishment. For example, in the undertaking accepted by Peel River Vineyards Ltd, the promisor allegedly omitted certain information in its prospectus. In the undertaking, ASIC required the alleged offender not to issue or release the prospectus. It also noted that if the prospectus had already been sent, the promisor would have to issue a letter notifying the people who had received the prospectus that the prospectus was subject to an undertaking.[29] As a result, the disclosure of the undertaking to a certain category of people would only take place if a section of the public had received the prospectus. The requirement served to correct the misinformation of those people.

Similarly, the use of disclosure will be required by ASIC when a third party is affected. For instance, in the undertaking given to Arif Fareed, the promisor allegedly breached his duties as a securities dealer. He did not disclose the commission he was taking from his clients. He was required in the undertaking to advise his clients of the content of the undertaking.[30]

Neither the Minister who introduced the enforceable undertaking into our system nor ASIC have described enforceable undertakings as a method to restore justice. However, Parker argues that the notion of restorative justice should be incorporated into the enforceable undertaking process.[31] As seen in the literature review, restorative justice is about restoring equilibrium to a relationship where one party has not fulfilled its obligations. However, restorative justice requires all parties to be empowered together to make innovative, flexible and expansive undertakings that go beyond what a court would order, with the purpose of identifying, correcting and preventing the original breach and its underlying causes.[32]

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[29] ASIC, Enforceable Undertaking, Peel River Vineyards Ltd, Document No 008547479 (18 October 2000).
[30] ASIC, Enforceable Undertaking, Arif Fareed, Document No 017029050 (16 August 2002).
[31] Christine Parker, "Restorative Justice in the Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67 *Modern Law Review* 220.
[32] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 11.

Even though the third party doesn't have a say in the undertaking, the disclosure can inform the person affected by the alleged breach of the steps taken by the regulator. It is a type of corrective measure to correct the belief that a third party relied on when dealing with the promisor. Table 8.4 shows the cases that required disclosure to the people affected by the action of the promisor. Misleading advertisement/information/conduct is at the top of the list with 14 undertakings requiring the disclosure of the undertaking to a certain category of people.

Such disclosure is essential to inform the affected party of the alleged actions of the promisor. This allows the affected person to take private action if it feels that it has not recovered the totality of its losses, for instance. In the undertaking given to Freehold International Pty Ltd and Optioneer System Pty Ltd, the promisors agreed to inform their clients of the content of the undertaking. In the letter they sent to their clients, it was clearly stated that the affected parties might be able to rescind the agreements they made with Freehold. Accordingly they would need to contact a lawyer for more information on their rights.[33]

However, a problem with this undertaking is that, while the alleged breach affects third parties there is no requirement that they be consulted to ascertain the degree of damage inflicted on them. Applying the concept of restorative justice to the undertakings can remedy this. In the United States of America, consent decrees allow the court to try to ensure that third parties are not badly affected by the settlement entered into between the regulator and the alleged offender.[34]

One of the requirements of the *Tunney Act* is that the government will solicit public comment before finalizing any antitrust settlement. The settlement document will be published in the Federal Register at least 60 days prior to the effective acceptance of the decree and the government will make certain relevant documents available for public

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[33] ASIC, Enforceable Undertaking, Freehold International Pty Ltd and Optioneer Systems Pty Ltd, Document No 017029024 (14 February 2002).
[34] David Grober, *Tunney Act: A call to Action* (25 February 2002) <http://techupdate.zdnet.com/techupdate/stories/main/0,14179,2849085,00.html> at 15 September 2004.

inspection. Summaries of the proposed decree and those documents will be published in certain general circulation newspapers.[35]

This system ensures that the public is aware of the proposed decree and are given an opportunity to comment on the content of the decree. This brings a certain type of restorative justice in that all affected parties can be aware of the proposed consent decree and be able to add certain elements to such a settlement, if the court believes that their comments are reasonable. This ensures no affected party is ignored by the undertaking.

Even though the disclosure that is used in the consent decree is different from the type of disclosure being studied ere, it is worth noting. Arguably, such disclosure should have a place in our system to ensure that the rights of all the people affected are taken into account when giving the undertaking, especially when some of the affected people will be compensated for their losses. The regulator can also obtain more information about the alleged offender when the public is involved in the process of regulation.

For instance, in the consent decree between the United States regulator and Microsoft, there was a deluge of public comments in relation to the proposed decree. Accordingly, the judge who was looking at the consent decree asked Microsoft and the Justice Department if they were planning any changes to the settlement proposal in response to public comments.[36]

The inclusion of disclosure requirements in an undertaking serves a corrective purpose protecting the public.[37] Is this also the goal when ASIC requires the promisor to disclose the undertaking to the public?

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[35] Ibid.
[36] Ibid.
[37] ACCC, above 24, 6-7.

8.5.3. Disclosure of undertaking to general public

As noted above, in the hope of correcting the consequences of the actions of the promisor, the regulator will require him or her to disclose the undertaking to some people. Such a corrective action will reach the same target audience as the original campaign.[38] Accordingly, ASIC should only require the undertaking to be disclosed to the general public when the action of the alleged offender that led to an undertaking has targeted the public in general. If ASIC requires in the promisor to disclose the undertaking to the public for any other reason, such disclosure may have the effect of adverse publicity and hence have a punitive goal.

Type of alleged breaches	Total number of enforceable undertakings using disclosure of the undertaking to the public	Total number of enforceable undertakings using disclosure
Breach of duties	0	9
Dealing with securities or financial services without license	8	17
Fundraising/ investment offer in breach of the law	0	12
Unregistered investment schemes	0	3
Misleading advertisement/information/advice/conduct	4	25
Breach of disclosure provision	1	6
Miscellaneous	1	8
Total	**14**	**80**

Table 8.5: Matters where ASIC used disclosure to the general public in an undertaking[39]

[38] Ibid.
[39] ASIC, above n 1.

As Table 8.5 shows, ASIC does not require disclosure by the promisor of the undertaking to the general public on regular basis. The regulator has only required such disclosure in 17.5% of the cases. All the alleged offenders who have entered into an undertaking that requires disclosure to the public in general have one thing in common: they have all targeted the general public in their alleged breach. They have targeted members of the public either through the internet, newspapers or the Australian Stock Exchange (ASX). When reading those undertakings, it will become apparent that ASIC required disclosure to the public in the same way the individual or company who dealt with securities, financial services or/and investment advice targeted the public. This again demonstrates that disclosure of the undertaking has a corrective purpose.

The disclosure to the public takes place on three levels:[40]

- through newspapers;
- in financial reports and the ASX; and
- through ASIC's website.

ASIC will usually require the promisor to target the same audience that he or she targeted when allegedly committing the breach. Thus, if the alleged offence was directed through a website the disclosure of the undertaking will be done through the website. For instance, A & A Gillon Pty Ltd provided financial product advice without a license via the Shapiro website. It entered into an undertaking with ASIC under which it promised not to offer financial product advice and to refund its customers. It also undertook to disclose the content and terms of the undertakings on the Shapiro website.[41]

When looking at the eight undertakings that deal with the alleged offence of advising or dealing with securities without a license that resulted in disclosure of the undertaking to

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[40] Ibid.

[41] ASIC, Enforceable Undertaking, A&A Gillon Pty Ltd, Allen Ray Gillon and Ann Gillon, Document Nos 017029066, 017029067, 017029068 (14 January 2003).

the public, it is apparent that in these cases the promisor allegedly targeted an internet audience through a website. Accordingly, the undertakings required the promisor to issue a statement on that website disclosing the content of the undertaking to the parties originally targeted.[42]

This type of publicity will be available to the public and most especially to the people affected by the action of the promisor. Another type of disclosure can involve major newspapers. The reason why such general disclosure is needed, is that the promisors targeted the public through major newspapers. As a result, the regulator is asking them again to target the same general public they targeted in their original campaign. It is again a corrective measure which aims to fix the problem caused by the original breach.

For instance, on 30 July 2003, National Investment Institution Pty Ltd, Henry Kaye, Novasource Consulting Pty Ltd and Alan Meagher entered into an enforceable undertaking with ASIC. ASIC considers that they were engaging in misleading and deceptive conduct in connection to their supply of certain financial services. They were also carrying on a financial service business without a license. They finally issued a brochure that contained misleading information. In response, ASIC required them to issue a letter to the specific customers that attended the seminars organized by the promisors. ASIC also required the alleged offenders to publish information about the content of the undertaking in *The Australian*, *The Australian Financial Review* and in a major daily newspaper circulating in the capital cities of each State and Territory.[43]

In other instances, ASIC will require the promisor to release the undertaking to the ASX. For example, in 1999, ASIC accepted an undertaking from the Seven Network in relation to the non-compliance of the company with the accounting standards. ASIC required the promisor to disclose the content of the undertaking in its financial report and to the ASX.

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[42] ASIC, above n 1.

[43] ASIC, Enforceable Undertaking, National Investment Institute Pty Ltd, Henry Kaye, Novasource Consulting Pty Ltd and Alan Meagher, Document Nos 017029093, 017029094, 017029095 and 017029096 (30 July 2003).

As a result, the undertaking became known by the people who might have been affected by the breach.[44]

This disclosure to the public of the terms of the undertaking is considered by ASIC as corrective advertisement. Accordingly the goal of this type of disclosure requirement is the same as the goal of the disclosure requirement to a certain category of people. In both cases, the disclosure targets those people who might have suffered from the promisor's alleged breach. That is, it is there to protect the public.[45] The same reasoning that justified the disclosure to a certain category of people, applies here. But what is the purpose behind the disclosure of an undertaking to the staff of the promisor?

8.5.4. Disclosure of the undertaking to staff

As it can be noted from Figure 8.1 and Table 8.3, this type of disclosure has been required in three instances only. Disclosure of an enforceable undertaking to the staff of the alleged offender is sometimes used when the promisor's advertisement of certain product is allegedly misleading. Such a requirement is put in place to prevent similar breaches from happening again by advising the staff that are usually involved with the advertisement campaigns of the terms of the undertaking. This has a similar effect to the education requirement discussed in Chapter 7.

On 14 December 2000, ASIC entered into an enforceable undertaking with Tower Life Australia Ltd. Tower had allegedly used misleading advertisements. ASIC required it to stop such a behavior and to inform the staff in charge of the selling and promotion of its products of the terms of the undertaking.[46] A similar requirement was present in the undertakings given to Suncorp Metway Insurance Ltd[47] and American Home Assurance Company and Family Insurance Advisory Services Proprietary Ltd.[48]

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[44] ASIC, Enforceable Undertaking, Seven Network Ltd and Seven Network (Operations) Ltd, Document No 008 547 317 (8 March 1999).
[45] ACCC, above n 24, 6-7.
[46] ASIC, Enforceable Undertaking, Tower Life Australia Ltd, Document No 008 547 486 (14 December 2000).
[47] ASIC, Enforceable Undertaking, Suncorp Metway Insurance Ltd, Document No 008 547 385 (30 August 1999).
[48] ASIC, Enforceable Undertaking, American Home Assurance Company and Family Insurance Advisory Services Pty Ltd, Document No 008 547 439 (20 April 2000).

This method is effective for the simple reason that when the staff of a company is informed of the undertaking, they will know how to act in the future. If they know of the requirement in the undertaking, the likelihood of them breaching it and committing the alleged offence will be slimmer. But why would ASIC require the undertaking to be disclosed to current and future employers?

8.5.5. Disclosure of undertaking to future employers

Can the requirement to disclose the content of an undertaking to the current and future employers of the promisor have been imposed in order to stigmatize the alleged offender? To answer this question, three elements should be noted:

- In all the undertakings that require disclosure to future employers, the alleged offenders are individuals.[49]

- The disclosure targets specific employers.[50]

- The matters that led to the undertakings were those set out in Table 8.6.

[49] ASIC, above n 1.
[50] Ibid.

Type of matter	Total number of enforceable undertakings using disclosure of the undertakings to employers	Total number of enforceable undertakings using disclosure
Breach of duties	5	9
Dealing with securities or financial services without license	7	17
Fundraising/ investment offer in breach of the law		12
Unregistered investment schemes	0	3
Misleading advertisement/information/advice/conduct	0	25
Breach of disclosure provision	0	6
Miscellaneous	0	8
Total	**12**	**80**

Table 8.6: Matters where ASIC used disclosure to employers in an undertaking[51]

The fact that Table 8.6 shows that the requirement to disclose the undertaking to present and future employers only takes place in case of breach of the duties of directors or of dealers with securities, investment advice and financial services, shows that the goal of the undertaking may appear to be to stigmatize the individual. This is not really the case, because these undertakings only require disclosure to specific employers. The result in 11 of the 12 undertakings listed in Table 8.6 that the individual agreed to a voluntary ban from dealing with securities, financial services and investment advice.[52] Accordingly,

[51] Ibid.
[52] Ibid.

disclosing the undertaking to future employers working in this area is very important, especially if the future employers are dealing in the field of the prohibition.

In all 12 undertakings, it was noted that the alleged offender would have to disclose the undertaking to current and future employers if the employers were dealing with securities or investment advice. It becomes apparent then, that this requirement has nothing to do with shaming the individuals. This is more a prevention measure. The employer will know that the individual has agreed to a voluntary ban. As a consequence, the likelihood of the employer asking the promisor to contravene the undertaking will be minimal.

8.5.6. Summary of the goal behind disclosure of the undertaking

As discussed, there are several types of disclosure required in an undertaking and the most common one is the disclosure of the undertaking to the affected parties. The disclosure that is used has an indirect effect on the prevention element. It is included in the undertaking to ensure that corrective action has taken place.

Another common requirement in an undertaking is in relation to refunds and compensation to the affected parties. The next section deals with the purpose behind this requirement.

8.6. Refund, indemnification and compensation

Of the 227 undertakings that have been accepted by ASIC, 57 required the promisor to refund a certain category of people. Refund, indemnification and compensation are required when third parties have been affected by the actions of the alleged offender. The areas in which this requirement arises are listed in Table 8.7.[53]

[53] ASIC, above n 1.

Type of matter	Total number of enforceable undertakings using refund, indemnification and compensation	Percentage of enforceable undertakings using refund, indemnification and compensation
Dealing with securities or financial services without license	6	10.53
Fundraising/ investment offer in breach of the law	17	29.82
Unregistered investment schemes	2	3.51
Misleading advertisement/information/advice/conduct	18	31.58
Breach of disclosure provision	3	5.26
Miscellaneous	11	19.3
Total	**57**	**100**

Table 8.7: Undertakings that contain a refund, indemnification or compensation requirement

Table 8.7 shows clearly that refunds, compensation and indemnification are most common in the undertakings that relates to misleading advertisement and breaches of the law in relation to fundraising provisions. These are the types of alleged breaches of the law that may lead to some adverse effect on third parties, causing them financial loss.

8.6.1. Goals behind the refund and compensation requirement

In the undertakings, the regulator will be concerned with finding a way to undo the harm caused by the alleged breach. Compensation, indemnification and refund are all mechanisms that are used by ASIC to ensure redress to the parties adversely affected by

the conduct. As a consequence, the goal behind the use of compensation, refund and indemnification in the undertaking is to correct the action of the alleged offender.[54]

In most of the undertakings that relate to alleged breaches of the fundraising provision, ASIC requires the promisor to refund any person who has invested in the company based on the misleading prospectus. For example, on 30 June 2000, Aus Gem International Ltd gave ASIC an undertaking in relation to the omissions that where present in its prospectus. The prospectus was deemed misleading by ASIC. In the undertaking, Aus Gem promisor promised to stop the alleged offence and not to distribute the prospectus to the public. If the prospectus had reached members of the public who bought shares based on that prospectus, the promisor would have to disclose the undertaking to the public and five a refund.[55]

In another example, on 16 June 2000, National Mutual Health Insurance Pty Ltd entered 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.[56]

The refund requirement is only present when a third party is affected by the actions of the promisor. However, should this requirement be present in all undertakings? The submissions on this matter to the ALRC were not supportive of such an introduction. Some responses observed that compensation is not always relevant or appropriate to the resolution of the alleged contravention.[57] This concern is not relevant here because it is apparent when reading the undertakings accepted by ASIC that the regulator only requires the promisor to compensate the people affected by his or her actions. The ALRC has recommended the use of enforceable undertakings in such a fashion.[58]

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[54] ACCC, above n 24, 7.
[55] ASIC, Enforceable Undertaking, Aus Gem International Ltd, Document No 008 547 487 (11 December 2000).
[56] ASIC, Enforceable undertaking, National Mutual Health Insurance Pty Ltd, Document No 008 547 447 (16 June 2000).
[57] ALRC, above n 4, 132-133.
[58] Ibid.

Accordingly, the compensation requirement is included in the undertaking when certain people have suffered loss or damage as a result of the alleged contravention. However, ASIC does not encourage the intervention of affected third parties in the process of accepting an undertaking. The regulator does not need to listen to the public. This can be considered as a drawback in relation to the efficiency of the use of undertakings. If the regulator does not require the affected parties to come forward, there is every chance that ASIC will not be aware of the damage caused to some people by the actions of the promisor.

As noted above, the consent decree in the United States has found a way to solve this dilemma. The *Tunney Act* requires the regulator to publicize the consent decree before it is accepted by the court to allow members of the public to comment on the undertaking. This allows the court to determine the validity of the undertaking.[59] Introducing a period during which the affected parties can present their complaints to the regulator might be a good addition to the Australian system especially when ASIC is ordering the promisor to pay the affected parties some compensation. Such a system might ensure that undertakings correct the harm allegedly committed by the promisor.

8.6.2. Summary of the goals of compensation

The compensation, refund and indemnification requirement is used in the undertakings as a method of correcting the conduct of the alleged offender. It ensures that third parties are compensated for the losses they suffered due to the alleged actions of the promisor. But such a requirement should not be generalized in all the undertakings because not all the alleged breaches will result in damages to the public. Accordingly if this type of requirement is generalized to situations where no damage has been suffered, it will loose its corrective goal.

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[59] Grober, above n 34.

8.7. In brief

The use of disclosure and compensation in the undertakings ensures the correction of the action of the alleged offender.[60] This goal is in accordance with the ALRC's recommendation on the purposes of administrative enforcement.

The only criticism that can be made is that the undertakings accepted by ASIC do not permit third parties to be involved in the process. As noted in this chapter, the public is sometimes affected. The introduction of restorative justice to the system of enforceable undertakings might ensure fairer and more just undertakings in the future. A system of disclosure like the one present in the United States might be needed. In any case, the next chapter will look at the goals behind the use of compliance programs and community service in the undertakings.

[60] ACCC, above n 24, 6-7.

Chapter 9 Compliance programs and community service requirements in enforceable undertakings

9.1. Introduction

As noted in Chapter 6, the promisor entering into an enforceable undertaking sometimes undertakes to:[1]

- Put in place a comprehensive compliance program;
- Implement community service programs.

These are the two requirements that will be studied in this chapter. ASIC frequently requires the alleged offender to develop an internal compliance program. Such a promise in the undertaking usually requires the alleged offender to review its operating procedures, recognize and acknowledge areas where risks of non-compliance with the law might appear and cultivate and implement a comprehensive program. The undertaking also includes provisions that will ensure a regular review, internal accountability and independent audit of the effectiveness of the program.[2]

In other instances, ASIC will instruct the promisor to develop, implement and fund industry wide education programs to raise community awareness.[3] This type of requirement is not very common in the undertakings unlike the implementation of a compliance program. As was observed in Chapter 6, it is essential to discover the nature of these two promises. Why are they included in the undertaking? Are they there to punish the promisor or to protect the public? To answer these questions, this chapter looks at the goals behind the introduction of compliance programs in the workplace. This

[1] ASIC, *Register of Enforceable Undertakings* <http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Enforceable+Undertakings+Register?openDocument> at 10 February 2004. The observation made above can be seen when reading the undertakings.
[2] Karen Yeung, *The Public Enforcement of Australian Competition Law* (ACCC, 2001) 120.
[3] Ibid 121.

will be followed by a look at the goals behind the implementation of community service requirements in an undertaking.

9.2. Compliance programs in general

It is difficult to define precisely what is meant by a corporate "compliance program". In general it implies putting in place a system that will ensure the company's compliance with something. It can be seen as a management system aimed at ensuring that the rules applicable to the corporation are met. There are different types of compliance programs. Some are simple, others are more complex. They can 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. [4]

9.2.1. Role of compliance programs

The compliance system, as an internal management mechanism, might play a major role in pushing down the barriers to allow both shared and contested values to be embraced through engagement with social movements, media, regulators, courts and law. A compliance program might easily facilitate this by monitoring and acknowledging that some corporate values and practices conflict with other values. It then calls out for the business unit, top management, regulators and broader democratic communities to find a solution for the conflict in each circumstance.[5]

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[4] Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 18, 22.
[5] Ibid 42-43.

9.2.2. Goals behind the implementation of compliance programs

It is very important that companies put a compliance program in place so that their employees understand what is required of them. This will raise their awareness and limit the likelihood of them engaging in prohibited conduct. The goals behind such compliance programs are the following:[6]

- To enable the employees to detect behavior which may result, or has already resulted, in contravention of the law, before the regulator take any action to remedy the possible breach.

- To avoid the possibility of having to spend significant costs in defending a prosecution or private action.

- To avoid any unfavorable 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.

- To assist in a plea of mitigation where a penalty is to be imposed following conviction for a breach of the law.

- To create an awareness of the content to the law among the company's employees.

These goals can be seen as self-serving. Braithwaite has observed that the business community will not follow the law unless it gets something in exchange. Companies

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[6] Christopher Andrew, "Trade Practices Compliance Programs: Why you Should Have One" (1993) 3(2) *Australian Corporate Lawyer* 29, 29.

wish to implement compliance programs because such programs might save them expenses such as unfavorable publicity.[7]

9.2.3. Compliance program as a mitigating factor

In 1979, the Federal Court started 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. 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.[8]

For instance, in *Trade Practices Commission v TNT Australia Pty Ltd,*[9] 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:[10]

> *"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."*

Accordingly, one of the reasons that a company may adopt a compliance program is to use it as mitigating factor in future legal proceedings. But compliance programs are also important because they may prevent possible future breaches.

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[7] Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, 1992) 36.
[8] Christine Parker, "Evaluating Regulatory Compliance: Standards and Best Practice", (1999) 7 *Trade Practices Law Journal* 62, 63.
[9] *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 41, 375.
[10] Ibid 169.

9.2.4. Compliance as a prevention measure

Corporate compliance systems can also be seen as management systems that:

> *"aim to prevent, and where necessary, identify and respond to, breaches of laws, regulations, codes or organizational 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."*[11]

Sometimes, ASIC requires the promisor to put a compliance program in place. But who is targeted by such a requirement? What is the purpose behind the compliance program requirement? These two questions will be answered below.

9.3. Compliance programs and enforcement undertakings

As noted in Chapter 6, in most of the undertakings, the promisor will promise to stop committing the alleged offence. But such a promise alone will not prevent future breaches from occurring. Accordingly asking the promisor to take a proactive stance will have its own reward.[12]

9.3.1. Compliance program in undertakings

Out of 144 undertakings given to companies, ASIC required the promisor to put in place a compliance program to improve its overall compliance with the law in 59 undertakings. Typically such compliance programs involve a combination of the following elements:[13]

- The promisor will appoint an independent party.

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[11] Parker, above n 4, 17.

[12] 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 2003) 8 <http://cccp.anu.edu.au/Parker_ACI_2805031.pdf> at 22 April 2004.

[13] ASIC, above n 1.The number 144 includes two types of undertakings: undertakings accepted by companies alone and undertakings given to companies and individuals at the same time.

- The independent party will review the compliance program.

- The independent party will report to the promisor and to ASIC on its recommendations.

- The company will implement the recommendation of the independent party.

- The independent party will audit the compliance program when put in place and will report to ASIC.

Most of the undertakings contain these elements. There is always an independent expert that will be assessing the compliance program put in place. But who is targeted by such requirements in the undertakings?

9.3.2. The promisors

In general, the promisor can be a company or an individual. In the undertakings that contain a compliance program requirement, the promisor is usually a company. There were only two instances where the promisor who had to implement a compliance program was actually an individual. For Instance, Neil John White and Glen Rainer Meuwissen allegedly did not perform efficiently, honestly and fairly their duties as representative of a dealer. Accordingly, they entered into an undertaking with ASIC on 22 June 2000. They promised to disclose the undertaking to their clients and to put in place a compliance program in "Meuwissen & White Financial Services".[14] Since there are only two undertakings in relation to compliance programs given to individuals, promisors who are individuals, are not included in Table 9.1.

[14] ASIC, Enforceable Undertaking, Neil John White and Glen Rainer Meuwissen, Document No 008547449 (22 June 2000). The second undertaking that involves individuals that promised to implement a compliance program is the undertaking given to John Irving, Desmond Robert Munro and Alan Geoffrey Scott: ASIC, Enforceable undertaking, Irving, Munro and Scott, Document No 014927707, 017029126, 017029127 (28 May 2004).

Year	Proprietary company	Public unlisted company	Public listed company	Foreign company	Total
1998	0	0	1	0	1
1999	3	1	3	0	7
2000	6	4	2	2	14
2001	2	3	2	0	7
2002	6	2	2	0	10
2003	4	4	0	0	8
2004	1	7	2	0	10
Total	**22**	**21**	**12**	**2**	**57**

Table 9.1: Companies targeted by a requirement to have a compliance program[15]

Table 9.1 illustrates the type of companies that were required, in the undertaking they agreed to, to put in place a compliance program. These companies vary in type and size. As it can be seen from Table 9.1, there is not one specific type of companies that is targeted by such a requirement. The only surprise is that 22 proprietary companies gave an undertaking that included a compliance program requirement. Only 12 listed public companies agreed to such a requirement. Accordingly, ASIC does not seem to base the inclusion of such a requirement in its undertakings on the size and financial capacity of the company.[16] Another observation can be made from looking at Table 9.1: the number of undertakings accepted by proprietary companies that include a compliance program is waning. But what alleged breach of the law will lead to an undertaking that requires the implementation of a compliance program?

9.3.3. The alleged breaches

Implementation of a compliance program may be required in the areas identified in Table 9.2.

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[15] ASIC, above n 1.
[16] This conclusion will be revisited in Chapter 12.

Alleged breach that required the implementation of a compliance program	Number of undertakings using compliance program	% of undertakings using compliance program
Lack of disclosure	15	25.42
Problem with compliance	11	18.64
Misleading advertisement/information/conduct	18	30.52
Breach of duties of security holder/dealer	5	8.48
Wrong calculation of the GST/unit prices	3	5.08
Failure to ensure that the authorised representatives of the company kept proper record	3	5.08
Miscellaneous	4	6.78
Total	**59**	**100**

Table 9.2: Alleged offences that led to the inclusion of compliance program requirement in the undertakings[17]

Table 9.2 shows that the most common alleged breaches that have led to the implementation of compliance programs through the acceptance of an undertaking are the following: misleading advertisement, information or conduct; lack of disclosure; and a problem with compliance. These alleged breaches reflect the character of the company that entered into the undertaking. Usually most of those companies are firms dealing with financial services. To resolve these three alleged offences, ASIC required the companies to stop their alleged breach and to implement a compliance program.

But what type of compliance program was put in place? Is there a standard compliance program that will be adopted?

[17] ASIC, above n 1.

9.3.4. Content of compliance program

There is not one specific type of compliance program recommended in the undertakings. The compliance program will usually be relevant to the principal business of activity. It will be regularly updated so that legislative amendments and other new developments are taken into account. Examples of such requirements in the undertakings can be seen below. Depending on the undertaking, ASIC has recommended three types of compliance programs, namely:

- a specific compliance program;
- a general detailed compliance program; or
- a very general compliance program.

These three points are considered below. Examining the content of the compliance program that should be implemented in the company will illustrate the goal behind such a requirement and the weaknesses of the system.

9.3.4.1. Implementation of a specific compliance program

In certain instances where the promisor is required to implement a specific compliance program, ASIC puts in place detailed information on how the alleged offender should proceed in its implementation of the program. The compliance program that will be implemented in these instances will be directly related to the alleged breach.

For example, Crown Casino Ltd allegedly failed to disclose certain information to the market. It entered into an undertaking with ASIC on 11 September 1998 in which it promised to provide the ASX with quarterly reports. It also undertook to implement a compliance program in respect to the company's obligation to comply with the ASX Listing Rules.

An example of the inclusion of the requirement of specific compliance program imposed by ASIC can be seen in the undertaking given to Pahth Telecommunications Ltd.[18] The company allegedly failed to comply with its continuous disclosure requirements. It promised in the undertaking to implement the following compliance program:[19]

> *"Pahth undertakes that the Pahth Compliance Procedure will, as far as is reasonable, be in accordance with AS3806-1998, the Australian Program for Compliance Programs and will at least contain the following matters:*
>
> *(a) a clear identification of the company's disclosure obligation under LR [listing rule] 3.1 and section 1001A of the Law and the consequences to the company and its officers if the company fails to comply with them;*
>
> *(b) a requirement to appoint a company officer or officers who are primarily responsible for insuring the company complies with LR 3.1 ("Responsible Officers);*
>
> *(c) a requirement to establish procedures to ensure that the responsible officer is made aware of all the information a reasonable person would expect to have a material effect on the price or value of the company's securities immediately after that information comes into existence;*
>
> *(d) a requirement to identify "areas of risk" for which specific compliance procedure must be in place, for example disclosure of events which require the consent or comment of a third party, and detail those procedures;*
>
> *(e) the decision making process of determining whether LR 3.1 requires the company to disclose information brought to the attention of the Responsible Officer;*
>
> *(f) guideline for determining what information must be disclosed in compliance with LR 3.1 including an non-exhaustive list of examples of*

[18] ASIC, Enforceable Undertaking, Pahth Telecommunications Ltd, Document No 008547505 (2 February 2001).
[19] Ibid.

information to be disclosed (for example, information possibly material to the company's prospects, earnings, assets or liabilities or to the price of any of the company's securities) – the guidelines should incorporate any provisions in the ASX Listing Rules designed to allow a company to withhold information;

(g) record keeping procedures to record the process for review of specific information and the decision whether or not to disclose that information;

(h) procedures to ensure that all officers and other employees or agents, who may from time to time be in possession of undisclosed information that maybe material to the company's prospects, earnings, assets, or liabilities or to the price or value of the company's securities, understand the continuous disclosure obligations on the company imposed by the Law and the ASX Listing Rules and have those obligations drawn to their attention on a periodic basis;

(i) procedures for orientation of new directors and senior staff to ensure their awareness of the Pahth Compliance Procedures and ensure a culture of compliance within Pahth;

(j) procedures to ensure that undisclosed information that a reasonable person will expect to have a material effect on the price or value of the company's securities remains confidential until it is disclosed by the company;

(k) procedures for ensuring that the company's compliance procedures are updated from time to time to reflect changes in the company's business operations and changes in the law and the ASX Listing Rules;

(l) A requirement that the company's audit committee and external auditors annually audit the company's adherence to the compliance procedures and pass an opinion on whether the procedures continue to be appropriate for the company."

As can be seen, in this undertaking ASIC concentrated on the implementation of a compliance program in relation to the alleged breach of the continuous disclosure provisions. Similarly, any new compliance program should facilitate the prevention of similar breaches by the promisor in the future. In its undertaking, Pahth Telecommunication Ltd agreed to take the necessary steps to counteract any future breaches in relation to the requirement of continuous disclosure by putting in place the compliance program.[20]

9.3.4.2. Implementation of a general detailed program

In other cases, ASIC will require the promisor to put in place a general compliance program. It will also set the premises for the compliance program by giving details on the requirements that are needed to be fulfilled. Two types of general detailed programs can be found.

Some undertakings involve the implementation of a compliance program that is quite general. An example of such a requirement can be found in the undertaking given to Lowndes Lambert Australia Pty Ltd.[21] ASIC was concerned that Lowndes was involved in misleading or deceptive conduct. Accordingly, the alleged offender promised to stop the offending behavior and implement the following general compliance program:[22]

> *"It will with 60 days of the acceptance of this undertaking by ASIC, prepare and submit for consideration by ASIC, a written analysis and explanation of a compliance program ("the compliance program") designed to address Lowndes Lambert's obligations under the ASIC Act, relevant Australian insurance legislation and the General Insurance Code of Conduct ("the Code"), confirming or demonstrating that the compliance program ha the following characteristics or objectives:*

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[20] Ibid.
[21] ASIC, Enforceable Undertaking, Lowndes Lambert Australia Pty Ltd, Document No 008 547 387 (15 September 1999).
[22] Ibid.

(a) Aim: To create a culture of compliance at Lowndes Lambert, and to prevent so far as is reasonably possible, any contraventions of relevant legislation or the Code, by its directors, employees or agents;

(b) Policy: The formal adoption by the Board of Directors of Lowndes Lambert, of a policy of strict compliance with both the letter and spirit of relevant legislation and the Code within Lowndes Lambert;

(c) Compliance Infrastructure: The appointment of a senior manager or in-house lawyer as Lowndes Lambert Compliance Officer, with responsibility for the implementation of the Compliance Program;

(d) Coverage: The Compliance program is to cover all directors, employees and agents of Lowndes Lambert whose duties could result in them being in conduct that might breach either relevant legislation or the Code;

(e) Education: Develop and implement, or reconfirm, an education program with the purpose of having relevant staff conversant with relevant legislation, to a level where general staff can avoid obvious contraventions and can identify more complex potential problems (especially with regard to the ASIC Act) for referral to appropriate persons in the Lowndes Lambert compliance infrastructure.

It will implement agreed revisions to the compliance Program within 30 days of ASIC notifying Lowndes Lambert that the Compliance Program is otherwise acceptable."

The undertaking does not simply target the alleged misleading conduct of the promisor. It is more general, and includes a compliance program that will clear the obligation of the alleged offender under the *ASIC Act,* relevant Australian insurance legislation and the

General Insurance Code of Conduct.[23] Such a compliance program will prevent future breaches of these laws from being committed by the promisor.

However, other undertakings require the implementation of a compliance program that not only relates to the area of the alleged breach but can also cover other issues. An example is the undertaking can be seen in the undertaking given to Burrell Stockbroking Pty Ltd.[24] ASIC had certain concerns in respect to the internal compliance procedures of the company. Accordingly it requested the implementation of the following compliance program:[25]

> *"It will, on or before 31 March 2001, engage an external independent compliance consultant (the compliance consultant) whose appointment and terms of reference are to be approved by ASIC, to review, assess, make recommendations and report in writing (the Initial Report) to Burrell Stockbroking and ASIC on Burrell Stockbroking's compliance, internal controls and procedures and training programs.*
>
> *The compliance assessment will include, but not be limited to, the identification and the making of recommendation for remedying non-compliance with the law, the Regulation and license conditions attached to the license, (if any) including, but not limited to such issues as:*
>
> - *Supervision and training of representatives.*
> - *Record keeping.*
> - *Procedures to ensure representatives have a reasonable basis for recommendations made.*
> - *Procedures to ensure representatives comply with the "Know Your Client Rule" and "Know Your Product Rule" of Section 851 of the Law*

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[23] Ibid.
[24] ASIC, Enforceable Undertaking, Burrell Stockbroking Pty Ltd, Document No 008547499 (22 December 2000).
[25] Ibid.

- *Procedures for opening new client accounts and obtaining a sufficient client profile from clients.*
- *Processes for documenting recommendations and warnings to clients.*

Burrell Stockbroking will agree with ASIC a timetable to implement the recommendations made by the compliance consultant as soon as practical but in any event by 30 June 2001. However, if Burrell Stockbroking objects to any recommendation in the Initial Report it will notify ASIC in writing of such objection together with its reasons within 28 days of receiving the Initial Report.

Burrell Stockbroking will instruct the compliance consultant to further review, assess and report in writing to both Burrell Stockbroking and to ASIC (Final Report) Burrell Stockbroking compliance, internal controls and procedures and training programs and will provide a copy of that report to ASIC on or before 30 September 2001."

In this undertaking, ASIC inserted certain specific issues that it wanted the compliance consultant to look at. These issues related to the alleged breach. But the regulator also gave the consultant some freedom to include in the report other elements that might need to be incorporated in the compliance program. Those elements did not have to be relevant to the alleged breach.

9.3.4.3. Implementation of a very general compliance program

Finally, some undertakings do not formulate precise rules that need to be followed by the promisor. ASIC will give minimum advice to the promisor. In the undertaking given to Garrisons Pty Ltd, the promisor had to:[26]

"... Arrange for the preparation by 31 December 2001 of a report on Garrisons' compliance program by an independent evaluator in

[26] ASIC, Enforceable Undertaking, Garrisons Pty Ltd, Document No 017029005 (27 June 2001).

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."

Another example of a very general compliance program is in the undertaking given to Count Financial Group Pty Ltd:[27]

> *"Count will engage an external professional compliance consultant, 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."*

ASIC did not give any details on the content of the compliance program. This lack of guidance can cause problems when the regulator wants to enforce the undertaking.[28] The courts have been reluctant to uses AS3806 because they say, it will probably involve "vague evaluative judgments or insignificant debates on their interpretation", and they will impose "standards which are aspirational in their expression and not readily measured in their application".[29] This will make AS3806 of limited use as a guide for learning about how to design an effective self-regulation system. Its only use can be found in being a useful checklist for ensuring that basic process elements have been covered.[30] On the other hand, the goal behind the implementation of the compliance

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[27] ASIC, Enforceable Undertaking, Count Financial Group Pty Ltd, Document No 008547347 (1 June 1999).
[28] This issue will be looked at in more detail in para10.5.2.
[29] *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79.
[30] Christine Parker, "Is There a Reliable Way To Evaluate Organisational Compliance Programs", Paper presented at the Australian Institute of Criminology and RegNet Conference, Current Issues in Regulation, Enforcement and Compliance, 2-3 September, 2002, 10, <http://www.aic.gov.au/conferences/regulation/parker.pdf> at 16 December 2005.

program in all the undertakings remains the same: the prevention of occurrence of future breaches of the law.

9.4. Goal behind the inclusion of compliance programs

As can be seen, ASIC does not recommend one specific type of compliance program that should be followed by the promisor. When a company has allegedly breached the law, ASIC's answer to such a dilemma might be to include in the undertaking the requirement to put in place a compliance program. Such a decision will reflect the purposes behind the inclusion of the compliance program requirement in the undertaking.

The implementation of a compliance program is generally seen as a preventive measure.[31] When ASIC requires the alleged offender to put in place a specific compliance program, it is aiming to prevent similar breaches. But when ASIC is requiring the promisor to establish a general compliance program, the goal is still prevention. But the purpose will not only be centered on the prevention of similar breaches but the prevention of all sorts of breaches of the law. Such a requirement can sometimes cause problems and can be open to criticism such as those listed below.

9.5. Criticism of compliance programs in enforceable undertakings

Several criticisms can be leveled at the requirement to implement a compliance program in the undertakings, namely:

- Problems with enforcing the undertaking.
- Lack of precision in the undertaking.
- Problems monitoring the compliance program.

These three points are considered below.

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[31] Yeung, above n 2, 125.

9.5.1. Problem with enforcing the undertaking

One of the problems that may appear when ASIC wants to enforce an undertaking that contains a promise by the alleged offender to implement a general compliance program might be that the court will reject ASIC's request to enforce the undertaking. If an injunction in relation to the implementation of a compliance program covering all the provisions of the *Corporations Act* is sought, then the court will not enforce it due to its remoteness from the contravention. It will be beyond the power of the court to issue such a judgment. Such an order will still be inappropriate, even if it is within the court's power to make. [32]

As a result, there is a risk that the court will not enforce the undertaking rendering it worthless. To guard against this, ASIC should always ensure there is a connection between the alleged offence and the undertaking. As discussed at paragraph 9.3.4.3 above, ASIC has, on several occasions, required the implementation of general compliance program in its undertakings.[33]

9.5.2. Lack of precision in undertakings

The requirement of implementation of a compliance program in an undertaking must therefore be formulated with precision. The requirement should be easily obeyed. Undertakings which are likely to involve vague evaluative judgments or significant debates on their interpretation will not be given the court's approval.[34] Accordingly, when ASIC requires the promisor to put in place a compliance program that follows the Australian Standard Association standards of compliance program, this requirement can be seen by the court as "aspirational in their expression and not readily measured in application".[35]

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[32] This point will be developed in more detail in Chapter 12; *Australian Competition and Consumer Commission v Institute of Western Australia Inc* [1999] FCA 18 at [25].
[33] Ibid.
[34] Farmer, "Trade Practices Compliance Programs, Implication from ACCC v Real Estate Institute of WA Inc",(1999) 17 *Australian Business Law Review* 249, 252.
[35] Ibid.

This can be an issue with ASIC because as noted in paragraph 9.3.4.3 ASIC sometimes will not give any details on the time within which the compliance program must be implemented. This can cause a serious problem because the courts might refuse to enforce the undertaking.

9.5.3. Monitoring the compliance of the promisor

Although the implementation of a compliance program aims to prevent similar breaches from occurring in the future, this preventive goal might not be reached if the monitoring of the implementation is inadequate. It is essential for the compliance program audits to provide adequate accountability for the programs implemented.

One potential problem is the lack of one agreed methodology to be followed when evaluating the implementation of a compliance program. The regulator has not published any guidance on what a compliance program audit requires. Accordingly, the consultant who is evaluating the newly implemented compliance program will not have any guidance, except for the terms of the enforceable undertakings themselves.[36] As seen in prior paragraphs, ASIC's enforceable undertaking requirements in relation to assessing compliance can be vague.

Furthermore, there is not a common methodology that is followed by the expert when assessing whether the compliance program is in breach of the undertaking. Accordingly, each expert employs a different methodology. Some will be more lenient than others. This will render the audit worthless and the regulator will not know if the company has complied with the undertaking or not. If ASIC is not sure that the company complied with the undertaking, it cannot take action against it in court. The promisor will not ensure that it is complying with the requirements of the undertaking, and the undertaking will not really lead to prevention of future occurrences of the alleged breach.[37]

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[36] Ibid.
[37] Ibid.

9.6. Community service requirements

Enforceable undertakings not only attempt to secure the future compliance of alleged offenders. They may contain promises to promote community awareness of the law and to the range of rights to which individuals are entitled. The ACCC guideline describes such undertakings as "community service undertakings".[38]

As noted in Chapter 3, community service orders have been promoted as an alternative penalty option, not only for individuals but also for corporate offenders.[39] Such a requirement in the undertaking aims to ensure the development and implementation of industry wide compliance education programs to raise the public's awareness of the law and their rights.[40]

9.6.1. Enforceable undertaking and community services

ASIC has occasionally included community services undertakings as a requirement in its undertakings. Until 2003, only four undertakings included a true community service obligation. These undertakings are the following:

- ASIC believed that Michael Anthony Casey allegedly failed to act efficiently in the performance of his duties as a holder of a dealers license. In 1999, he 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 fulfill some education requirements. He also promised to cooperate with ASIC and the ASX in the preparation and presentation of seminars in Sydney and Melbourne that would be open to all designated Trading Representatives. This presentations and seminars were to consider issues of law, practice and procedure relevant to acting as a Designed Trading Representative.[41]

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[38] Yeung, above n 2, 121.
[39] ALRC, *Securing Compliance Discussion Paper: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65 (April 2002), 92.
[40] Yeung, above n 2, 121.
[41] ASIC, Enforceable Undertaking, Michael Anthony Casey, Document No 008547357 (9 July 1999).

- In an undertaking given to Combine Insurance Company of America, Combine sold policies that allegedly were not appropriate for the needs and circumstances of persons living in the community. Accordingly, the promisor was required to donate $40,000 to assist in the preparation of educational material for Aboriginal consumers of financial services.[42]

- Another undertaking that included a community service requirement was given to Fintrack Financial Services Pty Ltd and Fintrack Pty Ltd. The promisors in this case allegedly mislead the public through a series of advertisements via TV, radio, website and brochures. They promised to pay $15,000 to ASIC, to be used by ASIC for consumer education, or similar programs in relation to the finance and mortgage broking industry.[43]

- In 2003, it was alleged that Automotive Financial Services Pty Ltd did not comply with legislation in relation to insurance contracts. It promoted a product that should have been considered as an insurance contract. Accordingly it promised to contribute $20,000 to ASIC, to be used by ASIC for researching, educating and promoting consumer awareness about their rights, including any risk in purchasing financial products offered by or through car dealers.[44]

However in 2004, ASIC seems to have started using community services undertakings in its undertaking on a more frequent basis. Three undertakings in that year required the promisor to fulfill a community service requirement. The content of those undertakings is similar to the ones mentioned above.

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[42] ASIC, Enforceable Undertaking, Combined Insurance Company of America, Document No 008547484 (13 November 2000).
[43] ASIC, Enforceable Undertaking, Fintrack Financial Services Pty Ltd and Fintrack Pty Ltd, Document No 017029105 (3 September 2003).
[44] ASIC, Enforceable Undertaking, Automotive Financial Services Pty Ltd, Document No 017029111 (25 September 2003).

In other cases, ASIC's enforceable undertakings have simply required the alleged offenders to set up web links to the ASIC website providing information to consumers. This is mainly aimed at education of the public.

For example, Suncorp Metway Insurance Ltd was allegedly involved in misleading advertisement and advice. In its undertaking, 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.[45] But what is the goal behind the use of enforceable undertakings?

9.6.2. Purpose behind the use of community service requirements in the undertakings

Section 12GLA of the *ASIC Act* defines community service orders as "an order directing the person to perform a service that is... for the benefit of the community or a section of the community."[46] This definition makes it clear that the work must "benefit the community".

Accordingly, such an order shows a desire to apply the notion of restorative justice. It requires a person to correct the harm caused to the community by their contravention. However a more pragmatic reason for the use of compensation order was mentioned by the ALRC. The court sometimes makes community service orders if it feels that a defendant's financial resources would prevent a fine from being recovered.[47]

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[45] ASIC, Enforceable Undertaking, Suncorp Metway Insurance Ltd, Document No 008547385 (30 August 1999).
[46] ASIC Act, s 12GLA(4).
[47] ALRC, *Tailored Penalties for Corporations* <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications/reports/95/28.Tailored%5fpenalties%5ffor%5fcorporations.html?query=%22tailored+penalties+for+corporations%22#fnB50> at 17 April 2005.

In the undertakings issued by ASIC, the community service requirement seems present to prevent and protect the public. It ensures the education of the community on certain issues and reduces the likelihood of future contravention.[48]

For example, in the undertaking given to Michael Anthony Casey, the individual was required to commit to a series of seminars to give information and advice to Trading Representatives. In other cases relating to alleged breaches that affect consumers, ASIC has required the promisor to put a link in its website that will direct the public to the ASIC website which contains consumer advice and information. But even though the apparent purpose of community service requirements is in relation to prevention and protection of the public, some people believe that the real purpose is to punish the alleged offender.

9.6.3. Potential criticism

The ALRC report considered that community service orders can be seen as punitive penalties inflicted on an offender in certain instances. Accordingly, it is appropriate when determining the nature of the community service order to consider the following matters: [49]

- whether any damage has been suffered by the community as a whole as a result of the contravention;

- a reasonable relation between the community service order and the nature of the damage caused; and

- The need to specify the cost to the business of implementing a compliance program and the deadline for compliance.

Given that the undertaking can impose community service requirement on the promisor, it is recommended that these issues should be taking into consideration when deciding the

[48] ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 111.
[49] Ibid 113-114.

content of the undertaking. The appropriateness of the use of community service requirements in the undertakings given by ASIC will depend upon their proper characterisation. If they can be 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. It is also unlikely that the Parliament intended that the enforceable undertaking provisions would be used for punitive purpose.[50]

As can be seen from the undertakings mentioned in para 10.6.1, the community service requirement in the undertaking seems to comply with the recommendation of the ALRC. ASIC is not using the community service requirement in the undertaking for punishment purposes, but for corrective action.

9.7. In brief

Putting in place a compliance program is very important because it can prevent the occurrence of similar alleged offences in the future. On the other hand, the inclusion of the requirement of community services in the undertaking should be always used as a prevention measure, not a punitive one, in the absence of express legislative authority to use ss 93A and 93AA of the *ASIC Act* for punitive purposes.

The inclusion of the requirement to implement a compliance program and community services requirements seems to have been used in a manner that will ensure the prevention of future breaches from occurring. These goals are in accordance with the ALRC recommendation for administrative penalties.

[50] ALRC, *Compliance with the Trade Practices Act 1974*, Discussion Paper 56 (1993), 69.

Chapter 10 Fairness, stability and consistency in the enforceable undertakings

10.1. Introduction

As stated in the methodology, fairness, stability and consistency should always be taken into account when the regulator is deciding on the best remedy to be used because fairness, stability and consistency have a direct effect on the nature of the relationship between the regulator and the public.[1] The nature of this relationship in turn affects the way in which the regulator applies the remedy of enforceable undertakings. The use of the undertakings heavily relies on trust and compliance between ASIC and the alleged offender. On one hand, the regulator should believe that the promisor will comply with the undertaking. As mentioned in Chapter 5, ASIC takes into consideration certain factors when deciding if it should accept an undertaking or not. For instance, it observes whether the alleged offender is likely to comply with the terms of the undertaking or if the alleged offender might acknowledge that ASIC has reason to be concerned about the alleged breach.[2]

On the other hand, ASIC cannot force the alleged offender to enter an undertaking. Cooperation between the regulator and the promisor is essential. If such cooperation is none-existent, entering into an undertaking will be almost impossible. The promisor should believe that the regulator is treating him or her fairly without discrimination or favoritism.[3] Accordingly, it is essential that fairness, stability and consistency leave their mark on the enforceable undertakings given by ASIC. Without these elements, no one will enter into an undertaking and this remedy will become void of any strength. This chapter looks at the undertakings given to the individuals and to public and proprietary companies to compare the breaches allegedly committed and the promises given. Is each

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[1] Karen Yeung, *The Public Enforcement of Australian Competition Law* (ACCC, 2001) 3, 4.
[2] ASIC, *Practice Note* 69 [69.11] <http://www.cpd.com.au/asic/pn/pn069.pdf> at 28 December 2003.
[3] Karen Yeung, above n 1, 3-4.

category of promisor given similar undertakings when it is believed that they have committed the same alleged offences?

10.2. Types of people involved in undertakings

ASIC can accept undertakings from individuals and companies. For the purpose of this discussion, the enforceable undertakings will be categorised in the following way:

- Enforceable undertaking given by individuals;
- Enforceable undertakings given by proprietary companies;
- Enforceable undertaking given by unlisted public companies public; and
- Enforceable undertakings given by listed public companies.

An enforceable undertaking can have for its subject more than one person. Accordingly, the undertaking can be given to several individuals or companies. It can also have for its subject a company and its directors.

Years	Proprietary company	Public unlisted	Public listed	Foreign companies[4]	Individuals
1998	12	0	4	0	10
1999	17	6	6	0	25
2000	29	12	6	5	48
2001	7	10	3	1	20
2002	16	9	2	1	28
2003	16	6	1	0	21
2004	2	8	2	0	17
Total	**99**	**51**	**24**	**7**	**169**

Table 10.1: Classification of people involved in undertakings[5]

Table 10.1 shows the numbers of people that have entered into enforceable undertakings with ASIC. The numbers varies from those provided in prior chapters because some of the parties in table 10.1 were involved in the same undertakings. It does not reflect the number of undertakings given, but the number of parties who have been given an undertaking. Figure 10.1 is based on the numbers in Table 10.1.

[4] Foreign companies are companies registered overseas. As Table 10.1 shows, they are subject to some undertakings.

[5] ASIC, *Register of Enforceable Undertakings* <http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Enforceable+Undertakings+Register?openDocument> at 10 February 2004. The observation made above can be seen when reading the undertakings.

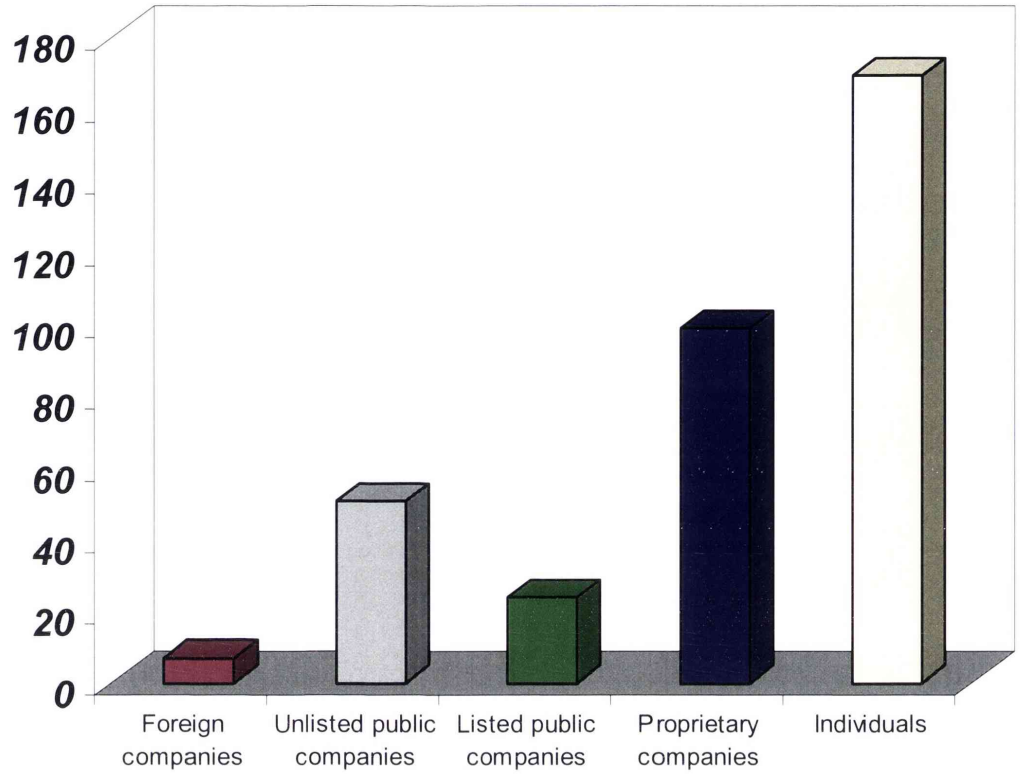


Figure 10.1: People accepting undertakings

Of the five categories listed in Table 10.1 and Figure 10.1, individuals entered the most enforceable undertakings. Individuals include individuals entering into undertakings by themselves or with the company they work for. Proprietary companies were mostly targeted by undertakings in the past. But in 2004, there was a drop in the number of undertakings given to proprietary companies, with more undertakings being given to unlisted public companies. This could indicate a shift in ASIC's policies in relation to larger businesses.

10.3. Undertakings given to individuals only

On examining the undertakings accepted by ASIC, it is clear that most of the individuals involved are either directors of companies or people dealing with securities. Table 10.2 illustrates the most common breaches committed in relation to the individual's position as a director or as a person dealing with securities and/or investment advice namely:

- Breach of directors' duties

- Breach of securities dealers', financial services and investment advisers' duties.

Breach of directors' duties	Breach of securities dealers', financial services and investment advisers' duties
Voluntary ban: 5	Voluntary ban: 11
Voluntary ban and education: 10	Voluntary ban and education: 15
	Voluntary, disclosure of the undertaking and refund: 2
	Voluntary, disclosure of the undertaking, and community services: 1
	Voluntary ban, disclosure of the undertaking: 4
	Voluntary ban, disclosure of the undertaking and education: 2
	Voluntary, education, disclosure of the undertaking, and community services: 1

Table 10.2: Alleged breaches and the undertakings given to individuals only[6]

The numbers in Table 10.2 differ from those provided in Chapter 7 because Table 10.2 only target breaches of directors' duties and breaches of duties of people dealing with securities, financial services and investment advice while the numbers in Table 7.1 relate to people managing a company or dealing with securities, financial services and investment advice (which can include dealing with securities without a license for instance). Accordingly, Table 7.1 includes more alleged breaches.

Table 10.2 reveals that similar alleged offences are usually dealt with in a similar fashion. Most of the undertakings contained a voluntary ban and/or an education requirement. It can be noted from the undertakings accepted by ASIC that protection and prevention are their main focus. For instance, most of the undertakings that contain a promise to stop dealing with securities or investment advice or to stop acting as an officer of a company

[6] Ibid.

are accompanied in most situations with the desire to ensure that after the period stated in the undertaking the individual will be rehabilitated through education.[7]

As noted in Chapter 7, an undertaking in most cases ensures the improvement of the individual and the protection of the public. But this leaves two major factors to be noted. First, the publicity that the individual is subjected to will affect his or her career prospects since the promisor must disclose the undertakings to future employers in most cases noted in Tables 8.6 and 10.2. Second some of the undertakings involve the individuals giving something back to the community. This might have some different ramifications on the validity of the enforceable undertaking, as seen in Chapter 9 when looking at the problems that might occur where community services requirements are included in the undertakings.

In short, the alleged breaches of directors' duties and security dealers or investment adviser's duties will lead to a voluntary ban. The education requirement, disclosure of the undertaking, reimbursement of costs and community services requirements will be geared toward the individual who committed the alleged offence. Accordingly, there seem to be a fairness, stability and consistency in the undertakings given to the individuals. The individual will know what to expect when entering into an undertaking with ASIC.

10.4. Treatment of proprietary companies: 1998 to 2004

As noted in Figure 10.1, the second most common type of entity that entered into an undertaking with ASIC are proprietary companies. There are 99 proprietary companies that entered into 58 undertakings with ASIC. Table 10.3 illustrates the most common alleged breaches and the undertakings given by proprietary companies, namely:

- misleading advertisement, information or conduct;

[7] *Donald and Australian Securities and Investments Commission* AATA 622 (Unreported, S A Forgie DP, 2 July 2001), [57].

- problems with disclosure requirements under the law;
- problems with the company's compliance program; and
- dealing with securities or investment advice without a license.

In all the undertakings illustrated in Table 10.3 to 10.6, ASIC requires the promisor to stop the action that led to the alleged breach. Accordingly ASIC asks the promisor to comply with the terms of the law. This is ironic because the company has to comply anyway with the terms of the law, whether or not it agrees with the undertaking. If ASIC just required the promisor to stop the alleged offence, then at that time the undertaking would only constitute a warning. But this author cannot say that the undertakings are just a warning, because the undertakings considered in prior chapters include other promises[8] to ensure the protection of the public and the prevention of future breaches. The promises that are given to proprietary companies are illustrated in Table 10.3.

[8] See Figure 6.2 in Chapter 6.

Misleading advertisement, information or conduct	Problem with disclosure of information required by the law	Problem with compliance program	Dealing with securities or investment advice without a license
Disclosure of undertaking + compliance program: 5 undertakings	Voluntary ban:1 undertaking	Compliance program:2 undertakings	Stop action until approval of license + disclosure + Refund: 2 undertakings
Disclosure of the undertaking + refund + compliance program: 3 undertakings	Compliance program + compensation: 1 undertaking	Compliance program and disclosure of the undertaking: 1 undertaking	Disclosure of the undertaking + compensation: 1 undertaking
Disclosure of the undertaking + refund:2 undertakings	Disclosure of undertaking: 1 undertaking	Compliance program:1 undertaking	Stop action until approval of license: 2 undertakings
Follow the law and audit financial reports: 2 undertakings	Disclosure of undertaking + refund: 5 undertakings	Compliance program and suspension of license a new director is appointed and compliance with license: 1 undertaking	Voluntary ban: 4 undertakings
Compliance program: 2 undertakings			Maintain record of clients and send them to ASIC: 1 undertaking
Refund + compliance program: 1 undertaking			Stop if not receive license + Disclosure of undertaking:2 undertakings
Disclosure +refund + compliance program + community services: 1 undertaking			

Table 10.3: Alleged breaches and the undertakings given by proprietary companies[9]

[9] ASIC, above n 5.

As it can be seen from Table 10.3, there is a certain consistency in the way undertakings are given to proprietary companies with slight variations. For instance, if the proprietary company is involved in misleading or deceptive advertisement, ASIC requires the promisor to implement a compliance program, disclose the undertaking to a certain category of people and/ or refund. As seen in prior chapters, the purpose behind these promises is to prevent future breaches of the law and the correction of the alleged actions of the promisor.

Table 10.3 shows that ASIC will use the same promises in similar undertakings ensuring the fairness, stability and consistency of the undertakings. This will encourage other proprietary companies to enter into an undertaking with ASIC because they will have an expectation of ASIC's requirement and can be confident that they will be treated in the same way as other proprietary companies.

10.5. Treatment of unlisted public companies: 1998 to 2004

From 1998 to 2004, 51 unlisted public companies entered into 48 undertakings with ASIC. It is apparent when looking at Figure 10.1 that the use of undertakings against unlisted public companies has fluctuated through the years. From 2001 and 2004, most of the undertakings given to companies were undertakings in relation to breaches allegedly committed by unlisted public companies.

For instance in 2004, 67% of the companies who entered into the undertakings were unlisted public companies. This number is important because in the past, proprietary companies were most targeted by the undertakings. This rise in numbers is usually accompanied by a fall in the number of undertakings given to proprietary companies. For instance in 2004, only 17% of the companies that entered into an undertaking were proprietary companies. One wonders if in these two years there was a policy in relation of enforceable undertakings that targeted unlisted public companies, to the detriment of proprietary companies.

Table 10.4 illustrates the most common offences allegedly committed by unlisted public companies and the relevant undertakings that were given through the years:

- misleading advertisement, information or conduct;
- problems with disclosure requirement under the law; and
- problems with the company's compliance program.

With the exception of dealings with securities and investment advice, these alleged breaches are quite similar to the alleged offences that led to the undertakings accepted by proprietary companies.

Misleading advertisement, information or conduct	Lack of disclosure of information required by the law	Problem with compliance program
Compliance program: 1 undertaking	Compliance program + refund: 2 undertakings	Compliance program:5 undertakings
Compliance program + disclosure of undertaking + education of the public: 1 undertaking	Compliance program:3 undertakings	Compliance program + disclosure of the undertaking: 2 undertakings
Alteration of the misleading offer + avoid future misrepresentation in the future + refund: 1 undertaking	Compliance program + disclosure of undertaking: 2 undertakings	Compliance program + disclosure of the undertaking: 1 undertaking
Compliance program + Disclosure of undertaking: 2 undertakings	Disclosure of the undertaking + refund: 6 undertakings	
Disclosure of undertaking + future clarification of advertisements:1 undertaking	Buy back shares + disclosure of undertaking:1 undertaking	
Compliance program + Disclosure of undertaking + refund: 2 undertakings		
Disclosure of the undertaking: 1 undertaking		
Compliance program + disclosure of undertaking+ refund + community services: 1 undertaking		

Table 10.4: Alleged breaches and the undertakings given by unlisted public companies[10]

Again, Table 10.4 reflects a certain consistency in the way undertakings are given to unlisted public companies. For instance, for most of the alleged breaches of a company's compliance, ASIC required the promisor to implement a new compliance system. There are a few variations in the undertakings, which is normal because each case has its own facts.

For example, in the undertakings, the requirement varies from one undertaking to the next. But the basic purpose of the undertaking remains the same. In seven out of 10 of

[10] ASIC, above n 5.

undertakings in relation to the alleged breach of misleading advertisement/statement/conduct, ASIC required the implementation of a new compliance system. If a certain category of the public was affected, ASIC required the unlisted public company to disclose the undertaking to these affected parties. If the affected party had suffered a financial loss because of the alleged offence, ASIC will required the alleged offender to compensate the affected party. Accordingly, the inclusion of disclosures and refunds in the undertaking will vary from situation to situation. For this reason the ALRC did not support of the inclusion of compensation in all undertakings.[11]

When comparing Tables 10.3 and 10.4, it is apparent that there is a similarity between the treatment of proprietary companies and the treatment of unlisted public companies. The most common alleged offences are almost identical in both cases, and the undertakings given are similar in content. In both cases, the enforceable undertakings have the aim to prevent the same incident from happening again, protect the public and correct the effects of the alleged action. ASIC uses the same promises to deal with alleged breaches committed by proprietary companies and unlisted public companies.

10.6. Treatment of listed public companies: 1998 to 2004

Table 10.1 and Figure 10.1 noted that ASIC gave only 21 enforceable undertaking to 24 listed public companies. The numbers of undertakings accepted by such companies is extremely low when compared with the numbers of proprietary and unlisted public companies that have entered into enforceable undertakings.

Two explanations can account for this phenomenon:

- It is possible that there is not enough incentive for listed companies to enter into an enforceable undertaking. They might prefer to use the court system because they probably have more resources than proprietary companies.

[11] Australian Law Reform Commission (ALRC), *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 132-133.

- It is possible (and to this author, more plausible) that although there over 1 million companies in Australia, only about 1400 are listed companies.[12] Accordingly, the number of proprietary companies that have accepted an undertaking will be bigger than the number of listed public companies that were given an undertaking.

The most common alleged offences committed by listed public companies are:

- lack of disclosure of information required by the law; and

- problems with compliance programs.

Table 10.5 illustrates the most common alleged breaches that are relevant to public listed companies and the undertakings that were given to remedy the breaches.

Lack of disclosure of information required by the law	Problem with compliance program
Disclosure of undertaking+ amendment of form: 1 undertaking	Compliance program: 3 undertakings
Compliance program: 5 undertakings	
Disclosure of undertaking + refund: 4 undertakings	
Compensation + Disclosure of the undertaking + community services: 1 undertaking	

Table 10.5: Alleged breaches and the undertakings given by unlisted public companies[13]

In the case of listed companies, the most common alleged offence was in relation to disclosure. Of 24 undertakings given to listed companies, 11 related to breaches of the different disclosure provisions of the *Corporations Act 2001* (Cth).[14] The response to this alleged breach of the law was the use of certain prevention measures to ensure that the

[12] Hanrahan, Ramsay and Stapledon, *Commercial Applications of Company Law* (CCH Australia Ltd, 2004) 75.
[13] ASIC, above n 5.
[14] Ibid.

offence would not occur again in the future. The undertakings also tried to minimize the damage to innocent third parties.

For instance, if the content of a prospectus did not conform with legislative requirements, the undertaking would require the company issuing new shares to stop its actions until a new prospectus was lodged with ASIC. If the prospectus was issued, the investors that received were to be informed of the undertaking, and if any of them had been allotted shares following that prospectus, they were to have their moneys refunded. This would ensure the protection of the public. This requirement is imposed public listed and unlisted companies if they lodge a prospectus document that does not satisfy the requirements of the law.

Again, the main purpose behind all these undertakings is to protect the public and prevent the occurrence of similar breaches in the future. The treatment of listed companies seems quite similar in that of the rest of the parties, be they proprietary or unlisted companies. What about foreign companies?

10.7. Treatment of foreign companies

Only seven undertakings targeted foreign companies. The most common alleged offences that were committed by foreign companies were:

- provision of misleading information;
- dealing with securities without a license; and
- lack of disclosure of information required by the law.

Table 10.6 illustrates the alleged offences that led to an enforceable undertaking and the promises that were given by the promisor.

Misleading information	Dealing with securities without a license	Lack of disclosure of information required by the law
Australian people should not be able to access the website of the foreign company + disclosure of undertaking: 1 undertaking	Disclosure of undertaking + apply for license: 1 undertaking	Disclosure of undertaking + refund: 1 undertaking
Compensation: 1 undertaking	Disclosure of undertaking: 1 undertaking	Compliance program: 1 undertaking.
Compliance program + disclosure of the undertaking: 1 undertaking		

Table 10.6: Alleged breaches and the undertakings given by unlisted public companies[15]

Even though there is not a huge range of undertakings in relation to foreign companies, Table 10.6 shows that the alleged offences are similar to those allegedly committed by public companies (listed or unlisted) and proprietary companies. The undertakings by themselves are also similar in content to those contained in Tables 10.3 to 10.5. It is clear that the most common undertakings again relate to putting a compliance program in place and disclosing the undertaking to a certain category of people.

10.8. Summary

In short, it is apparent from Tables 10.2 to 10.6, that all undertakings accepted by ASIC are similar in content. Public companies (both listed and unlisted), proprietary companies, foreign companies and individuals seem to be treated in the same way. In all cases the main purpose of the undertaking was to prevent such an event from happening again.

Furthermore, similar alleged breaches of the law are dealt with in a similar fashion, no matter the size or influence of the entity involved. But this can be considered somewhat unfair. Each one of these entities has different resources available to it.

[15] Ibid.

10.9. Possible criticism of the system

When the regulator requires the business community to take a prescribed set of protective measures, it presumes that there is a certain uniformity in the problems to be controlled. The world to be regulated is, however, unusual, changeable and indistinct. Each person has different resources and capabilities.[16]

As a result, even though ASIC's undertakings treated all parties in the same way and with the same goals, the fact that each party has different circumstances might make the undertakings somewhat unfair to certain groups. In general, compliance with an enforceable undertaking costs a company considerably more than the fine a court will impose on them.[17]

The enforceable undertaking usually holds strict educational and safety promotion obligations for participants, as well as the cost of implementing compliance programs and carrying out audit and training. The cost of putting in place a compliance program is unlikely to empty the pockets of a public company while it might cripple the business of a proprietary company. Accordingly, this unfairness may deter some people from entering into future undertakings with ASIC.[18]

10.10. In brief

Enforceable undertakings are not just used by ASIC as a remedy to impose control on businesses. They also activate and draw upon the conscience and talent of the parties ASIC seeks to regulate. Without this reliance, enforceable undertakings would become obsolete because ASIC needs the alleged offender cooperation. The alleged offender has to accept the undertaking. Without this acceptance, the remedy of enforceable undertaking would be impossible to apply.[19]

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[16] E Bardach and RA Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982) 58.
[17] Queensland Government, Department of Industrial Relations, *Fact Sheet on Enforceable Undertakings* <http://www.dir.qld.gov.au/publications/prosecutions/enforceable_undertakings/fact_sheet.htm> at 29 April 2005.
[18] Ibid.
[19] Bardach and Kagan, above n 16, 323

The fairness, stability and consistency of the undertakings are essential because they ensure the faith of the business community in the system of enforceable undertakings. If the regulatory system seems unreasonable, the business community reacts defensively and will be full of resentment. It will refuse to cooperate with the regulator.[20]

As noted in this chapter, the ASIC undertakings considered were similar in content. Accordingly, the undertakings seem fair, stable and consistent. The only problem is that this similarity might lead to the problems discussed in paragraph 10.9 above. As a result, when giving an undertaking, ASIC should always make sure that the undertaking is affordable to the promisor.

[20] Ibid 93.

Chapter 11 Monitoring of enforceable undertakings

11.1. Introduction

This chapter concentrates on the way in which the regulator, ASIC, monitors the compliance of alleged offenders with the terms of enforceable undertakings. The importance of such compliance stems from the fact that without a good monitoring system, the enforceable undertaking sanction will be useless. If a good monitoring system is not in place, breaches of the undertaking will go unnoticed. Accordingly, the enforceable undertaking as a penalty will be ineffective even if it achieves in theory the desired instrumental goals of the regulator.[1]

No monitoring will mean no accountability of the promisor. If a person is in trouble, he or she will definitely want to enter into an undertaking because an undertaking may be considered as fastest and probably cheapest way of getting out of the mess he or she created. Furthermore, in the absence of a good compliance system, the chances of the promisor being caught while breaching the undertaking will be extremely slim. If this is the case, the words of Rene Rivkin will haunt us. In an interview, he pointed out that an undertaking is a guideline that should be followed in the future.[2] With an ineffective monitoring system, the undertaking will no longer be a sanction but a guideline with no repercussions whatsoever.

Accordingly, the question must be asked: has ASIC enforced any undertaking it has accepted in the past? In total there appear to have been only four cases where ASIC has instituted proceedings for breach of an undertaking.[3] These cases will be studied in detail in Chapter 12. But does this low number mean that everyone is actually complying with the undertakings they enter into?

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[1] Karen Yeung, *Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?* 9 <http://www.aic.gov.au/conferences/regulation/yeung.pdf> at 28 February 2005.
[2] Tim Boreham, "Rivkin won't be Misunderstood" *The Australian* (18 October 2000) 42.
[3] ASIC <http://www.asic.gov.au> at 15 May 2005.

To answer this question, this chapter observes the system that has been put in place by ASIC to monitor compliance of the promisor with the enforceable undertaking agreed to. The type of monitoring system that is applied will probably give the reader an idea of the odds that the regulator will discover breaches of the undertakings given.

11.2. Monitoring system

ASIC uses several different methods to monitor compliance with an undertaking, namely:[4]

- Directors monitoring the compliance of their company with the terms of the undertakings and reporting to ASIC in case of breach.

- Companies reporting to ASIC on their compliance with the terms of the undertaking and advising ASIC in case of breach.

- Individuals providing a statutory declaration stating that they complied with the undertaking.

- Independent experts reporting to ASIC on compliance with the undertakings and advising the regulator on the occurrence of any breach.

- ASIC, if it suspects a breach, will conduct its own investigation into the matter.

The methods of monitoring compliance with an undertaking are the focus of this chapter. The advantages and disadvantages of each method will be highlighted. But before looking at the methods that ASIC uses to monitor compliance with an undertaking, it is

[4] ASIC, *Register of Enforceable Undertakings* <http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Enforceable+Undertakings+Register?openDocument> at 10 February 2004. The observation made above can be seen when reading the undertakings.

essential to note that most of these methods have one element in common: their reliance on self- regulation in most cases.

11.3. Self-regulation and enforceable undertakings

An enforceable undertaking relies heavily on voluntary compliance. The person who enters into an undertaking promises to do or not to do certain things and is expected to ensure that compliance with the undertaking is fulfilled. *Practice Note 69* shows that ASIC is careful when given undertakings. The regulator will not automatically enter into an undertaking with every person who proposes an undertaking. ASIC only targets people who can be trusted and who have a higher chance of not breaching the undertaking in the future.[5]

This characteristic is very important because most of the time, ASIC relies on those people to implement the undertaking. In many cases, the promisors are the ones who will report any breaches they make of the undertakings. As a consequence, it is imperative that they are trustworthy. This might explain why ASIC gives them the job of monitoring their own behavior.

11.4. Self-regulation of undertakings

In most cases, there is a clause in the undertaking that points out who is in charge of monitoring the promisor's compliance with the undertaking. For the purpose of this chapter, it is assumed that where the undertaking does not specify the manner in which the monitoring should takes place, the regulator will rely on the promisor to ensure its compliance with the undertaking.

[5] ASIC, *Practice Note* 69, [69.11] <http://www.cpd.com.au/asic/pn/pn069.pdf> at 28 December 2003.

11.4.1. Monitoring by individuals who entered into an undertaking with ASIC

In the undertakings that are given to individuals, three scenarios need to be distinguished:[6]

- the permanent voluntary ban;
- the voluntary ban for a certain period; and
- other types of undertakings.

In the first scenario, where the promisor has agreed to a permanent voluntary ban from managing a company or from dealing with securities and investment advice, the promisor is not required to report to ASIC. He or she is expected to comply with the undertaking. However, if there is a breach of that undertaking, ASIC will take strong measures.

In the second scenario, where the promisor agrees to a voluntary ban from managing a company, or from dealing with securities and investment advice for a certain period of time, the promisor usually presents ASIC, at the end of the agreed period, with a statutory declaration stating that he or she has complied with the terms of the undertaking. If the undertaking requires the promisor to fulfill an education requirement, then the promisor is required to provide a certificate that proves the completion of the required course.

In the third scenario, where the promisor gives other types of promises in the undertaking, ASIC has required the individual to monitor his or her compliance with the undertaking. This scenario does not include undertakings given to individuals and companies at the same time. It only relate to undertakings given to individuals alone. Table 11.1 illustrates these three categories.

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[6] ASIC, above n 4.

Years	Individual report to ASIC	Undertaking signed by individuals (no mention of monitoring in undertaking)	Total
1998	4	1	5
1999	9	8	17
2000	15	9	24
2001	4	5	9
2002	9	6	15
2003	0	7	7
2004	2	6	8
Total	**43**	**42**	**85**

Table 11.1: Monitoring by individuals that entered into the undertaking.

An interesting element in Table 11.1 is that, in 2003, ASIC did not require the individual to inform it of breaches of the undertaking. Two questions arise from this:

- Has ASIC found that requiring the promisor to report any new breaches of the undertaking is ineffective? Or

- Does ASIC expect the individual to report any new breach of the undertaking, even if this is not mentioned as a requirement in the undertaking?

Hopefully, the latter answer is the correct one. If it is, when dealing with individuals, ASIC will rely to a great degree on the promisor to ensure compliance. This has its disadvantages and they are the same as the disadvantages that are present when ASIC relies on the company to monitor its own undertaking.

11.4.2. Monitoring by company who entered into an undertaking with ASIC

In certain instances, ASIC noted in the undertaking that the company should inform the regulator of any breach of the undertaking. Table 11.2 shows the frequency of such reliance.[7]

Years	Proprietary company reporting to ASIC	Public listed company reporting to ASIC	Public unlisted company reporting to ASIC	Total
1998	0	3	0	3
1999	2	4	3	9
2000	7	2	4	13
2001	5	2	7	14
2002	8	1	5	14
2003	4	1	3	8
2004	2	2	7	11
Total	**28**	**15**	**29**	**72**

Table 11.2: Monitoring of undertakings by company

Table 11.2 shows that ASIC is relying heavily on the company to come forward and advise it of breaches of the undertaking. It might be acceptable for small businesses to have such a requirement, because anything else might be too expensive and unaffordable. But where Table 11.2 notes that 15 listed companies and 29 unlisted companies had the same requirement to 28 proprietary companies, this indicates that ASIC is not really looking at the financial capacity of the company when given an undertaking. A public company can probably afford to put a more complex system of monitoring in place, than a proprietary company. So probably it is best to require the big companies to put in place another protective system to ensure compliance with the undertaking.

[7] Ibid

It is interesting to note that in 2004 a new trend seems to have emerged. On several occasions ASIC required the public companies to have more that one person reporting to ASIC on the implementation of the undertaking. For instance, when the regulator entered into an undertaking with Unisuper Ltd, the public unlisted company had to report to ASIC on compliance with the undertaking. The company was also supposed to present a statutory declaration from an officer of the company that the company had complied with the terms of the undertaking. Finally, a compliance auditor was also supposed to report on this matter.[8] But again, this is a new method. Only time will tell if ASIC will continue with such requirements. For the past few years ASIC has relied heavily on the monitoring of the undertakings by companies.

This method of monitoring to a large extent counts on the cooperation of the promisor. Braithwaite, when devising his pyramid of enforcement, pointed out that the business community will not cooperate with the regulator unless the regulator has a bargaining tool in its hand: if the offenders do not cooperate, the regulator will use stronger methods to enforce their cooperation. Thus the penalty will be harsher.[9]

As mentioned in Chapter 6, ASIC seems to be following the same method in its undertakings. The regulator outlines to the alleged offenders the penalty that will usually be used in response to a breach allegedly committed. For instance, in the undertaking given to Tower Life Australia Ltd, ASIC stated the following in its undertaking:[10]

> *"Under sections 12GD, 12GE of the ASIC Act, ASIC may, inter alia, seek injunctions preventing a person from engaging in certain conduct, require that person to do any act or thing and/or place corrective statements. Under sections 12GM and 50 of the ASIC Act, ASIC may commence proceedings for or on behalf of consumers who have suffered damage by reason of any default, including a breach of the ASIC Act."*

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[8] ASIC, Enforceable Undertaking, Unisuper Ltd, Document No 017 029 138 (4 November 2004).
[9] John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (State University of New York Press, 1985) 117-118.
[10] ASIC, Enforceable Undertaking, Tower Life Australia Ltd, Document No 008 547 486 (14 December 2000).

ASIC won't use the harsher punishment unless the promisor continuously breaches its undertaking. But a problem arises: in order for ASIC to use the harsher remedy, it needs to be aware of the breach. In this case, ASIC is relying on the promisors to monitor their own compliance.

If the monitoring of the undertaking is in the hands of the company itself, then the company might not tell ASIC of breaches of the undertaking in the knowledge that ASIC is not checking its compliance (in the absence of a whistle-blower advising the regulator of a breach).

As a result, the regulator will be at the mercy of the promisor in these circumstances. It will only be aware of the information that the company reports. Again, this shows the importance of accepting undertakings from alleged offenders that can be trusted to advise ASIC of breaches they have committed. But will the scenario be different if an officer of the company is doing the monitoring?

11.4.3. Monitoring by officers of companies

In some undertakings, the officers of the company are the one who will monitor compliance with the undertaking. These officers can be the directors of the company subject to an undertaking, along with their company[11] or the board or senior officers of the company. This has been used through the years as shown in Table 11.3.

[11] They are characterised in the table as specific directors.

Years	Specific director in Pty company reporting	Specific directors in public company reporting	Officer in Pty company reporting	Officer in unlisted company reporting	Officer in listed public company reporting	Total
1998	5	0	0	0	0	**5**
1999	1	1	2	2	2	**8**
2000	2	2	5	7	2	**18**
2001	1	1	0	0	2	**4**
2002	2	3	0	0	0	**5**
2003	2	0	3	2	0	**7**
2004	0	3	1	5	0	**9**
Total	**13**	**10**	**11**	**16**	**6**	**56**

Table 11.3: Monitoring by officers of the company

An interesting figure is that only 23 directors who entered into an undertaking with their company were required to report to ASIC in cases of breach of the undertaking. In the rest of the cases, those directors, who were subject to an undertaking with their company, had to ensure compliance of their company with the undertaking, without a need to report to ASIC. The person that would report on the undertaking in those instances would be the company or an independent expert.

This method of monitoring seems preferable to the previous two because you will have someone in the company who will be reporting to ASIC. But this method of monitoring is also flawed.

11.4.3.1. Officers

In some of its undertakings, ASIC requires officers of the company to report to ASIC. It does not always specify the name of the officer who will be in charge of monitoring the undertaking. It can be difficult for the regulator to know who is in charge of what in the

company. This is an unreliable strategy, given staff turnover and the competing pressures on investigators' priorities.

As a consequence, if the officer in charge of the monitoring leaves the company, another person will be appointed who will not know much about the undertaking. He or she will have to start from scratch and become familiar with the system that has been implemented. This can lead the officer to miss certain pertinent details indicating that the undertaking has not been complied with. Furthermore, the officer who is in charge of monitoring is working for the company. He or she can be pressured to write a positive report. This could consequently not make the degree of follow up of audit reports consistent.

In some undertakings, ASIC named the person in charge of the monitoring. But still the system is flawed.

11.4.3.2. Directors

When the alleged offenders are a company and its director, ASIC has usually required the director to ensure compliance of the company with the terms of the undertaking. In some cases (as seen in Table 11.3 above), it has also ordered those directors to be in charge of monitoring of company's compliance with the undertaking and reporting to ASIC on any breaches of the undertakings.

This provides a clear incentive to the directors to report breaches to ASIC. If the director does not comply with the monitoring requirement he or she will breach her or her own undertaking and might face legal action brought by ASIC for breach of that undertaking.

In some undertakings, the incentive is even greater, for example where the directors are be considered as guarantors to the company. Such directors will be highly motivated to ensure compliance with the undertaking. For instance, in the undertaking given to Landmark Property Syndicates Ltd, Stephen Peter Diez and McLaughlin Financial Services Ltd, the director, Diez, undertook to provide a guarantee to unit holders in the

event the company failed to pay the sums it was required to under the terms of the undertaking.[12] In such cases, the director will definitely cooperate with ASIC because he or she will be personally affected if the company does not comply with the undertaking. But what are the weaknesses of such a system?

11.4.3.3. Problem with independence

When the officers of a company, be it directors or others, are monitoring the compliance of their company with the terms of the undertaking, the issue of independence of those officers is raised. Presumably officers will be partial to the firm and can find themselves in some trouble. They might have to choose between the regulator's demands and the companies' wishes. At the end of the day, they are working for the promisor who can fire them if they will not follow their employer's wishes.

As a result, if the company is being lax in complying with the undertaking, the officer will have three choices:

- report to ASIC and risk being fired from his or her job;
- ignore the matter and pray for the best; or
- try to negotiate with the company to enforce the undertaking.

The method chosen by the officer will depend on his or her character. Most officers will focus their attention on whether the company has remedied the conduct in the way required. For example, was there payment of compensation, or the publishing of corrective advertisement? They will probably ignore compliance program deficiencies if the main requirements are met.

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[12] ASIC, Enforceable Undertaking, Landmark Property Syndicates Ltd, Stephen Peter Diez and McLaughlin Financial Services Ltd, Document No 017029048 (8 August 2002).

ASIC needs to give such officers incentives to come forward and declare the breaches committed by their companies to the terms of the undertaking. This is especially the case when the regulator does not specify the name of the person who will be in charge of monitoring compliance. But are the results of monitoring compliance with the undertaking any better when the monitoring is carried out external independent experts?

11.4.4. Monitoring by external and independent experts

More and more frequently, ASIC is relying on reports from independent experts to review and/or audit compliance with an undertaking, particularly when the undertaking is requires the promisor to put in place a compliance program. The completed report of the independent expert will be sent to the management of the company that entered the undertaking and to ASIC. Table 11.4 shows ASIC's use of such methods to monitor compliance with the undertaking:

Year	Use of independent expert in Pty companies to monitor compliance program	Use of independent expert in unlisted companies to monitor compliance program	Use of independent expert in listed companies to monitor compliance program	Other cases where independent expert reports	Total
1998	0	0	1	0	**1**
1999	3	1	3	2	**9**
2000	6	4	2	3	**15**
2001	2	3	2	3	**10**
2002	6	2	2	0	**10**
2003	4	4	0	1	**9**
2004	0	3	0	0	**3**
Total	**21**	**17**	**10**	**9**	**57**

Table 11.4: Monitoring by external and independent experts

Table 11.4 shows that in most instances when ASIC requires the company to put in place a compliance program, it will ask the compliance expert to report to ASIC on the way the company is implementing the compliance program.

11.4.4.1. Reports of external experts

If the report of the expert is unsatisfactory, the regulator is entitled to enforce the undertaking. It will do so by reminding the promisor of its obligations to comply by seeking further evidence of non-compliance, and ultimately by taking the case to court. This seems a very effective method to ensure compliance with the undertaking because the monitoring will be external and independent to the company. Theoretically, an external expert will not be subject to the same pressure as an officer of the company.

But research carried out by Parker illustrates that in practice this is not the case. A regulatory response to experts' reports appears to be quite rare. Parker, through her interviews with auditors, showed that two scenarios are common: [13]

- Some experts interviewed by Parker pointed out that they believe that in some instances the experts' reports were not conduct on time (in some cases, months late, and in others, never conducted at all) without any response from the regulator. In some cases only one report was prepared when the undertaking required multiple reports, and again the regulator did not react in any way to this blunt breach of the undertaking.

- Some experts were dissatisfied with the way the promisor was complying with the undertaking. They recorded this in their report yet ASIC did not respond adequately. In some instances, all the regulator did was to write letters to the promisors pointing out what they needed to do to improve compliance. In other instances, there was a complete silence.

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[13] Christine Parker, "Regulator-Required Corporate Compliance Programs Audits" (2003) *Law and Policy* 221, 223.

Some senior ASIC staff have responded to these findings by saying that they regularly met with the promisors and the experts to discuss the reports presented by the experts. They also conducted their own surveillance in some cases. Nevertheless this seems to occur only in high profile cases. According to independent consultants, it does not happen frequently.[14]

11.4.4.2. Methodology and standards in expert reports

But how do the experts prepare their reports? This question is very important because if the report is not carried out thoroughly, then ASIC will not know if there was compliance with the undertaking or not. This paragraph concentrates on the reports relating to the installation of a new compliance program because Table 11.4 illustrates that ASIC usually asks for reports of independent auditors or consultants when the promisor is required to implement a compliance program.

The audits conducted by experts in relation to the compliance program have an undefined form, and there is no agreed methodology to be followed. ASIC has not issued guidelines on the elements to be included in a compliance program audit. Often ASIC refers to AS 2806-1998, the Australian Standard on Compliance Programs. However there is no further guidance on how the test should be completed to check if the compliance program fulfills the requirement of the undertaking.[15]

In addition, there is no one common practice among the experts on how to conduct a compliance program audit. Most of them usually provide a general description of their methodology in their reports. However, many of the audit reports do not make it clear how many people were interviewed and what positions they held, what type of document was examined, or whether any site visits had been conducted.[16]

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[14] Ibid 226.
[15] ASIC, above n 4.
[16] Parker, above n 13, 231-232.

Most of ASIC's requirements for an audit of a compliance program merely require the expert "to review, assess, and make recommendations in relation to the Compliance Program". [17] As a result, it is up to the expert to determine how to carry out the audit. 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."[18]

As a consequence, the way the assessment is carried out will depend on the character of the independent expert. The auditors interviewed by Parker relied primarily on documentation of the system, and secondly on discussions with senior management only. For most audits there was no testing and not even an inspection of the process in action. Accordingly, if the compliance program looked good on paper the report would be positive. The expert would simply have looked at the intended design of the compliance program. But in some instances design documents can be deceiving. The most brilliant design can be applied incorrectly, rendering it totally ineffective.[19]

Since the auditors are often only looking at the design of the compliance program, the regulator will not know if the undertaking is really being complied with. The compliance program will lose its effect. Furthermore, the fact that the regulator might not take action when the expert gives a dissatisfactory report, might discourage the auditor from conducting further enquiries into possible breaches.[20]

Maybe ASIC should officially adopt the standard of evaluation the courts use when dealing with compliance system. In *Australian Competition and Consumer Commission v Australia Safeway Stores Pty Ltd & Ors,*[21] Justice Goldberg applied the following test:

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[17] 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) 14 <http://www.cccp.anu.edu.au/Parker_ACI_2805031.pdf> at 15 March 2004.
[18] Ibid.
[19] Parker, above n 13, 230.
[20] Ibid.
[21] *Australian Competition and Consumer Commission v Australia Safeway Stores Pty Ltd & Ors* (1998) ATPR 41, 562.

> *"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 implemented by [the defendant]... Secondly, one must ask whether the implementation of the compliance program was successful."*[22]

Again putting one specific evaluation system will help the experts considerably and will make enforceable undertakings more effective.

11.4.4.3. Independence of experts

The experts are independent. But that independence is itself jeopardized by the fact the undertakings always point out that the promisor is the person who will be paying their fees. Accordingly, they are at the mercy of the promisor who can release them if they are not satisfied with the report.

Some independent experts interviewed by Parker pointed out that they believed they had been released by the promisor because they were too demanding.[23] ASIC has tried to counteract this problem by stating in the undertaking that the experts cannot be removed without the approval of ASIC. But again, ASIC does not have a guideline on when to accept the changing of an expert. So the question remains: will ASIC ask the expert why they are being replaced or will it just listen to the promisor?

Another issue is that ASIC does not have a specific list of approved experts to do the monitoring. It is up to the firm to decide who to pick. As a consequence, a wide variety of people are appointed for the job, including large commercial law firms, solo and small firm lawyers, compliance consultants and large and small auditing firms. ASIC usually tries to monitor such appointments by putting in a clause stating that the promisor will advise the regulator of the name of the person appointed to conduct the audit.[24]

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[22] Ibid 43.
[23] Parker, above n 17, 10.
[24] Parker, above n 13, 232.

But despite this, a problem remains in relation to the definition of "independent". Can a compliance program auditor who has advised the firm on putting the compliance program in place, effectively review and audit it? Some auditors believe this is improper, while others believe that provided the firm is independent it can provide both consulting and auditing services. ASIC seems to agree with the latter view in drafting its undertakings.

11.4.4.4. Problems with expert reports

There is a lack of consistency in the way ASIC uses auditors in its monitoring of the undertakings. In certain cases ASIC requires the auditors to assess the compliance program of the company and then ensure that it is implemented. This method seems effective if the expert carries out a positive assessment of the new program.[25]

In other cases, ASIC requires the expert to assess the company's compliance program and to give certain recommendations. The consultant will report in the beginning on the implementation, and then no longer have anything to do with the company. At that time, the implementation of the compliance program will depend on a company who no longer has to report to ASIC on any such matter.[26] But is ASIC playing an active role in the monitoring of the undertaking?

11.5. ASIC on the offensive

Following the release of *Practice Note 69*, ASIC will take action in case there is breach of an undertaking. In theory, whenever someone reports to ASIC a breach of an undertaking, ASIC starts its own investigation into the matter. In the undertaking, ASIC will point out this possibility. For example the following clause that is found in some undertakings:[27]

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[25] ASIC, above n 4.
[26] Ibid.
[27] ASIC, Enforceable Undertaking, IT Investing Ltd, Document No 008 547 460 (18 August 2000).

"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 the undertakings."

It is apparent from this phrase that ASIC is trying to ensure future cooperation with the promisor. As a result, if ASIC suspects a breach, it will take action and ask for the books of the promisor to check for the possibility of a breach. The promisor in return promises to facilitate ASIC's inquiry by giving the regulator access to all the information needed. This system seems a good one because it opens the way for the regulator to do a quick investigation into the matter. With the cooperation of the promisor, any inquiry will be easier done. But sadly the reality is sometimes not perfect.

As noted above, in practice, certain experts have observed that ASIC is not doing anything when the compliance consultants are reporting possible breaches. This situation is dangerous because if the promisors realize that the regulator is not going to take any action against them, then they will not usually be motivated to comply with the undertaking.

It has also been argued that ASIC only keeps close monitoring on high profile cases. As a result, promisors with a low profile can escape scrutiny.[28] For instance, in *ASIC v Ludgates Corporate and Investment Advisory S*,[29] it was pointed out that ASIC did not closely monitor compliance with the undertaking given to Ludgates Corporate & Investment Advisory Services Pty Ltd and Ludgates Chartered Accountants.[30] 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, and

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[28] Parker, above 13, 226.
[29] *Australian Securities and Investments Commission v Ludgates Corporate and Investment Advisory S* [2003] FCA 625 (Unreported, Sackville J, 20 June 2003).
[30] ASIC, Enforceable Undertaking, Ludgates Corporate and Investment Advisory, Document No 008547416 (29 February 2000).

not through the monitoring system that was put in place when the undertaking was entered into.[31]

As noted in Chapter 4, the ACCC was the first regulator to use enforceable undertakings. This regulator has pointed out in some court actions that the undertakings in certain areas are not being effective and are being breached. This was a major reason why the regulator would not want to enter into an undertaking in that same area again.[32]

But even though the regulator has pointed out that undertakings are being breached, it is imperative to note that the ACCC has only enforced five undertakings in court. This number is low compared to the number of undertaking accepted by the ACCC since 1993.[33] This scenario also applies to ASIC.

11.6. Summary

The monitoring system that ensures compliance with enforceable undertakings is not a perfect one. The effectiveness of the promisor in monitoring its own compliance with the undertaking depends heavily on the character and integrity of the promisor.

As for the use of officers of the company, such monitoring will definitely be more effective when the undertaking specifies the director or officer who is to ensure compliance.

Having an independent expert report to ASIC on a compliance program is a different way to ensure compliance with an undertaking. It enables the regulator to have an external view of the way the promisor is complying with the undertaking.

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[31] *Australian Securities and Investments Commission v Ludgates Corporate and Investment Advisory S,* above n 27, [9], [10].
[32] *Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 (Unreported, Carr J, 17 October 2001).
[33] ACCC, Register of Enforceable undertakings <http://www.accc.gov.au> at 15 May 2005.

However this approach has disadvantages due to the lack of guidance currently provided by regulators on how to do the monitoring. As a final course of action, if ASIC has doubts about compliance it can undertake its own investigation with the cooperation of the promisor.

These methods range from self-monitoring to monitoring that involves intervention from an outsider. But in all methods, everyone will be reporting to ASIC. This author created Figure 11.1 to illustrate the monitoring process.

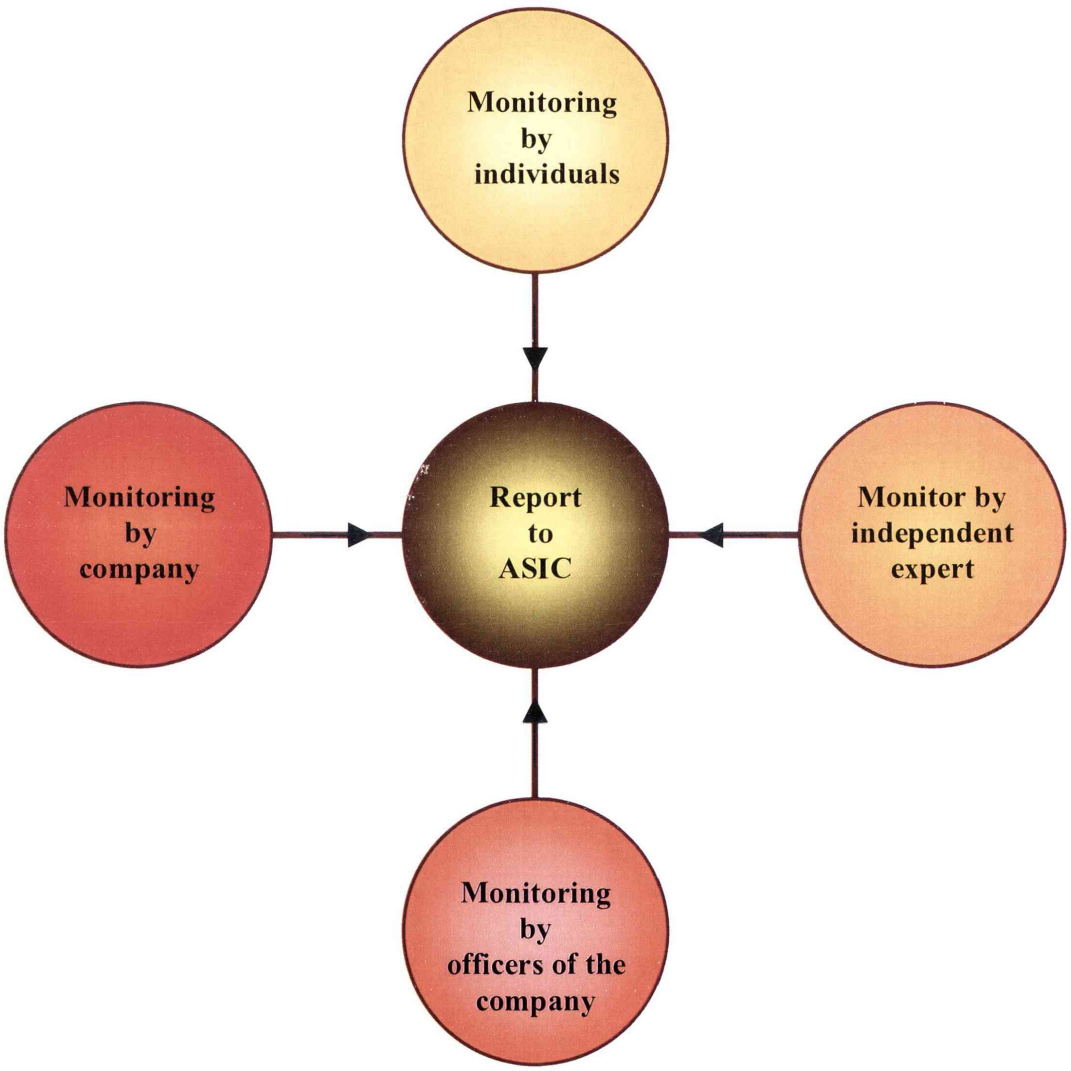


Figure 11.1: Monitoring system of undertaking

As noted above, the monitoring system is not perfect. But that does not mean that there is a need to modify the regulation of enforceable undertakings. Instead, a problem solving approach is required.[34] Amelioration of the system can be achieved using the three steps noted in the literature review, that is:

- a clear focus on result;
- the adoption of a problem solving approach; and
- an investment in collaborative partnership.

These three points are interdependent. It is clear that ASIC must take a more pro-active approach to monitoring compliance with undertakings. This can be realized by implementation of system in the regulatory agency to ensure that non-compliance with an undertaking will have some repercussions. If this ideal is too expensive to implement, a collaborative partnership might prove to be a practical alternative.

In the undertaking, ASIC has already formed a collaboration with the promisors. That is a first step to ensuring monitoring. As seen in Figure 11.1 there is a certain collaboration in the system of monitoring. A number of people are supposed to monitor the undertaking and report to ASIC. But what is missing is the response of the regulator to the reports of the monitors. ASIC must provide clear guidelines for experts on how to assess compliance with the undertaking. Acknowledgement by ASIC of the content of expert reports is also essential. ASIC must reinvent its monitoring system to ensure the ongoing viability of the system of enforceable undertakings.

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[34] Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brooking Institution Press, 2000) 1, 100; For more information about the problem solving approach look at Chapter 2 of this thesis (paragraph 2.7).

As can be noted, the monitoring system will usually go from the person in charge of monitoring the undertaking to ASIC. The system is similar, in this way, to the functioning of our solar system. The planets orbit the sun in the same way that the people in charge of monitoring the undertaking orbit the regulator. But what is missing is the following: in our solar system, the sun radiates its warmth toward the planets. This is not the case with ASIC. ASIC doesn't respond quickly to the concerns of the people in charge of monitoring. Accordingly the force that is supposed to attract these people toward the regulator is absent. As a result, they will not be as effective as they would if they had the attention of the regulator. If this does not change, the enforceable undertaking as a penalty could become obsolete. The ideal solution proposed in this chapter can be characterised by Figure 11.2 created by this author.

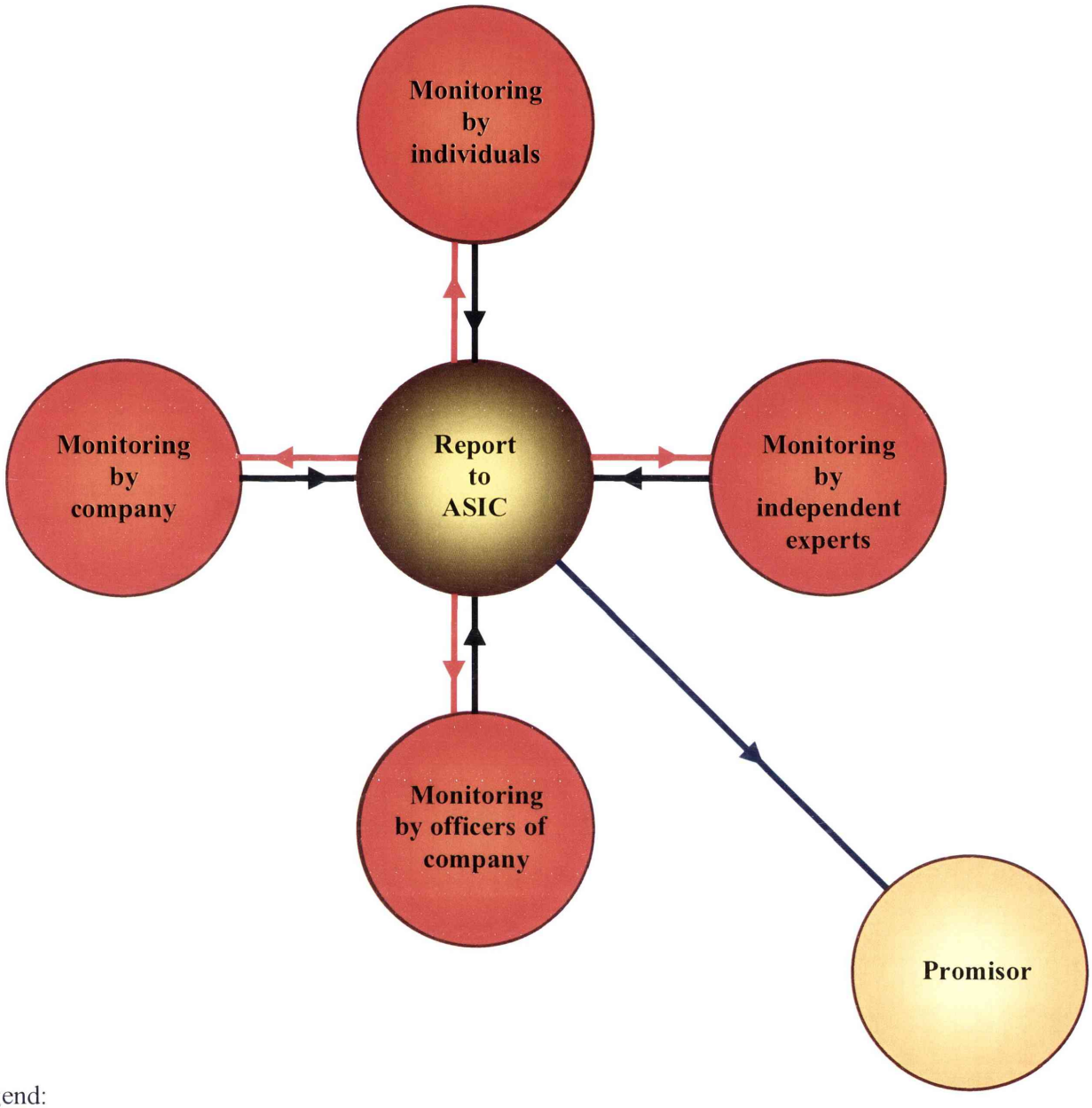


Figure 11.2: Monitoring system of undertaking

As seen in Chapter 5, the number of undertakings accepted by ASIC has gone down considerably through the years. The reason might be that the promisors are not

complying with the undertakings and ASIC is finding it hard to implement the content of the undertaking either because it cannot detect the breaches to the terms of the undertakings or because the courts are unwilling to enforce the undertaking.

If the reason is that ASIC can't detect the breaches to the undertaking, than a new monitoring system should be put in place. This author believe that if the promisor will know that breaches of the undertakings will be discovered by ASIC than the promisor will be more tempted to comply with the terms of the undertakings. After all, a breach of the undertaking will lead to more drastic penalties. The pyramid of enforceable will be in full swing. But the effectiveness of the pyramid will depend on the court's reaction of the undertakings because the courts are the ones who have the power to enforce the undertakings. So they can make or break this penalty.

Chapter 12 The courts and enforceable undertakings: A look at the reaction of the courts toward the undertakings accepted by ASIC and the ACCC

12.1. Introduction

As noted in prior chapters, an enforceable undertaking is a promise enforceable in court. It is an agreement between two people, the alleged offender and the regulator. If a person is suspected of breaching the law, the regulator or that person can propose to solve the matter out of court. As a result, the promisor will promise to do or not to do certain actions. If there is a breach of the undertaking, the regulator will have to enforce it in court if it wants to force the promisor to comply with it. Accordingly, the mere breach of the undertaking will not be considered by itself contempt of court.[1]

This is a trait unique to Australia. As noted in Chapter 4, this is not the case for similar penalties used overseas. For instance, the breach of an undertaking in the United Kingdom will instantly be considered a criminal offence. Since the undertakings in Australia are not enforceable by themselves it is important to examine two relevant factors:

- Do the courts encourage the regulators to enter into enforceable undertakings? This is an important question because without the support of the courts, the regulators will not be willing to accept such undertakings.

- Are the courts willing to enforce the undertakings given by the regulators? If the courts are not willing to enforce the undertakings, the undertakings will be next to worthless.

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[1] *ASIC Act 2001*, ss 93A(3) and 93A(4); Australian Law Reform Commission (ALRC), *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 100-101.

This chapter answers these two questions and reflects the dilemmas faced by ASIC when using enforceable undertakings.

12.2. Support for the use of enforceable undertakings

In theory, the courts cannot coerce the regulators into accepting an undertaking. The following cases will allow this author to discover if this theory is reflected by reality:

- *ACCC v Real Estate Institute of Western Australia Inc*[2]
- *ACCC v Apollo Optical (Aust) Pty Ltd*[3] and *ACCC v Monza Imports Pty Ltd*[4]
- *Donald and ASIC*[5]

12.2.1. ACCC v Real Estate Institute of Western Australia Inc

This case concerns the partial resolution of proceedings in relation to agreements made between the Real Estate Institute of Western Australia Inc (REIWA) and two West Australian colleges. The agreements gave the colleges licenses to use materials and copyrights, owned by REIWA, for the purpose of training real estate and business agents. One of the terms of the agreements fixed a minimum price for these training courses. The price was equal to the one that REIWA charges for such courses. The ACCC commenced proceedings for unlawful price fixing and the court was asked to accept certain undertakings and issue some consent orders as a remedy for the breach.[6]

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[2] *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* [1999] FCA 18 (1999) 161 ALR 79

[3] *Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 (Unreported, Carr J, 17 October 2001).

[4] *Australian Competition and Consumer Commission v Monza Imports Pty Ltd* [2001] FCA 1455 (2001) ATPR 41.

[5] *Donald and Australian Securities and Investments Commission* AATA 622 (Unreported, S A Forgie DP, 2 July 2001).

[6] *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc*, above n 2.

It was pointed out by the Federal Court that settlements will be encouraged to reduce the burden of litigation on both public and private resources. The courts seems to support entering into all sorts of settlements, be they undertakings or otherwise. [7] As a consequence, the regulators have the blessing of the court to enter into such agreements with alleged offenders. But sometimes the courts will not just mention that accepting an undertaking is desirable but will go further and say that regulators should be forced to enter into such agreements. This can be seen in *ACCC v Apollo Optical (Aust) Pty Ltd* and *ACCC v Monza Imports Pty Ltd.*

12.2.2. ACCC v Apollo Optical and ACCC v Monza Imports

Apollo Optical Pty (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. Accordingly, it breached s 65C(1)(a) of the *Trade Practices Act 1974* (Cth). As a result, the ACCC applied for a consent order to stop the offending behavior. The court was concerned that the proceedings were unnecessary. It was pointed out that Apollo was at all time prepared to cooperate with the ACCC and it was willing to take all the necessary steps that might be required by the ACCC to prevent the breach from occurring again in the future.[8]

The Federal Court considered that in this case an undertaking could achieve the same result as a consent order. An undertaking was preferred because it would free the resources of the parties and the resources of the court. The respondent (Apollo) was more than willing to enter into such an undertaking to solve the matter. In response to the court's criticism, the ACCC noted that it had previously accepted a number of undertakings under s 87B of the *Trade Practices Act* from other people in similar situations, but despite those undertakings breaches of the relevant product safety standard continued. Since there is a continuous breach of this standard, it was more appropriate to go to court and ask for consent orders.[9]

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[7] Ibid [3].
[8] *Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd,* above 3, [3].
[9] Ibid [7].

12.2.2.1. Freedom of the ACCC to refuse to undertakings

In theory, the ACCC is not required to explain the reasons behind its decision not to enter into an undertaking. O'Loughin J said in *Trade Practices Commission v Cue Design Pty Ltd*[10] the following:[11]

> *"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."*

12.2.2.2. Curtain on such freedom

Even though the Federal Court in the *Apollo* case agreed with O'Loughin J, it used a veiled threat to ensure that in the future the regulator should enter into an undertaking if the result of the undertaking would be the same as the result of a court action. It was pointed out that the court will not be averse, in the future, to take into consideration the ACCC's refusal to accept a statutory undertaking when deciding whether to make a consent order or to award costs in its favor even when such orders are proposed on a consent basis.[12]

Accordingly, if the court finds that the proceedings before it were unnecessary (because the matter could have been dealt with through acceptance of an undertaking), it will subtly retaliate by not granting a consent order, for instance. This decision was confirmed in *ACCC v Monza Imports Pty Ltd.*[13]

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[10] *Trade Practices Commission v Cue Design Pty Ltd* (1996) ATPR 41.
[11] Ibid 41.
[12] *Australian Competition and Consumer Commission v Apollo Optical (Aust) Pty Ltd*, above n 3, [14].
[13] *Australian Competition and Consumer Commission v Monza Imports Pty Ltd*, above n 4.

12.2.2.3. Result

Although it is agreed that the court should not have a say in the decision of the regulator to enter or not to enter into an undertaking, it is clear that the court is willing to coerce the regulators into accepting certain undertakings by way of veiled threat: "You do as we say or we will not grant you what you wish."

Albeit the three cases mentioned above related to proceedings brought by the ACCC, there is no reason to believe that such reasoning will not be applied by the court when dealing with actions brought by ASIC. As a result, the regulators should be cautious in the future when starting legal proceedings. They may have to justify the reasons for not rejecting entering into an undertaking, (as the ACCC did in both *Apollo* and Monza cases) when applying for a consent order. This is very interesting because the decisions to accept or not to accept an undertaking by ASIC cannot be reviewed by the AAT. But the AAT found a way to bypass this rule and coerce the regulator into entering into an undertaking.

12.2.3. AAT and enforceable undertakings

The decisions of ASIC to enter into an undertaking are not open to judicial review. This is not the case with the ACCC or APRA. As seen in Chapter 4, APRA has the power to enter into undertakings similar to those accepted by ASIC and the ACCC.[14] But the review process differs when dealing with APRA. In *Glass v APRA,*[15] it was noted that a decision to refuse to vary an enforceable undertaking is reviewable. By analogy and extension, this means that the refusal to accept an enforceable undertaking would be reviewable.[16]

As for the ACCC, a judicial review for procedural fairness of a decision to accept an undertaking may be available under the *Administrative Decisions (Judicial Review) Act*

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[14] *Superannuation Industry (Supervision) Act 1993* (Cth), s 120A.
[15] *Glass v Australian Prudential Regulation Authority* [2003] FCA 1105 (Unreported, French J, 26 September 2003).
[16] Ibid [14].

1977 (Cth) *(ADJR Act).* In *Australian Petroleum Pty Ltd v ACCC,*[17] it was held that the ACCC's decision not to vary or withdraw an undertaking was reviewable under the ADJR Act. In *Hospital Benefits Fund of WA Inc v ACCC,*[18] it was decided that an undertaking that has been accepted in circumstances which fall short of the requirements of procedural fairness, may be impugned in the judicial review process.

Even though ASIC's decision to accept or reject an undertaking cannot be reviewed by the AAT, the decision of the AAT in the case of *Re Donald and ASIC* [2001] AATA 622 reflects the desire of the courts to coerce regulators into accepting more enforceable undertakings.

12.2.3.1. Donald and ASIC

Toward the end of trading on 29 May 1998, Mr 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 his action, on 20 July 1999, ASIC imposed a banning order on Mr Donald. On 5 August 1999, Mr Donald applied for a review of ASIC's decision to ban him from dealing with securities for four years. On 21 January 2000, the AAT decided to vary the decision by reducing the banning period from four years to two years. Following an appeal lodged by Mr Donald in the Federal Court, Heerey J allowed the appeal and remitted the matter to a differently constituted tribunal for re-hearing. In the re-hearing, the AAT decided the following:[19]

- A banning order should be made prohibiting Mr Donald from doing any act as a dealer's representative from 20 July 1999 until 22 November 2000.

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[17] *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 73 FCR 75 (1997) ATPR 41-555.
[18] *Hospital Benefits Fund of WA Inc v Australian Competition and Consumer Commission,* (1997) ATPR 41-569.
[19] *Donald and Australian Securities and Investments Commission,* above n 5.

- Mr Donald should enter into an enforceable undertaking with ASIC to the effect that he will undertake a course in Business and Finance Practice Industry and/or the Financial Markets Law, Regulation and Compliance courses offered by the Securities Institute. He will also help ASIC in the preparation and presentation of certain seminars. He will undertake for a period of three and a half years from the date of the undertaking not to create or do anything that is likely to create a false or misleading appearance of active trading in any securities on a stock market or a false or misleading appearance with respect to the market for the price of any securities. Lastly, he will give a copy of the undertaking to all licensed dealers by whom he is employed.

This decision of the AAT was upheld by the Federal Court.[20]

12.2.3.2. Entering an undertaking with the alleged offender

As mentioned at the beginning of this chapter, a person cannot be forced into entering an undertaking. Accordingly, in theory, the AAT cannot coerce an individual or a company into agreeing to the terms of an undertaking. In *Donald and ASIC,* [21] the AAT pointed out that Mr Donald had a choice between entering into an undertaking or completing the banning order as originally made by ASIC (four years of ban).[22] The reality is that the choice given by the court 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, which is in this case an undertaking. After all, a banning order is a harsher penalty than an undertaking. Following such a decision of the AAT, on 18 June 2001, Mr Donald presented ASIC with a proposed undertaking.

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[20] *Australian Securities and Investments Commission v Donald* [2003] FCAFC 318 (2003) 136 FCR 7 (2003) 203 ALR 566.
[21] *Donald and Australian Securities and Investments Commission* [2001] AATA 366 (2001) 38 ACSR 10.
[22] Ibid [135].

12.2.3.3. Coercing ASIC into accepting the undertaking

By a letter dated 19 June 2001, ASIC stated that it declined to accept the undertaking that was proffered by Mr Donald. This author has to point out here that s 93 AA (1) of the *ASIC Act 2001* clearly states that it is ASIC that "may accept a written undertaking". The court has no involvement with the process until (if at all) it believes upon the application of ASIC that the promisor has breached the undertaking. As a result, the court does not have the power to coerce ASIC into entering into an undertaking.

Similarly, the AAT has not been given the power to review a decision of ASIC to enter into an undertaking.[23] Nor may it review a decision of ASIC to reject entering into an undertaking.[24] In this case, the AAT, on 21 June 2001, set aside ASIC's decision to reject the undertaking and decided that ASIC would accept the written undertaking proposed by Mr Donald.[25] In doing so, the AAT ignored both s 93AA and subs 244 of the *ASIC Act*.

12.2.3.4. Grounds on which the undertaking is accepted by the AAT

The reasoning behind the AAT decision was the following: the AAT has the power to review a decision of ASIC to issue a banning order. It is well established that when reviewing the administrative decisions of ASIC under s 43(1) the *Administrative Appeals Tribunal Act 1975* (Cth), the AAT stands in the place of the regulator and is empowered to exercise all the relevant powers and discretions of ASIC for the purpose of reviewing the decision under review.[26]

Hill J said in *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32:

> *"The language of s 43 is quite clear and unambiguous. It empowers the Tribunal to exercise all the powers and discretions conferred upon the original decision maker provided it does so for the purpose of reviewing a*

[23] *ASIC Act* 2001, s 244.
[24] Ibid.
[25] *Donald and Australian Securities and Investments Commission*, above n 5.
[26] *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1).

decision. Provided the necessary purpose is present, the power conferred upon the Tribunal is not otherwise limited. It is not necessary or permissible to put a gloss."[27]

As a consequence, for the purpose of reviewing ASIC's decision to ban a person from managing a company or from dealing with securities and/or investment advice, the AAT had by virtue of s 43(1) of the *AAT Act* the power to use any sanction to ASIC. This includes the power of ASIC to enter into an enforceable undertaking with the alleged offender.

12.2.3.5. Result

This decision of the AAT, which was upheld in the Federal Court, undermines ASIC's authority. In the future, if ASIC prefers to issue a banning order instead of entering into an enforceable undertaking, the banned person can always appeal to the AAT against the banning order and propose instead to enter into an undertaking. Since an undertaking is a lesser penalty than a banning order, the alleged offender will prefer entering into an undertaking. In the past, alleged offenders have tried to force ASIC and the ACCC into accepting an undertaking instead of pursuing court actions. This can be observed in the *Apollo* case. Apollo requested that the court force the ACCC into entering into an undertaking. Even though the court did not grant that wish, it was clear that it used a veiled threat that can affect the action of the regulators in the future.

Today, banned individuals will try to overturn ASIC's banning orders by going to the AAT and requesting an undertaking. In short, the decision of the AAT gives it the power to indirectly do what the legislator did not want it to do in the first place. Under the guise of checking a banning order, the AAT can today force ASIC into accepting undertakings the corporate regulator was not willing to grant in the beginning.

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[27] *Secretary, Department of Social Security v Hodgson* (1992) 37 FCR 32, 39.

12.2.4. In brief

Even though neither the courts nor the AAT should have a say in the regulators' decision to accept or not to accept an undertaking, in practice they do. The courts and the AAT appear in favor of the regulators entering into undertakings. They will even use coercion to force the regulatory agencies to accept such settlements. But this support for the use of enforceable undertakings by the judicial system is shadowed at a later stage if the undertaking is breached because the courts are not always keen on enforcing the undertakings.

12.3. Courts enforcing the undertakings

Section 93AA(4) of the *ASIC Act* notes that if the court is satisfied that the promisor has breached the terms of the undertaking, the court may make one or all of the following orders:[28]

- an order directing the promisor to comply with the terms of the undertaking;
- an order directing the alleged offender to transfer to scheme property an amount up to the amount of any financial benefit that the promisor has obtained directly or indirectly from the breach of the undertaking;
- any order the court considers appropriate directing the promisor to compensate any person who suffered loss or damage as a result of the breach; and
- any other order that the court considers appropriate.

Pursuant to this section, two elements have to be considered by the courts:

- whether there is a breach of the undertaking; and

[28] *ASIC Act 2001*(Cth), s 93AA (4).

- what order it will make.

Even though some of the cases that will be studied below relate to the use of enforceable undertaking by the ACCC, there is no reason not to apply the same reasoning to cases relating to ASIC's use of enforceable undertakings. The provisions that are relevant to enforceable undertakings in the *Trade Practices Act* and in the *ASIC Act* are quite similar.[29]

12.3.1. Breach of the undertaking

In *ACCC v Signature Security Group Pty Ltd,*[30] Stone J was asked to enforce an undertaking accepted by the ACCC. The first issue that attracted the court's attention was the following: was the undertaking properly given by the alleged offender and was it properly accepted by the ACCC? As a result, before even looking to see if there is a breach of the undertaking, the court will make sure that there was no coercion when the decision was made to enter into an undertaking. Once this is established, the court will look at the facts of the case to see if a breach has occurred.

12.3.1.1. Objective test

Usually, the court applies an objective test to determine whether the undertakings have been breached. In *ACCC v Signature Security Group Pty Ltd,*[31] the Federal Court pointed out that the intention of the promisor will not be taken into consideration when dealing with a breach of an enforceable undertaking. In the author's view, such a test is the appropriate one. If the undertaking could only be breached by the intentional conduct of the promisor, this would severely limit the efficacy of such undertakings (which presumably are designed to prevent the alleged contravening conduct in any form, be it deliberate or not). It seems that the courts are willing to declare a breach of an undertaking.[32]

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[29] *Trade Practices Act*, s 87B and *ASIC Act*, s 93A.
[30] *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 3 (2003) ATPR 41-908 (2003); 52 ATR 1.
[31] Ibid.
[32] Ibid [41].

However, the courts will not always satisfy themselves in checking if there has been a breach of the undertaking. They can also go back, before the undertaking was accepted, to determine whether the reasons for entering the undertaking were valid.

12.3.1.2. ASIC enforcing its undertakings in court

In ASIC's case, there has not been any real challenge against the enforceability of its undertakings. ASIC has only proceeded against four parties who agreed to enter into an undertaking. Two of these matters were in relation to unlicensed financial services providers. ASIC alleged that they breached their undertaking not to continue carrying on business. In both cases, injunctions were issued against the promisors.

In *ASIC v Robyn A C Cochrane,*[33] Ms Robyn did not contest ASIC's allegation that she breached her undertaking. She was absent during the court proceedings. Accordingly, no one challenged ASIC's allegations.

In *ASIC v Grubb*,[34] Mr Grubb stated that the circulated letters issued were not in breach of his undertaking to wind up and cease his business as a broker. The court rejected such a claim, pointing out that it was apparent that Mr Grubb breached his undertaking. As a consequence, the court issued an interlocutory injunction.

In a third matter, ASIC brought criminal proceedings against a Mr Seymour in relation to the operation of an unregistered managed investment scheme, where his company had previously given an enforceable undertaking promising to cease offering interests in the scheme.[35]

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[33] *Australian Securities and Investments Commission v Robyn A C Cochrane* [1999] NSWSC 814 (Unreported, Santow J, 9 August 1999).
[34] *Australian Securities and Investments Commission v Grubb* [1999] WASC 103 (Unreported, White J, 27 July 1999).
[35] Christine Parker, "Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings" (2004) 67(2) *Modern Law Review* 241.

In the fourth case, *ASIC v Sharetrend Software Pty Ltd,*[36] ASIC sought to enforce the undertaking accepted by Sharetrend Software Pty Ltd and its two directors in court. The undertaking required Sharetrend to cease doing any act in the marketing and sale of certain computer software that recommended users to buy or sell shares. In this case, ASIC sought to enforce not only the terms of the enforceable undertaking but also the provisions of the *Corporations Law*. The court thought that there was an important issue to be decided as to whether the defendant gave investment advice without a license.

Ultimately, the court decided that it would be more appropriate to hold a full trial on the substantive issues, rather than simply enforcing the undertaking. This case, in particular, shows that where the prosecutor does not prosecute the underlying breach, the court may in its own discretion consider the merits of the original undertaking. These cases suggest that it is likely that in any contested enforcement of an enforceable undertaking, the court will look at the alleged underlying breach before enforcing the undertaking either because the regulator chose to take enforcement action for the underlying breach, or in the court's own discretion.[37] The court will also make its own decision about which terms of the undertaking should be enforced and how.

12.3.2. Court deciding on enforcement of undertakings

Even when the courts acknowledge that an undertaking accepted by the regulator has been breached, they are not always willing to enforce it. In deciding if the terms of an undertaking should be enforced, the court looks at several elements to assess the validity of the undertaking:

- whether the undertakings are within the power of the court;
- whether the undertakings are appropriate;

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[36] *Australian Securities Investments Commission v Sharetrend Software Pty Ltd* [2000] VSC 472 (Unreported, Mandie J, 3 November 2000).
[37] Parker, above n 35, 242.

- whether the undertakings are practical; and

- whether the undertakings are "live undertakings".

These four points will be developed below.

12.3.2.1. Undertakings within power of the court

In the acceptance of an undertaking, the court must not exceed its power. Limitations on the court's jurisdiction or power to grant a final injunction must be observed in the acceptance of an 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. [38]

Accordingly, the parties by consent cannot confer power to 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. In the exercise of that power, the court is not merely giving effect to the wishes of the parties, it is exercising a public function and must have regard to the public interest doing so. 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.[39] As a result, ASIC should make sure that the court has the power to enforce the content of the undertaking.

12.3.2.2. Undertakings are appropriate

The undertakings should be appropriate orders. In *ACCC v Z Tek Computer Pty Ltd,*[40] it was pointed out that there should be a "nexus" between the alleged conduct and the injunction granted by the court.[41] 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

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[38] *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc*, above n 2, [3].
[39] Ibid.
[40] *Australian Competition and Consumer Commission v Z Tek Computer Pty Ltd* (1997) 148 ALR 339.
[41] Ibid 343.

to the alleged breach, then the court will not enforce the undertaking. For instance, if an injunction in relation to the implementation of a compliance program covering all the provisions of the *Corporations Act* is sought, then the court will not enforce it because it is remote from the contravention. It will be beyond the power of the court to issue such a order. Such an order will still be inappropriate even if it is strictly within the power of the court. As a result, there should always be a connection between the alleged offence and the undertaking accepted by the regulator.[42]

12.3.2.3. Undertakings are practical

The undertakings should be practical. Even if an undertaking is not beyond the power of the court, and is appropriate, the court might still refuse to enforce it. The undertaking should be easily followed. By that, this author means that the undertakings must be formulated with precision so that they are capable of being obeyed. Undertakings which involve vague evaluative judgments or insignificant debates on their interpretation are not likely to be given the court's sanction.[43]

This problem appears, for example, when there is an agreement between the regulator and the promisor that the promisor will implement a compliance program. As mentioned in Chapter 9, if the requirement of a program that complies with the Australian standard for compliance programs imposes standards which are aspirational in their expression, and not readily measured in application, then the court will not enforce the undertaking.[44]

12.3.2.4. Undertakings that are still "live undertakings"

Finally, the court needs to ensure that the undertakings are "still live". If an undertaking is breached, the court will not automatically order its implementation. Where the controversy between the parties has been resolved by the court and where the effect of the undertaking would impose obligations in excess of those imposed by the

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[42] *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc*, above n 2, [25].
[43] Ibid [28].
[44] Ibid.

Corporations Act, then even if the undertaking has been breached, the court will refuse to enforce it.[45] In the end, the court has the discretion to decide whether an undertaking will be enforced or not. All is in the court's hands. This is apparent from the regulators' behavior when dealing with enforceable undertakings. Today ASIC and even the ACCC are very cautious when accepting an undertaking.

12.3.3. Caution on the part of regulators

One of the reasons for the introduction of enforceable undertakings in our system was to legitimize the use of such settlements. Before 1993, the ACCC used administrative resolutions. But there was fear that if such resolutions were breached by the alleged offender, they could not be enforced in court. Such problems were to be remedied with the introduction of enforceable undertakings. But this has not proved the case.[46] As shown above, if an undertaking is breached, it is up to the court to decide whether to follow the terms of the undertaking. As a result, the regulators are now formulating their undertakings with more caution.

12.3.3.1. ASIC fears reflected in certain clauses

ASIC sometimes fears that if the court finds that some of the clauses of the undertaking are invalid, it might not be willing to enforce the undertaking. For this reason, it sometimes includes clauses such as the following in its undertakings: [47]

> *"If a clause in this undertaking is invalid, illegal or unenforceable, then that clause to the extent of the invalidity, illegality or unenforceability must be ignored in the interpretation of this undertaking. All other clauses of this undertaking remain in full force and effect."*

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[45] *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 375 (2003) ATPR 41-942, [5].
[46] Australia, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2405 (Hon Michael Duffy, Trade Practices Legislation Amendments Bill 1992, Second Reading Speech).
[47] ASIC, Enforceable Undertaking: Ashley James Brandon, Document No 017029019 (18 December 2001).

Such a clause permits the courts, in the event they find that a clause in the undertaking is invalid, illegal or unenforceable, to ignore it and enforce the undertaking. Another action some regulators take is to obtain a court order with the undertaking.

12.3.3.2. Enforcing the undertaking by asking for extra guarantees

The ACCC today has scaled down its use of enforceable undertakings. In serious cases, the ACCC is more likely to seek a consent order than an enforceable undertaking to settle a matter. An enforceable undertaking in these instances will more likely be used to seek a supplementary remedy that cannot easily be obtained via court order, such as the implementation and monitoring of a compliance program.[48]

In interviews conducted by Parker, a number of interviewees commented on the ACCC's unwillingness to use enforceable undertakings in certain cases. Some noted that in certain instances, the ACCC will negotiate the terms of an undertaking with the alleged offender, and will follow this with a request to the court to note the undertaking and include it in a consent order. The reason behind this is that the ACCC wants to make sure that in case of breach the court has already acknowledge the validity of the undertaking and as a result of that will directly enforce the undertaking without applying the test that is mentioned in para 12.3.2.[49] Accordingly, the ACCC fears that in case of breach of the undertaking the court will not give it the injunction it seeks and this will leave the undertaking with no effect whatsoever. This in turn will directly affect the way the regulators treat this penalty. This reason might be behind the lowering in the number of undertakings accepted by ASIC. The United States system seems to offer a solution to this dilemma.

12.4. United States experience: Dodging the problem

In the United States, a consent decree is somewhat similar to the Australian enforceable undertakings. As noted in Chapter 4, one of the major differences between Australia and the US is that the breach of consent decree will lead directly to contempt of court. The

[48] Parker, above n 35, 218
[49] Ibid, 232.

regulator will not have to enforce the decree in court.[50] The *Tunney Act* expressly observes that the courts will consider the competitiveness impact of the consent decree, as well as its impact on the public generally and individuals alleging specific injury from the claimed contravention. The court must look at the overall picture to ensure that the consent decree is in the public interest. As a consequence, before entering into any consent decree, the regulator should obtain the permission of the court. But this system has been criticized in the United States.[51]

12.5. Possible criticism of such a system

One of the criticisms of the consent decree in the US is that courts will only "rubber stamp" the request of the regulators. It was pointed out that the court might be tempted to just agree with the request of the regulators without looking closely at the terms of the consent decree. This was the reason why the parliament requested that the courts should determine that the entry into a consent decree is in the public interest. Having laid down this rule, the congress sadly failed to articulate any guidelines as to what constituted the public interest, except in the most general way.[52]

As a consequence, the courts were left to develop their own standards and they have formulated a non-statutory indicator that was based on the public interest that the settlement would bring. The courts will usually look at the competitiveness impact of the decree and at its impact on third parties.[53] Accordingly, there was a hope that this system will escape the problem of rubber stamping. However, a few years ago, it was clear that this was not really the case. The consent decrees have rarely been disapproved by the courts and recent decisions interpreting the *Tunney Act* have been criticized for prohibiting intervention by the court except in the most extreme circumstances.[54]

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[50] ALRC, n 1, 100.
[51] American Bar Association (ABA), *Antitrust Consent Decree Manual: Section of Antitrust Law* (ABA, 1979) 8. This is not the case in Australia.
[52] Ibid.
[53] Ibid.
[54] Hogan and Hartson LLP, *Congress Completes Action on Important Changes to US Antitrust Laws* (2 June 2004) <http://affi.org/HHAntitrust.pdf> at 31 January 2005.

In particular, a 1995 District Court Circuit decision suggested that a judge was obligated to accept an antitrust consent decree unless it "appears to make a mockery of judicial power".[55] The decision also held that a reviewing court's function is:[56]

> *"not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the reaches of the public interest."*

In light of these decisions, proposals to reform the *Tunney Act* were introduced in the United States Senate in 2003 to bolster the courts' ability to scrutinize antitrust consent decrees. This legislation would have prohibited a court from entering a proposed consent judgment:[57]

> *"unless it finds that there is reasonable belief, based on substantial evidence and reasoned analysis, to support [the Department of Justice's] conclusion that the consent judgment is in the public interest."*

However, the American Bar Association (ABA) Antitrust Section, and some in the business community, opposed this provision because it would have substantially undermined the ability of parties to enter into binding consent decrees with the government. The ABA Antitrust Section was most concerned that the "substantial evidence" language could have been interpreted to require courts to engage in a lengthy review of each proposed decree, including evidentiary hearings. If such reviews became the norm, parties would have a significant disincentive to enter into settlements with the DOJ because the potential delay, cost and uncertainty of litigation would be offset by concerns about the potential delay, cost and uncertainty of a *Tunney Act* proceeding. The reason for entering into the consent decree would no longer exist. In response to these criticisms, the Senate deleted this provision from the Act.[58]

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[55] *United States v Microsoft*, 56 F 3d 1448, 1462 (DC Cir 1995).
[56] Ibid.
[57] Hogan and Hartson LLP, above n 52.
[58] Ibid.

The final *Tunney Act* amendments included a few provisions that are likely to have little impact on the use of consent decrees. It was stated that the purpose of both the *Tunney Act* and these amendments is to "ensure" that antitrust consent judgments are "in the public interest", and a repudiation of the District Court Circuit's language stating that the role of the court was limited to "determining whether entry of ... consent judgments would 'make a mockery of the judicial function'." As a result, this provision will likely have little, if any, practical effect on the ability of parties to enter into consent decree with the DOJ. It is hoped though, that the courts will scrutinize the consent decrees before agreeing to them.[59] But are Australian courts willing to grant the request of the regulators to acknowledge the undertakings?

12.6. Regulators attempts to have undertakings accepted in court

As noted before, in an attempt to dispel the doubt about the enforceability of enforceable undertakings, the Australian regulators, ASIC and the ACCC have tried to get the courts to acknowledge the validity of the undertaking before the occurrence of any breach. But the courts have not always been accommodating in this regard.[60]

The courts in Australia refuse to rubber stamps orders given by regulators, even if the parties agree to it. They will not consider the acceptance of the alleged offender to the orders made by ASIC, for example, as a reason to justify accepting the order. The judge will examine the facts and only then make such an order.[61]

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[59] Ibid.

[60] In *NW Frozen Foods v Australian and Consumer Commission* (1996) 71 FCR 285: The Federal Court noted that it will not depart from an agreement between the regulator and NW Frozen Foods merely because it was disposed to select another remedy. But as it will be noted in the next paragraph, the court will not be willing to rubber stamp an undertaking.

[61] *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia*, above n 3, [3].

In *ACCC v Woolworths Pty Ltd*,[62] it was submitted that the court should not be concerned with the terms of the undertakings when asked to note it, because the undertaking is given to the ACCC not to the court.

Mansfield J rejected such reasoning. He 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. Three reasons underlined his view:

- The court is empowered to enforce the undertaking in case of breach. If the undertaking is beyond the ACCC's power the court will never make any order to enforce it. [63]

- The court, when noting an undertaking, should not generally take an entirely passive attitude. The court may accept undertakings only when it has the power to do so.[64]

- When noting the undertaking, the court will check if the content of the undertaking falls within the regulator's powers.[65]

This decision was confirmed in *ASIC v Tower Australia Ltd.*[66] In that case, ASIC alleged Tower had engaged in misleading and deceptive conduct by issuing annual statements and withdrawal letters to policy holders and beneficiaries, some of which misstated the policy holders' and beneficiaries' entitlements to redemption or withdrawal benefits.[67]

Both parties submitted consent orders that provided for the court to note that ASIC had accepted from Tower a written undertaking in accordance with s 93AA of the *ASIC Act.*

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[62] *Australian Competition and Consumer Commission v Woolworths Pty Ltd* (2003) 198 ALR 417.
[63] Ibid [42].
[64] Ibid [46].
[65] Ibid [50].
[66] *Australian Securities and Investments Commission v Tower Australia Ltd* [2003] FCA 660 (Unreported, Sackville J, 4 July 2003).
[67] Ibid.

The test applied here was the same as the one applied by Mansfield J. The court, when deciding whether to note proffered undertakings, will look at whether the undertakings fall in or outside the ACCC's powers. In short, the court will check whether the undertaking clearly is in connection with the ACCC's performance of its powers and functions.[68] This point is very important to acknowledge because if the courts will automatically accept the undertakings than at that time the penalty of enforceable undertakings may be seen by the courts as being unconstitutional and invalid. In *Brandy v HREOC,*[69] the High Court held that the Human Rights and Equal Opportunity Commission (HREOC) cannot make binding determinations that have the effect of orders made by the court. Such a provision is invalid because it attempts to invest in the HREOC judicial powers and this is contrary to s 71 of the *Commonwealth Constitution.*[70] Accordingly ASIC and the ACCC cannot directly enforce their undertakings without the court's approval. If that ever take place the penalty of enforceable undertaking will become unconstitutional.

12.7. Summary

The court encourages the regulators to enter into enforceable undertakings. As was apparent from the *Monza* case, if an undertaking can be used to deal with an offence, the court will not welcome it if the regulator does not take such action. The court made it clear that its resources should be left for more important matters. But on the other hand, the court will not enforce an undertaking except after looking at several matters, such as its appropriateness and practicability. Consequently, the regulators should formulate the undertakings in a way that will ensure their acceptance by the court.

This can be difficult to achieve, and even open ways for the promisor to challenge the undertaking in the future. Even when the court gives its blessing to an undertaking, this alone does not imply that the court will be willing to enforce the enforceable undertaking

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[68] Ibid.
[69] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1.
[70] Ibid.

if the promisor does not abide by its terms. A system like the one in the United States might be desirable, provided the court does not become a rubber stamp for the regulators.

The regulators know that the courts encourage entering into enforceable undertakings but they also fear that such undertakings will not be supported by the courts in the event of a challenge. This dilemma may have some negative repercussions on the use of enforceable undertakings causing regulators to lose confidence in the penalty and this dilemma may be responsible for the decline in use of the undertakings. If the regulator looses confidence in the remedy of enforceable undertakings, no amount of encouragement by the courts to use enforceable undertakings will help. Clearer guidance by the legislator is needed to address this problem.

Chapter 13 Conclusion

13.1. Aim of this thesis:

Enforceable undertaking is an administrative remedy available to ASIC. It is a promise enforceable in court by which an alleged offender promises the regulator to do or not to do certain actions. The result achieved by an enforceable undertaking reflects the compromise that is agreed upon by the parties involved.[1]

Enforceable undertakings are widely used in the regulatory community at both State and federal levels because they allow the regulators to reach plausible solutions to alleged offences without spending the resources of their agencies or the resources of the courts. Enforceable undertakings provide a quicker, and cheaper, remedy than court proceedings.[2] The success of this administrative penalty as applied by ASIC has been such that there seems to be a desire to allow other regulators to use this remedy.[3]

For this reason, this thesis has concentrated on looking at the use of enforceable undertakings by ASIC. The study provides the reader with some idea as to how ASIC is applying this sanction. This is accomplished by observing the goals behind enforceable undertakings, the way ASIC treats the promisors, the method by which ASIC monitors the undertakings, and the reaction of the courts toward this remedy.

13.2. Instrumental goals of enforceable undertakings: In theory

The thesis noted the recommendations of the ALRC that administrative actions should achieve one or more of the following purposes:[4]

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[1] ALRC, *Securing Compliance Discussion Paper: Civil and Administrative Penalties in Australian Federal Regulation* (Discussion Paper 65, ALRC, April 2002), 100-101.
[2] ASIC, *Annual Report 1998-1999*, 12.
[3] Look at Chapter 4 of this thesis.
[4] ALRC, Report n 68, *Compliance with the Trade Practices Act 1974* (1994, Australian Law Reform Submission, Sydney), 38.

- Prevention of similar offences from occurring again.

- Protection of the public by stopping the offending conduct.

- Corrective action.

Accordingly, Chapters 6 to 9 of this thesis discussed the goals behind the requirements behind enforceable undertakings to see if these purposes match the ones listed above. This was achieved by studying the content of the undertakings and analyzing the goals behind the most common promises.

The promises that were studied in this thesis are:

- putting a compliance program in place;

- agreeing to a voluntary self-ban;

- fulfilling certain education requirements;

- compensating affected parties;

- undertaking community service; and

- disclosing the undertaking to a certain category of people.

The author concentrated on these promises because they are the most common requirements imposed on promisors entering into an undertaking. This is illustrated in Figure 13.1.

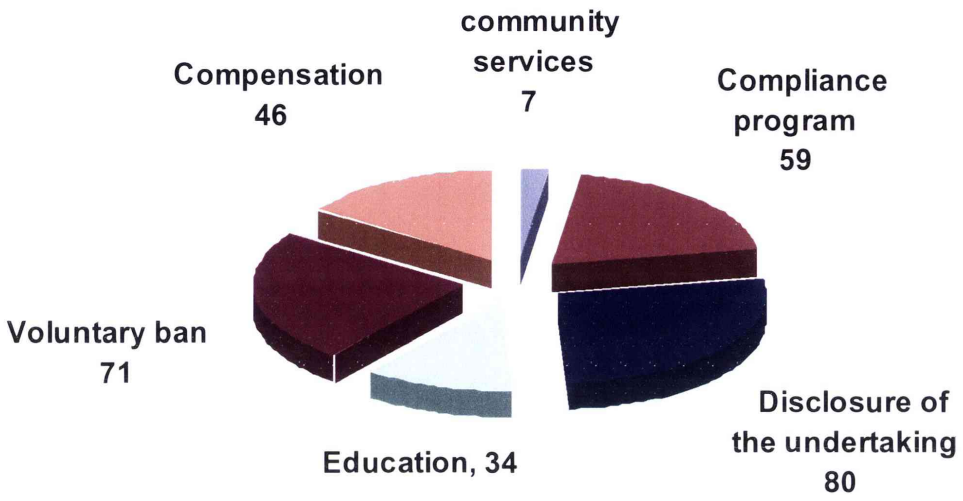


Figure 13.1: The frequency of the use of the promises included in enforceable undertakings from 1998 to 2004

According to Figure 6.2,[5] these promises can overlap. When comparing the two figures (6.2 and 13.1), it can be said that each undertaking accepted by ASIC contains at least one of these promises. Studying these promises permitted the detection of the purpose behind each requirement which, in turn, allowed a comparison to be made between those purposes and the purposes recommended by the ALRC. Chapters 7, 8 and 9 determined the purpose of the different promises accepted by ASIC and compared those purposes with the ones recommended by the ALRC. These purposes are summarized below.

13.2.1. Voluntary ban and education

As noted in Chapter 7, a promisor may sometimes agree to a voluntary ban in the undertaking. Generally the purpose of a voluntary ban is to protect the public. In *Rich v*

[5] Figure 6.2 appears in Chapter 6.

ASIC[6], McHugh J noted that disqualification are punitive in nature.[7] But a look at the content of the undertakings that contained a voluntary ban led to the following conclusions:

- When the promisor has agreed to a permanent voluntary ban, the purpose of the undertaking is to protect the public. If the promisor can apply for a variation of the terms of the undertakings if his or her circumstances change, the purpose behind such a requirement will not be punitive in nature.

- When the promisor has agreed to a voluntary ban for a certain period of time, the purpose of the undertaking is usually the protection of the public. This purpose is confirmed when such a requirement is accompanied by a condition for lifting of the ban. Usually, ASIC will require the promisor to complete a course to ensure that the promisor is fit to manage a company or to deal with securities, financial services and/or investment advice. The purpose behind the education requirement is to prevent the occurrence of similar breaches in the future.

- In certain instances, the promisor may agree to a voluntary ban for a fixed period of time only, with no education requirement needing to be fulfilled. These types of undertakings might be punitive in nature when applying the reasoning of McHugh J.

Accordingly, most undertakings that contain a voluntary ban requirement are protective in nature. When they include an education requirement, the purpose will be the protection of the public. On some occasions, the purpose behind a voluntary ban may be punitive in nature. Figure 13.2 illustrates the purposes of those undertakings containing a voluntary ban.

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[6] *Rich v Australian Securities and Investments Commission*, (2004) ACSR 242; [2004] HCA 42, [42].
[7] The arguments that led McHugh J to reach such a conclusion were discussed in Chapter 7.

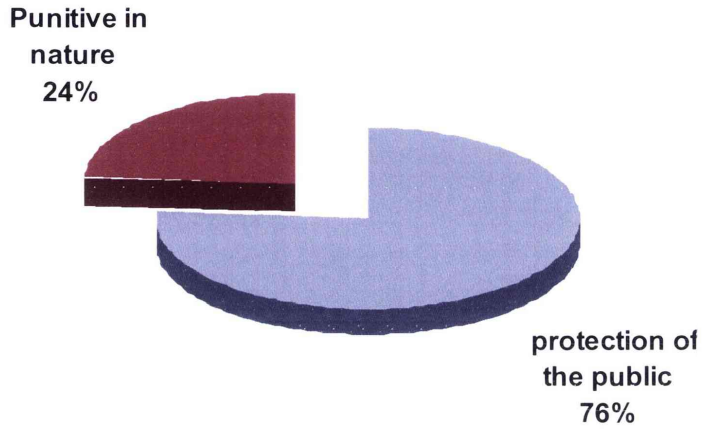


Figure 13.2: Purposes of the voluntary ban in undertakings accepted from 1998 to 2004

As Figure 13.2 shows, 24% of the undertakings that contained voluntary bans can be considered as punitive in nature.[8] These voluntary bans are fixed bans with no education requirement. Accordingly, when ASIC agrees to a voluntary ban for a fixed period, it needs to include in the undertaking an education requirement to ensure that the purpose of the undertaking complies with the recommendation of the ALRC report.

13.2.2. Disclosure of the undertaking and compensation

Chapter 8 studied the promises that require the promisor to disclosure the undertaking to the public and to compensate affected parties. This disclosure can be made in several ways, illustrated in Figure 13.3.

[8] This percentage (24%) is different from the one in Chapter 7 because it is in relation to all undertaking involving voluntary ban be it permanent or fixed ban. While the percentage in Chapter 7 was only in relation to fixed bans only.

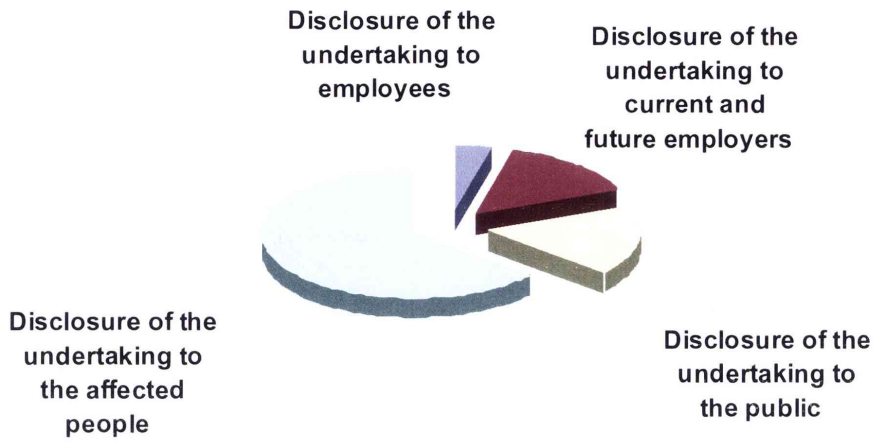


Figure 13.3: The disclosure of the undertaking to certain people

As can be seen in Figure 13.3, disclosure of the undertaking to the general public and disclosure to the affected people are the most common type of disclosure required. Each has the same purpose: to correct the actions of the promisors. On the other hand, the goal behind disclosure of the undertaking to the employees of the promisor relates to the prevention of future breaches. As for disclosure of the undertaking to current and future employers, the purpose is the protection of the public. But such a requirement can easily stigmatize the promisor. Accordingly, ASIC needs to be careful when it requires the promisor to disclose the undertaking to a certain category of people.

The purpose behind the compensation requirement is to correct the actions of the promisor. It requires the alleged offender to compensate the parties that are affected by the breach. Since different people can be affected by the breach, the introduction of the concept of restorative justice to enforceable undertakings is to be encouraged. Furthermore, a system of disclosure similar to the one used in the United States is desirable.

13.2.3. Compliance programs and community services

As for Chapter 9, the purpose behind the inclusion of a compliance program requirement in the undertaking is to prevent future breaches from occurring. Some undertakings require the promisor to implement a compliance program specific to the alleged breach. In such instances, the purpose of the undertaking is to prevent similar breaches from occurring in the future. In other undertakings, ASIC requires the promisor to put in place a general compensation program. Even though the goal behind such undertaking is still the prevention of future breaches, the generality of the requirement can cause some problems because the courts may not be willing to enforce this requirement if the undertaking is breached.

As for community services requirement, these can have punitive consequences. Accordingly, ASIC needs to be careful when accepting an undertaking that contains a community service requirement. To this author's knowledge, the undertakings that include a community service requirement have the goal of preventing future alleged breaches from happening.

13.2.4. Summary

With some reservations, mentioned above, it can be said that the purposes of the promises present in the undertakings accepted by ASIC are so far compatible with the purposes recommended by the ALRC. The purposes of the promises range from protection of the public to corrective actions. In short, they are in accordance with the recommendation of the ALRC report.[9]

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[9] ALRC, above n 1, 38.

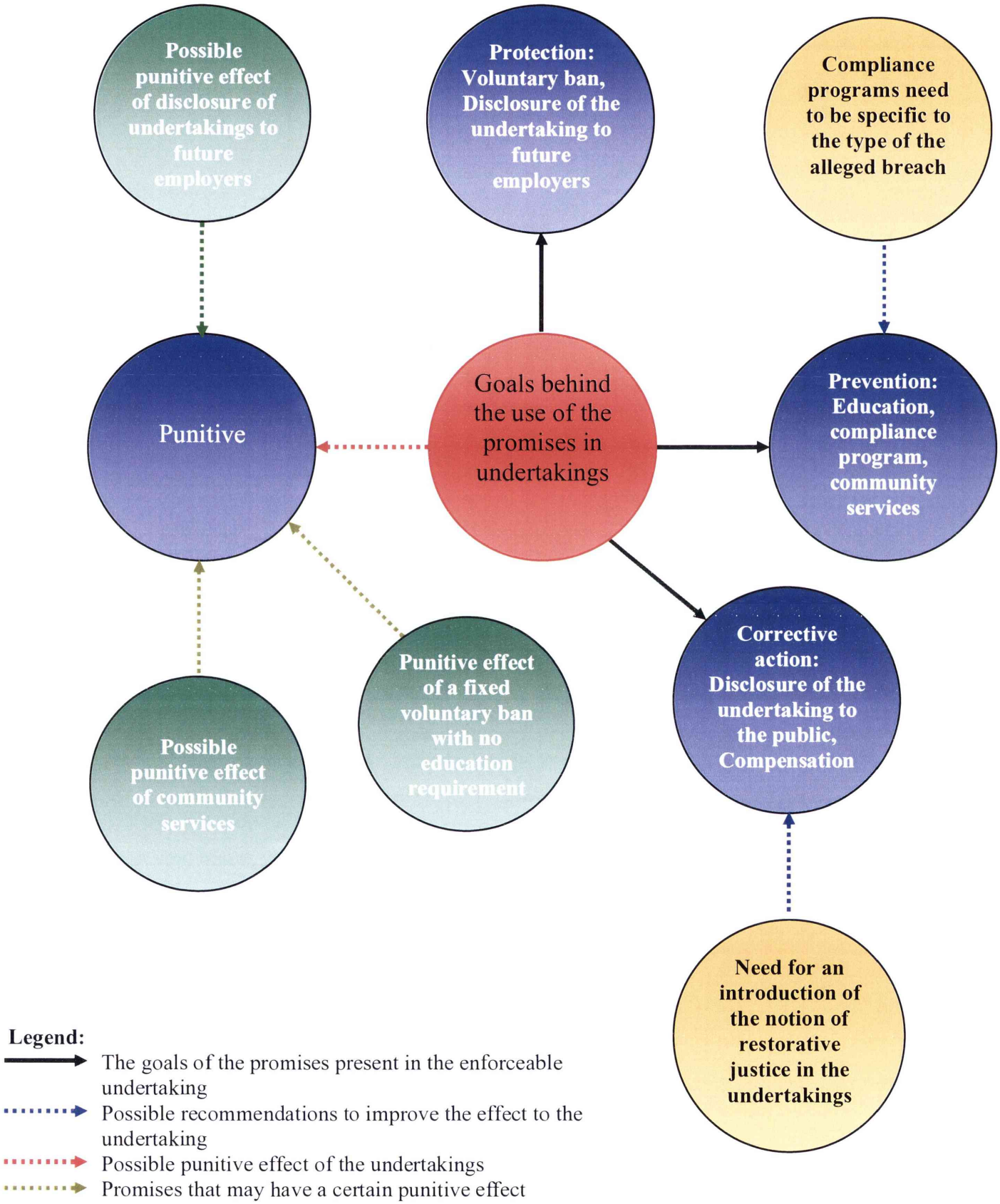


Figure 13.4 Goals behind the promises agreed upon in the undertaking

Figure 13.4 reviews the concepts that were discussed in Chapters 7, 8 and 9. It summarizes the goals behind the promises accepted in an enforceable undertaking. It also reflects the situation where the undertaking may not comply with the goals stated in the ALRC report. This will lead to the following consequence: if the court finds that the goal behind the undertaking is punitive the undertaking will not be enforceable and will be worthless. Accordingly, ASIC needs to be careful when it implements certain promises in the undertaking. Figure 13.4 also indicates certain improvements that could be introduced to the system of enforceable undertakings.

13.3. Fairness, stability and consistency:

The fairness, stability and consistency of the undertakings are essential because they will ensure the faith of the business community in the fairness of the undertakings. If ASIC acts unreasonably, the business community reacts defensively and will be full of resentment. It will refuse to cooperate with the regulator.[10]

The thesis found that the various enforceable undertakings accepted by ASIC seem to be similar in content. To this extent, the undertakings appear fair, stable and consistent. The only potential issue is that this similarity itself may lead to some problems of cooperation in the future, since the financial capacity of each promisor is different. Implementing the undertakings can be quite expensive for a business. A small business may suffer financial loss when implementing the undertaking whereas such a financial loss may not affect a large business.

13.4. Monitoring of the enforceable undertakings

It is essential that the monitoring of compliance with the undertaking is effective because if ASIC discovers that an undertaking has been breached it will have to enforce it in court. If the monitoring system is not reliable, ASIC will not know whether the promisor has complied with the terms of the undertaking. Accordingly, the promisor could breach the undertaking and not suffer any consequences, rendering this penalty ineffective.

[10] Check Figure 2.2 in Literature review.

ASIC imposes the following different requirements to monitor the promisor's compliance with an undertaking:

- directors must ensuring the compliance of their company with undertakings and report to ASIC in case of breach;

- companies must report to ASIC on their compliance with the undertaking and advise ASIC in case of breach;

- Individuals must provide a statutory declaration stating that they complied with the undertaking;

- independent experts reports to ASIC on compliance with the undertakings and advise the regulator of any breach; and

- ASIC, if it suspects a breach, will conduct its own investigation into the matter.

This thesis concluded that ASIC's monitoring system is not as good as it could be. Leaving the monitoring to outsiders might be cheaper for the regulator, but it is not always effective. ASIC does not currently issue any kind of guideline for independent experts responsible for checking compliance with undertakings.

13.5. Reaction of courts to enforceable undertakings:

This thesis studied the reaction of the courts to enforceable undertakings. If an undertaking has not been complied with, ASIC may enforce it in court.[11] Accordingly, the view of the courts toward undertakings is very important.

On one hand, in *ACCC v Monza Imports Pty Ltd,*[12] the Federal Court observed that if the dispute could be resolved by an undertaking, it would not welcome a failure on the part

[11] *ASIC Act*, ss 93A(3) and (4). For more detail, look at Chapter 11.

of the regulator to take such action. It was apparent from this case that the resources of the court should be left for more important matters. The court seemed to encourage entering into undertakings. Carr J made the following remark in *ACCC v Monza Imports Pty Ltd*:

> *"I asked counsel for the applicant 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...*[13] *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."*[14]

But on the other hand, the court will not enforce an undertaking except after looking at several matters like the appropriateness and practicability of the undertaking. Accordingly, the regulator will have to prepare the undertakings in a way that insures their acceptance by the court.

13.6. Conclusion

In brief, this thesis found that enforceable undertakings are being used appropriately by ASIC. With some reservations, the goals behind entering into an undertaking are the proper ones of protection of the public, prevention of similar alleged breaches from occurring in the future and correction of the actions of the promisor.

ASIC also treats all promisors in the same way. There is no distinction in the treatment of promisors in different categories. This ensures the stability of the undertakings. But if

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[12] *Australian Competition and Consumer Commission v Monza Imports Pty Ltd* [2001] FCA 1455 (2001) ATPR 41.
[13] Ibid [3].
[14] Ibid [14].

ASIC is not careful, this similarity of treatment may cause some problems due to the different financial capacities of each promisor. What might appear as a reasonable remedy for one person, might have disastrous results for another.

The monitoring system that ensures compliance with the undertaking is not a perfect one. The effectiveness of the system of enforceable undertaking depends on the integrity of the promisor. This thesis found that the monitoring system of the undertaking is flawed and need of improvement.

Finally, the thesis found that the courts appear to be encouraging the use of enforceable undertakings provided their content, appropriateness and practicability are found suitable. As a result, ASIC must formulate its undertakings in a way that ensures their acceptance by the courts.

In the end, it can be said that enforceable undertakings are a new type of remedy that will help the regulators to ensure that the regulated community will fix its weakness (for example by putting into place a compliance program) and prevent the occurrence of future breaches. It is a move from traditional sanctions such as imprisonment, disqualification... toward a system that tries to put in place a voluntary compliance of the regulated community with the spirit of the law. This sanction takes into consideration the application of enforcement pyramid and it moves away from excessive formalism and legalism by giving the regulator the power to think "outside the square". A few changes need to be made though to perfect the system of undertakings.

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