

JUSTICE TO OUTSIDERS THROUGH UNDERTAKINGS

MARINA NEHME*

An enforceable undertaking is a promise enforceable in court. In it, the alleged offender, known as the promisor, promises the regulator (for the purpose of this article the Australian Securities and Investments Commission) to do or not to do certain actions. The result achieved through an enforceable undertaking reflects the compromise that is reached by the parties involved. However, the alleged breach that has led to an enforceable undertaking may have affected a number of people who are not necessarily involved in the negotiation of the undertaking. Accordingly, this paper considers any impact that an enforceable undertaking may have on third parties.

I INTRODUCTION

The Australian Securities and Investments Commission (ASIC) regulates companies and the securities and futures industries in Australia. The *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*) also contains provisions for monitoring and regulating financial services.¹ Further, where an ASIC's investigation reveals that a contravention of the law has occurred, ASIC, as the corporate regulator, has an arsenal of sanctions at its disposal and may commence criminal, civil or administrative proceedings against the errant people.

This article focuses specifically on one of the administrative sanctions that is available to ASIC: enforceable undertaking. The reason behind this is that ASIC has a number of administrative sanctions at its disposal to deal with breaches and alleged breaches of the law. However most of these sanctions, such as banning orders, suspension and revocation of licence and infringement notices,² aim to protect the public. While such an outcome is important, such sanctions do not necessarily provide compensation to

* LLB, LLM (UNSW), Master by Research (UTS), Lecturer in Corporate Law at University of Western Sydney. This paper is part of the research I am conducting in relation to my PhD. I would like to thank Professor Michael Adams for the useful feedback he gave me. Email: m.nehme@uws.edu.au.

¹ M Adams and J 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 Australian Law Reform Commission (ALRC), *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 78-9; the ALRC considers some of this sanction as administrative sanctions and others as quasi administrative sanctions. For the purpose of this article, these sanctions and the sanction of enforceable undertakings will be considered as administrative sanction.

victims of the breach. They mostly concentrate around stopping the conduct of the offender³ or fining the alleged offender.⁴

However, in 1998, ASIC was granted the power to enter into an enforceable undertaking when it believed that a breach of the law had taken place.⁵ This sanction allowed the regulator to provide remedies to people that may have been affected by the alleged breach. Sections 93A and 93AA of the *ASIC Act* regulate this sanction. Both sections are similar in content. However, s 93A only deals with enforceable undertakings entered into by ASIC with responsible entities of registered schemes, while s 93AA is more general in nature. Under the later provision, ASIC may enter into an enforceable undertaking with any person in case of an alleged breach of the law. Section 93AA(1) states that ‘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.’⁶

Accordingly, an enforceable undertaking can be described as a promise enforceable in court.⁷ It takes the form of a settlement in which the alleged offender (who may be called ‘the promisor’) and the regulator (for the purposes of this paper, ASIC) start their negotiation in relation to the alleged breach. An enforceable undertaking may be seen as a form of alternative dispute resolution.⁸

³ This is the case with banning order and suspension and revocation of license. *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); ASIC v Adler* (2002) 42 ACSR 80 [56] (iv); *ibid* 396.

⁴ This is the case with infringement notices; M Nehme, M Hyland and M Adams, ‘Enforcement of Continuous Disclosure: The Use of Infringement Notice and Alternative Sanctions’ (2007) 21(2) *Australian Journal of Corporate Law* 112.

⁵ The sanction of enforceable undertaking was first introduced to the Australian Competition and Consumer Commission (ACCC) in 1993. The relevant provision that deals with this remedy is s 87B of the *Trade Practices Act 1974* (Cth) (*Trade Practices Act*).

⁶ The provisions of s 87B of the *Trade Practices Act* and of ss 93A and 93AA of the *ASIC Act* are drafted in very similar terms. Accordingly, there are a number of similarities in the ACCC’s and ASIC’s principles and policies in relation to enforceable undertakings. These similarities have been recognised by the courts when dealing with enforceable undertakings accepted by the ACCC and ASIC. Accordingly, judgements in relation to ss 93A and 93AA of the *ASIC Act* and s 87B of the *Trade Practices Act* are regularly cross-referenced. ACCC, *Section 87B of the Trade Practices Act* (ACCC, 1999); ACCC, *Corporate Trade Practices Compliance Programs* (ACCC, 2005); ACCC, *Merger Guidelines* (ACCC, 1999); ASIC, *Regulatory Guide 100, Enforceable Undertakings* (ASIC, March, 2007).

⁷ *ASIC Act* ss 93AA, 93A.

⁸ C Parker, ‘Restorative Justice in the Business Regulation? The Australian Competition and Consumer Commissions’ Use of Enforceable Undertakings’ (2004) 67 *The Modern Law Review* 209, 213.

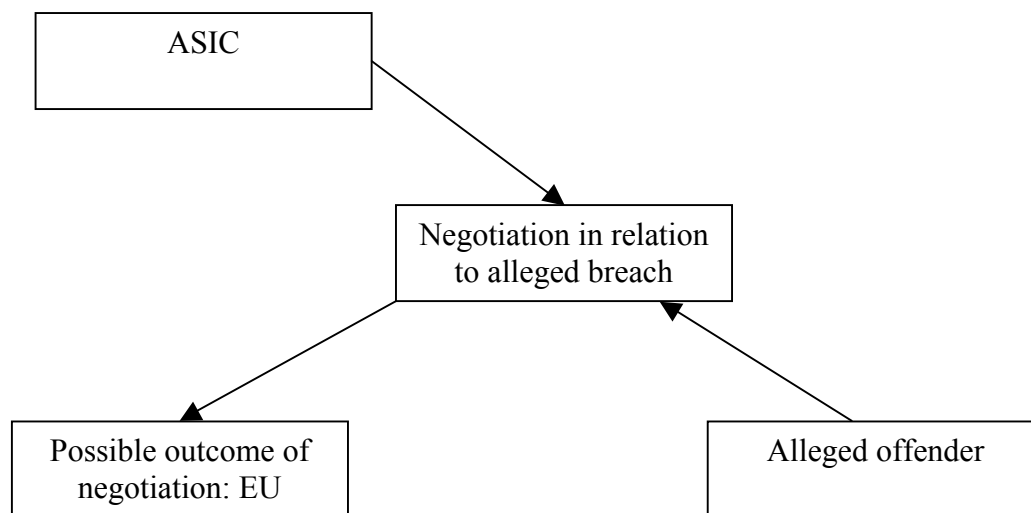


Diagram 1: Start of negotiation that may lead to an enforceable undertaking⁹

As noted in diagram 1, there is direct contact between the regulator and the alleged offender in order to address suspected breaches of the law and to reach a settlement in relation to this matter. Such negotiation would usually be initiated by either the corporate regulator or the alleged offender. However, it is important to acknowledge that not every alleged breach leads to an enforceable undertaking. In the past, ASIC has rejected a number of proposed enforceable undertakings because it viewed that the sanction in question was inappropriate to deal with the magnitude of the breach. For instance, more recently, ASIC refused to accept the enforceable undertaking proposed by Mr Duncan Howarth in relation to his breaches of the financial services laws because such an undertaking would not provide any protection to the public.¹⁰

Currently, ASIC accepts an enforceable undertaking if it believes that the undertaking would provide a better outcome than other sanctions.¹¹ Such an outcome is possible due to the fact that the provisions related to an enforceable undertaking in the ASIC Act are very broad. For instance, s 93AA(1) observes that ASIC can enter into any undertaking that is ‘in connection with a matter in relation to which ASIC has a function or power under this Act.’ In *Australian Securities and Investments Commission v Edwards*,¹² the court pointed out the ‘wide import’ of the words ‘in connection with’ that are present in s 93AA of the *ASIC Act*.¹³ Accordingly, such power to accept enforceable undertakings can be more comprehensive than that of the court, which is subject to certain restrictions.¹⁴

This provides ASIC with the opportunity to tailor the enforceable undertaking to the alleged breach and to take into account and respond to third party’s needs in the

⁹ The EU in the diagram stands for enforceable undertaking.

¹⁰ *Re Duncan Howarth v Australian Securities and Investments Commission* [2008] AATA 278.

¹¹ ASIC, *Regulatory Guide 100*, above n 6, 4.

¹² *Australian Securities and Investments Commission v Edwards* [2004] NSWSC 1044.

¹³ *Ibid* [16].

¹⁴ *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd (t/as Mac’s Liquor)* (2003) 198 ALR 417, [55].

undertaking. This is especially important due to the fact that only the regulator and the alleged offender are involved in the enforceable undertaking.¹⁵ However more people may be affected by the alleged conduct of the promisor as illustrated in diagram 2.

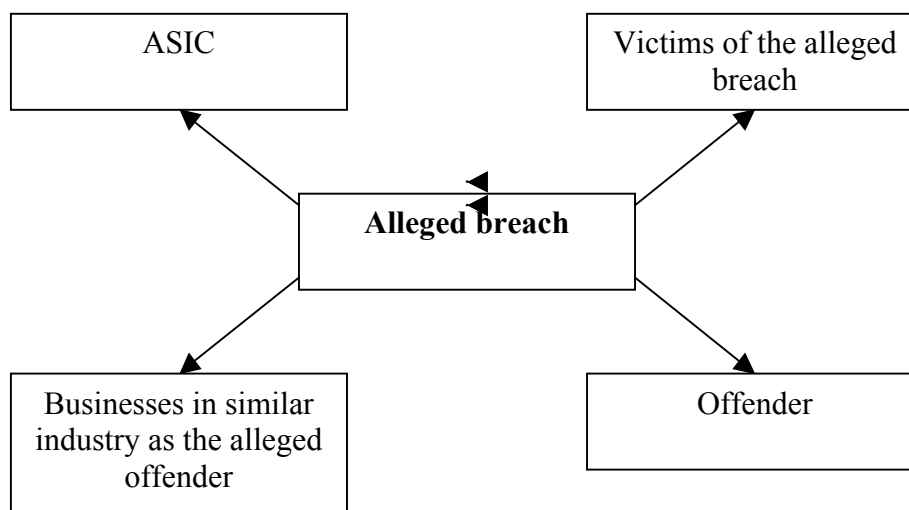


Diagram 2: People affected by an alleged breach that may lead to an enforceable undertaking

As a consequence, a conduct dealing with, for example, an alleged breach of the fundraising provisions may cause a financial loss to investors. In such a scenario, ASIC may accept an enforceable undertaking to deal with such an alleged conduct. Due to its broad import, an enforceable undertaking may provide its own brand of justice by addressing the alleged breach and protecting the interest of investors. This outcome may be achieved even though the statute does not mention that the regulator is required to take into consideration other people that may have been affected by the alleged breach.¹⁶

To discover whether or not an enforceable undertaking can achieve justice, the first part of this paper briefly looks at the underlying aims of an enforceable undertaking. The second part considers the impact that the enforceable undertaking may have on the victims of the alleged breach and on the businesses that are in a similar industry as the promisor.

II AIMS OF THE PROMISES GIVEN IN AN ENFORCEABLE UNDERTAKING

As previously noted, the statute¹⁷ allows the regulator wide latitude to negotiate and accept enforceable undertakings with outcomes similar to those remedies available to the court. Further, ASIC and the alleged offender may also agree to include in an enforceable undertaking remedies that are not normally within the court's power.¹⁸

¹⁵ This reality is illustrated in diagram 1.

¹⁶ *ASIC Act* ss 93A and 93AA.

¹⁷ *ASIC Act* ss 93AA and 93A.

¹⁸ *ASIC Act* ss 93AA(1) and 93A(1); *Australian Securities and Investments Commission v Tower Australia Ltd* [2003] FCA 660 [10].

A *Aims of an Undertaking*

When accepting an enforceable undertaking, ASIC usually hopes to achieve the following aims:¹⁹

- protection of the public;
- prevention of future breaches of the law; and
- corrective measures such as compensation or corrective advertisement.

To achieve such goals, alleged offenders will promise to do or not to do certain actions. The most common undertakings are to:²⁰

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

Since the content of the undertaking depends on the gravity of the alleged offence, undertakings would differ from each other. However, it is common for the abovementioned promises to interact when dealing with certain alleged offences. This ensures that the goals of the undertakings (protection of the public, prevention and corrective action) are achieved. For instance, a promise of a voluntary ban may be accompanied by education to prevent similar breaches from occurring in the future. Further, if certain parties have suffered a financial loss, an enforceable undertaking may also contain a clause dealing with compensation of the victim of the alleged breach.

B *Example*

One prominent example that illustrates the aims of an enforceable undertaking is the case of Multiplex Ltd. ASIC was concerned that Multiplex had breached the continuous disclosure rules concerning a material change in the profit relating to the Wembley National Stadium project in London. As a consequence of ASIC's inquiry into the matter, Multiplex entered into an enforceable undertaking with ASIC, in which it promised to compensate the investors for their loss and to engage an external consultant to reduce the possibility of a similar breach from occurring again.²¹ In this example, the enforceable undertaking protected the public through a quick resolution of the problem. It also had a preventive effect by ensuring that Multiplex's compliance program improved, thus guarding against future breaches.

¹⁹ ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 38. It is important to remember that enforceable undertaking is an administrative sanction and its goals and aims are not to punish the promisors; M Nehme, 'Enforceable Undertakings: A New Form of Settlement to Resolve Alleged Breaches of the Law' (2007) 11 *University of Western Sydney Law Review* 104, 117.

²⁰ ASIC, *Register of Enforceable Undertakings* <<http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable+undertaking+register:+list?openDocument>> at 11 June 2009; ASIC, *Regulatory Guide 100*, above n 6, 13-14.

²¹ ASIC, *Enforceable Undertaking: Multiplex Limited*, Document No 017 029 205 (2006).

Additionally, the enforceable undertaking dealt with the results of the alleged breach by forcing Multiplex to pay A\$32 million to those people affected by the alleged breach.²² The undertaking also acknowledged the commitment made by the Roberts family, one of Multiplex major shareholders, to pay A\$50 million in indemnity to people affected by the breach. The undertaking resulted in the acceleration of the payment of the A\$50 million to investors. The monies had to be paid to investors by 22 December 2006 instead of June 2007.²³

Accordingly, Mr Lucy stated that this enforceable undertaking ‘provides a swift and fair result that balances the regulatory imperatives, the interests of investors and acknowledges the willingness of Multiplex to offer a constructive response to the regulator’s concerns.’ In summary, victims of the suspected breach benefited, to a certain extent, from the enforceable undertaking entered into with Multiplex. However, this enforceable undertaking has been criticised by some commentators who characterised ASIC’s action as disappointing. It was perceived that the use of such a sanction discriminated against all existing shareholders by providing different protections to different people.²⁴

These criticisms do not seem to take into account the fact that an enforceable undertaking has definite advantages over other sanctions that may be available to the regulator.²⁵ An enforceable undertaking, after all, attempts to correct the action of the promisor. Further, continuous disclosure actions are usually complex, lengthy and expensive. For example, in January 2006, shareholders filed a class action against Telstra.²⁶ They alleged that Telstra did not comply with its continuous disclosure obligations. On 13 December 2007, the plaintiffs accepted a A\$5 million settlement of which A\$1.25 million was paid to the plaintiffs’ lawyers.²⁷ When comparing this scenario with the Multiplex case, the latter provides more benefits to misled investors.

C *Rights of the Victims to Sue*

Additionally, the corrective action that an enforceable undertaking provides does not prevent the victims of the alleged breach or members of the general public from taking further action against the promisor, because the basic principles of the rule of law allow individuals to enforce their rights in cases of breach of the law.²⁸ Further, based on *res judicata*, judgements are only binding between the parties in relation to the particular issue in the litigation. When the regulator accepts an enforceable undertaking, even in instances where such an enforceable undertaking is a supplement to court proceedings between the regulator and the alleged offender, such action does not prevent third parties from initiating their private lawsuits. For instance, in the case of Multiplex, even

²² Ibid.

²³ Ibid; ASIC, ‘ASIC Accepts an Enforceable Undertaking from the Multiplex Group’ (Media Release 06-443, 20 December 2006) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/06-443+ASIC+accepts+an+enforceable+undertaking+from+the+Multiplex+Group?openDocument>> at 23 March 2009.

²⁴ F Chong, ‘Multiplex’s \$32m Deal Slammed’, *The Australian* (Sydney), 22 December 2006, <<http://www.theaustralian.news.com.au/story/0,20867,20962251-643,00.html>> at 23 March 2009.

²⁵ For more information on this: Nehme, Hyland and Adams, above n 4, 112.

²⁶ *Taylor v Telstra Corporation Ltd* [2007] FCA 2008.

²⁷ A Zandstra, J Harris and A Hargovan, ‘Widening the Net: Accessorial Liability for Continuous Disclosure Contraventions’ (2008) 22(1) *Australian Journal of Corporate Law* 51, 64.

²⁸ *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 35.

though ASIC had entered into an enforceable undertaking with Multiplex that provided for a refund, a number of investors decided to initiate an action against Multiplex for its alleged failure to comply with the disclosure requirements and misleading conduct.²⁹ An enforceable undertaking may also be used as evidence in a lawsuit.³⁰

Further, the enforceable undertakings accepted by ASIC usually contain the following statement:³¹

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

In *Ironbridge Capital Pty Ltd v ACCC*,³² the Court confirmed that an enforceable undertaking does not affect the rights of outsiders, and that they may still seek the remedies available under law to protect their interests.³³

D Recap

As it has been illustrated above, when the alleged breach has affected a number of people, ASIC is willing to take the necessary steps to correct the action of the alleged offenders when needed. As a consequence, an enforceable undertaking may deliver a remedy superior to that of the court,³⁴ because it permits victims to be compensated for their losses without them needing to initiate private proceedings.³⁵ The next paragraph considers the types of protections an enforceable undertaking may provide to victims of the alleged breach and businesses in a similar industry as the promisor.

III PROTECTING THE INTERESTS OF THE VICTIMS AND BUSINESSES

Even though this is not a statutory requirement, before entering into an enforceable undertaking, ASIC has taken into consideration the ‘position of consumers and investors whose interests have been or may be harmed by the suspected conduct.’³⁶ This would allow an enforceable undertaking to achieve ‘an effective outcome for those who have been adversely affected by the conduct or compliance failure.’³⁷ Accordingly, ASIC considers the effect that its enforceable undertakings may have on the victims and businesses that are in a similar industry as the promisor.

²⁹ *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061 (Unreported, Federal Court of Appeal, Finkelstein J, 19 July 2007).

³⁰ For more information on this: M Nehme, ‘Enforceable Undertaking and its Impact of Private Lawsuit’ (2008) 22 *Australian Journal of Corporate Law* 275.

³¹ ASIC, *Enforceable Undertaking: David William Wolstencroft*, Document No 017 029 213 (2007) [4.1.2].

³² *Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission* (2005) ATPR 42-082. Even though this case relates to the ACCC and its variation of an enforceable undertaking, it may apply equally to ASIC due to the similarity of ss 93A and 93AA of the *ASIC Act* with s 87B of the *Trade Practices Act*. As mentioned in the introduction, the court judgements in relation to ss 93A and 93AA of *ASIC Act* and s 87B of the *Trade Practices Act* are regularly cross-referenced.

³³ *Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission* (2005) ATPR 42-082, [85].

³⁴ ASIC, *Regulatory Guide 100*, above n 6, [1.4].

³⁵ *Ibid* [2.3].

³⁶ *Ibid* [2.8].

³⁷ *Ibid* [2.10].

A *Victims of the Alleged Breach*

The term ‘victims of the alleged breach’ refers to parties who have been directly or indirectly affected by the alleged conduct of the offender and they may have suffered a financial loss as a result of the alleged breach. While ASIC is not required by statute to consult with victims of the alleged breach, a senior officer in ASIC noted that the regulator:

engages in internal consultation with other areas of ASIC when drafting enforceable undertakings. These other areas, such as consumer protection, compliance, etc, have a greater understanding of the particular issues that affected parties will be concerned with because they have greater interaction with these individuals. So while consultation with specific affected parties does not generally occur in relation to enforceable undertakings, undertakings have been discussed with areas of ASIC who have practical knowledge and experience on what is of concern to the public and affected parties generally.³⁸

Since ASIC’s restructure in the second half of 2008, ASIC has no longer a consumer protection directorate and a compliance directorate. However, ASIC still consult internally with the stakeholder teams within ASIC who have interfaced with the affected parties.³⁹

Such consultations are beneficial for they provide guidance to the regulator in the formulation of the terms of the enforceable undertakings. They also maximise the chances that the promises given by the alleged offenders are taking into consideration the position of the victims of the alleged breach. Promises that would achieve such an outcome are usually disclosure of the alleged breach, compensation and community services.

1 *Disclosure*

All the enforceable undertakings accepted by ASIC are required to be made available to the public for the purpose of transparency.⁴⁰ To achieve such an outcome, ASIC created, in 2000-01, an internet register of all the enforceable undertakings it had accepted. The public can now access the full text of each undertaking from ASIC’s website.⁴¹ Additionally, when the conduct that led to an enforceable undertaking caused harm or misled certain members of the public, the enforceable undertaking ensures that the victims of the alleged breach are made aware of the conduct of the promisor. Table 1 illustrates the numbers and percentages of enforceable undertakings that have included specific disclosure to the victims of an alleged breach.

³⁸ Interview with Jan Redfern, former Executive Director of Enforcement (Face to face meeting, 20 June 2008).

³⁹ Update by ASIC to the information provided in Interview with Jan Redfern, former Executive Director of Enforcement (Face to face meeting, 20 June 2008).

⁴⁰ For example, s 93A(6) of the *ASIC Act* states that ASIC will make an enforceable undertaking available to the person who asks for it.

⁴¹ ASIC
<<http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable+undertaking+register:+list?openDocument>> at 11 June 2009.

1998-2007	Total
Disclosure of the undertaking to the people directly affected by the alleged offence	88
Number of enforceable undertakings accepted during the year	277
Percentage of enforceable undertakings that contain a requirement to disclose the undertaking to the people directly affected by the breach	31.8%

Table 1: Disclosure to the victims of the alleged breach (in relation to enforceable undertakings accepted from 1998 to 2007)⁴²

The promisor had to disclose the content of the undertaking to their clients or consumers in 31.8% of the undertakings. As illustrated in table 1, not all undertakings contain a specific disclosure requirement because such a disclosure should only be included in an undertaking when it is corrective in nature.⁴³ Accordingly, the use of disclosure has to centre on this aim. This may be challenging because the corporate regulator can use corrective advertisement to achieve a number of goals such as shaming and punishment.⁴⁴ These possible outcomes are not desirable since any punitive impact of an enforceable undertaking may lead the court to consider that the undertaking is unacceptable and as a result unenforceable in court.⁴⁵

Accordingly, when accepting an undertaking that contains a promise of disclosure to the community, such promise needs to be weighted carefully. For instance, Tamberlin J stated that:

In any matter concerning corrective advertising the timing of such corrective advertising is of course important, ... There is no principle that any particular period is appropriate as a point beyond which corrective advertising is not warranted. In the context of advertising it is necessary to examine the nature, extent and intensity of the advertising and the media in which it has been released with a view to deciding whether there could reasonably be any current misapprehension as a result of the advertisements.⁴⁶

Further, Tamberlin J stated that ‘corrective advertising is intended to dispel incorrect or false impressions which may have been created as a result of deceptive or misleading conduct. It is not intended to be punitive’.⁴⁷

As a consequence, disclosure of the undertaking to the victims of the alleged offenders allows the affected person to take private action if they feel they have not recovered the totality of their losses through the enforceable undertaking, for instance. In the undertaking entered into with Freehold International Pty Ltd and Optioneer System Pty Ltd, the promisors agreed to inform their clients of the content of the undertaking. The

⁴² ASIC, *Register of Enforceable Undertakings*, above n 20.

⁴³ K Yeung, *The Public Enforcement of Australian Competition Law* (ACCC, 2001) 114.

⁴⁴ B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983) 260.

⁴⁵ *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 3 [46].

⁴⁶ *Australian Competition and Consumer Commission v On Clinic Aust Pty Ltd* (1996) 35 IPR 635, 640.

⁴⁷ *Ibid.*

letter they sent to their clients clearly stated that the clients could rescind the agreements they made with Freehold and that they would need to contact a lawyer for more information on their rights.⁴⁸ As it can be seen, corrective advertisement targets the category of people that was subject to the alleged conduct. Such an audience varies in size depending on the alleged conduct of the promisor.

Another example can be found in the ASIC undertaking with A & A Gillon Pty Ltd. A & A Gillon Pty Ltd provided financial product advice without a license via the Shapiro website. It entered into an undertaking with ASIC in 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.⁴⁹ Accordingly, the publicity targeted the parties that may have seen the advertisement on the Shapiro website.

Similarly, 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. They publicised their 'seminars' in a number of major Australian newspapers. ASIC considered that the parties 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, and they issued a brochure that contained misleading information. In response, ASIC required the promisors to issue a letter to the specific customers that attended their seminars. ASIC also required the promisors to publish information about the content of the undertaking in *The Australian*, *The Australian Financial Review* and a major daily newspaper circulating in the capital cities of each Australian state and territory.⁵⁰

Accordingly, the mode of disclosure of the terms of the undertaking is the same as the one used by the alleged offender. This ensures that the people targeted by the promisor have received notification of the term of the undertakings.

Further, the alleged breaches that led to a requirement of disclosure to the victims are set out in table 2.⁵¹

⁴⁸ ASIC, *Enforceable Undertaking, Freehold International Pty Ltd and Optioneer Systems Pty Ltd*, Document No 017029024 (2002) [2.2]. The exact figure is not known as the undertaking did not set up a lump sum of compensation.

⁴⁹ ASIC, *Enforceable Undertaking, A&A Gillon Pty Ltd, Allen Ray Gillon and Ann Gillon*, Document Nos 017029066; 017029067 and 017029068 (2003).

⁵⁰ ASIC, *Enforceable Undertaking, National Investment Institute Pty Ltd, Henry Kaye, Novasource Consulting Pty Ltd and Alan Meagher*, Document Nos 017029093; 017029094; 017029095 and 017029096 (2003).

⁵¹ ASIC, *Register of Enforceable Undertakings*, above n 20.

Type of alleged offences that led to a disclosure requirement in the undertakings	Total number of undertakings that have a requirement for disclosure to victims of the alleged offence	Percentage
Breach of duties	4	4.5%
Dealing with securities or financial services without license	13	14.8%
Fundraising/investment offer in breach of the law/breach of disclosure provisions	18	20.5%
Unregistered investment schemes	3	3.4%
Misleading advertisement/information/advice/conduct	36	40.9%
Miscellaneous	14	15.9%
Total	88	100%

Table 2: Matters where ASIC required the promisor to disclose the undertaking to victims of the alleged offence (in relation to enforceable undertakings accepted from 1998 to 2007)⁵²

Over the last decade, the most common areas where disclosure was a requirement in an enforceable undertaking were: (1) issuing securities without complying with the disclosure requirement under the law; (2) misleading and deceptive conduct; and (3) dealing with securities without a license. As noted in table 2, 76.2% of the undertakings that contain disclosure fall under these three categories.

For instance, 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.⁵³ 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 and, accordingly, the requirement served to correct the misinformation of those people.

In 2005, ASIC was concerned that the advertising of the Coles Myer Source MasterCard was misleading. As a consequence, it entered into an enforceable undertaking with Coles Myers Ltd in which the alleged offender promised to cease being involved in such conduct and promised to notify the affected consumers of the enforceable undertaking and of their right to cancel the cards.⁵⁴

In these matters, the people affected were advised of the alleged breach. Similarly, in the undertaking given by Mr Arif Fareed, the promisor allegedly breached his duties as

⁵² ASIC, *Register of Enforceable Undertakings*, above n 20.

⁵³ ASIC, *Enforceable Undertaking, Peel River Vineyards Ltd*, Document No 008547479 (2000).

⁵⁴ ASIC, *Enforceable Undertaking, Coles Myer Ltd*, Document No 017 029 178 (2005).

a securities dealer by failing to disclose the commission he was taking from his clients. The undertaking required him to advise his clients of the content of the undertaking.⁵⁵

While disclosure advises the victims of the breach allegedly committed by the promisor, other promises, such as compensation, provide more protection to the parties affected by the breach by allowing victims of the alleged breach to recover the financial losses that they have suffered as a result of the alleged breach.⁵⁶

2 Compensation⁵⁷

Consumers or clients of alleged offenders are also protected when an enforceable undertaking is entered into, since an undertaking may require compensation to be paid to the people affected by the alleged breach. Of the 277 enforceable undertakings accepted by ASIC, 71 required the promisor to refund a certain category of people. Refunds are required when third parties have suffered a financial loss due to the alleged actions of the promisor. The areas in which this requirement arises are listed in table 3.⁵⁸

Type of matter	Total number of enforceable undertakings using compensation	Percentage of enforceable undertakings using compensation
Dealing with securities or financial services without license	7	9.8%
Fundraising/investment offer in breach of the law/breach of disclosure provisions	21	29.6%
Misleading advertisement/information/advice/conduct	23	32.4%
Miscellaneous	20	28.2%
Total	71	100%

Table 3: Undertakings that contain a compensation requirement (in relation to enforceable undertakings accepted from 1998 to 2007)⁵⁹

As noted in table 3, 62% of the undertakings that contain a compensation promise relate to two alleged offences: (1) misleading advertisement; and (2) breaches of the law in relation to fundraising and disclosure provisions.

For example, ASIC accepted an enforceable undertaking with PCI Equity Pty Ltd on 27 June 2007 because the regulator was concerned that this company was breaching its Australian Financial Services Licence (AFSL) conditions and it was not complying with its duties as a financial services licensee. Such a conduct affected 47 retail clients who were issued units in the Trust in contravention of the AFSL conditions. Accordingly the

⁵⁵ ASIC, *Enforceable Undertaking, Arif Fareed*, Document No 017029050 (2002).

⁵⁶ ASIC, *Register of Enforceable Undertakings*, above n 20.

⁵⁷ For the purpose of this article the terms refund, compensation and indemnification are used interchangeably.

⁵⁸ ASIC, *Register of Enforceable Undertakings*, above n 20.

⁵⁹ Ibid.

undertaking contained promises of disclosure of the conduct to the victims of the alleged breach. The company also provided refund for these retail clients to compensate for any loss they may have suffered.⁶⁰

Further, throughout the last decade, ASIC has accepted enforceable undertakings to supplement court orders by focusing on the needs of the victims of the alleged breach. In 2005, the regulator was concerned that First Capital Financial Planning Pty Ltd provided defective advice to 177 clients by directing them to move their superannuation investments from First State Super Superannuation Scheme to Wealthtrac Personal Super Master Trust, Matrix Super Master Trust, Navigator Personal retirement Plan or First Capital One Retirement Builder. As a result, ASIC initiated proceedings in the Supreme Court of New South Wales. The defendant agreed to resolve the proceedings by consenting to declarations and injunctions made by the Supreme Court. Further, First Capital Financial Planning Pty Ltd entered into an enforceable undertaking with ASIC. In it, the promisor undertook to indemnify the clients for any losses they suffered due to the transfer of funds that took place.⁶¹ Accordingly, such a right of compensation in an enforceable undertaking gives the consumer/client/investor a quick way to recover their losses without going to court and paying court expenses. This is especially useful when the amount that the victim is entitled to is small and does not justify the start of litigation. The enforceable undertaking also provides protection to the victims of the alleged breach through the use of the promise of the implementation of community services.

3 *Community Service Undertakings*

Enforceable undertakings may not only lead to the disclosure of the undertaking to the affected parties. 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’.⁶² On the same note, s 12GLA of the *ASIC Act* defines a community service order as ‘an order directing the person to perform a service that is [...] for the benefit of the community or a section of the community.’⁶³ This definition makes it clear that the work must benefit the community.

However, the ALRC report considered that community service orders can be seen as punitive penalties inflicted on an offender in certain instances.⁶⁴ Accordingly, it recommended that that a court should have the power to issue community service orders only after considering three matters:

- 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 suffered by the community; and

⁶⁰ ASIC, *Enforceable Undertaking, PCI Equity Pty Ltd*, Document No 017029212 (2007).

⁶¹ ASIC, *Enforceable Undertaking, First Capital Financial Planning Pty Ltd*, Document No 017028207 (2007).

⁶² Yeung, above n 43, 121.

⁶³ *ASIC Act* s 12GLA(4).

⁶⁴ *ASIC Act* s 12GLA(4).

- the requirement that the community service orders must be specific in relation to its cost.

Given that the undertaking can impose community service orders on the promisor, it is recommended that these issues should be taken into consideration when deciding the content of the undertaking. The appropriateness of the use of community service orders 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 Parliament intended that the enforceable undertaking's provisions would be used for a punitive purpose.⁶⁵ All the community service promises included in the ASIC enforceable undertakings studied here have converged toward such an outcome. They have been accepted in instances where the alleged conduct may have had a widespread negative effect. In such cases, an enforceable undertaking may have contained a requirement to implement community services to protect that community through education.

For example, in an undertaking given by Combine Insurance Company of America, Combine sold policies that allegedly were not appropriate for the needs and circumstances of persons living in the community. Combine was required to donate A\$40,000 to assist in the preparation of educational material for Aboriginal consumers of financial services. Once more, the community that was deceived by the conduct of the promisor would be educated and as a consequence be made less vulnerable to similar ploys.⁶⁶

Similarly, another undertaking that included a community service requirement was given by Fintrack Financial Services Pty Ltd and Fintrack Pty Ltd. The promisors in this case allegedly misled the public through a series of advertisements via TV, radio, website and brochures. They promised to pay A\$15,000 to ASIC, to be used by ASIC for consumer education or similar programs in relation to the finance and mortgage broking industry.⁶⁷

In 2003, it was alleged that Automotive Financial Services Pty Ltd did not comply with legislation in relation to insurance contracts. The company promoted a product that should have been considered an insurance contract. In its undertaking, the company promised to contribute A\$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.⁶⁸

In 2004, ASIC seems to have started using community service undertakings on a more frequent basis. Three enforceable undertakings in that year alone required the promisor to fulfil a community service requirement. The content of those undertakings is similar

⁶⁵ Yeung, above n 43, 123.

⁶⁶ ASIC, *Enforceable Undertaking, Combined Insurance Company of America*, Document No 008547484 (2000).

⁶⁷ ASIC, *Enforceable Undertaking, Fintrack Financial Services Pty Ltd and Fintrack Pty Ltd*, Document No 017029105 (2003).

⁶⁸ ASIC, *Enforceable Undertaking, Automotive Financial Services Pty Ltd*, Document No 017029111 (2003).

to the ones mentioned above. However, no community services undertakings were given in 2005, 2006 and 2007.

All these community service promises that were included in an enforceable undertaking impacted on the affected community positively because these promises were aimed toward the protection of the affected community. They ensured the education of the affected victims on certain issues and thereby reduced the likelihood of people falling victim to similar contraventions in the future.⁶⁹ Such education is also provided to the businesses that are in a similar industry as the alleged offender.

B *Businesses in a Similar Industry*

As noted before, *ASIC's Regulatory Guide 100* notes that ASIC will accept an enforceable undertaking when such a sanction may result in a more effective regulatory outcome than other sanctions at ASIC's disposal. One of the factors ASIC takes into consideration when deciding whether an enforceable undertaking would result in a better outcome than other penalties is the effect that the enforceable undertaking may have on the regulated population.⁷⁰ An enforceable undertaking should promote general deterrence by making the business community aware of certain conduct and the consequences that may arise from engaging in such conduct.⁷¹

For instance, on 28 March 2006, ASIC accepted an enforceable undertaking from Transcomm Credit Co-operative Ltd after the regulator's investigation found the credit union's advertising material featured claims that were misleading and deceptive.⁷² Such an undertaking sent a message to all reverse mortgage providers to ensure that their advertisements were clear and accurate. Mr Jeremy Cooper, ASIC Deputy Chairman, noted that: 'ASIC will continue to keep a close eye on the promotion of reverse mortgages and will be particularly vigilant, as in this case, where the product has some features that have the potential to harm consumers which are either not disclosed or misrepresented.'⁷³

In another matter, ASIC accepted an enforceable undertaking from UniSuper Ltd, the trustee of the UniSuper Fund, following an investigation that found that UniSuper Ltd had failed to provide member statements to UniSuper Fund members in receipt of temporary incapacity and permanent disablement benefits, as required by the *Superannuation Industry (Supervision) Act 1993* (Cth), for the reporting period 1 July 1998 to 30 June 2002. Furthermore, other problems appeared with UniSuper Ltd's complaint handling system.⁷⁴ Mr Mark Steward, ASIC Deputy Executive Director of Enforcement, observed that the enforceable undertaking 'sends a strong message to the superannuation industry that ASIC views superannuation disclosure and complaints handling obligations seriously.'⁷⁵

⁶⁹ ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 111.

⁷⁰ ASIC, *Regulatory Guide 100*, above n 6, [2.8]

⁷¹ *Ibid* [2.9].

⁷² ASIC, *Enforceable Undertaking: Transcomm Credit Co-operative Ltd*, Document No 017 029 194 (2006).

⁷³ ASIC, 'ASIC Stops Misleading Reverse Mortgage Advertising' (Media Release 06-093, 29 March 2006).

⁷⁴ ASIC, *Enforceable Undertaking: UniSuper Ltd*, Document No 017 029 138 (2004).

⁷⁵ ASIC, 'Trustee of University Super Fund Gives Undertaking to ASIC' (Media Release 04-361, 4 November 2004).

Further, enforceable undertakings may be educative in nature for they may clarify the expectation of the regulator. Industries will know what is and what is not acceptable. For example, ASIC believed that Mr Michael Casey allegedly failed to act efficiently in the performance of his duties as the holder of a dealer's 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 fulfil certain educational 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. These presentations and seminars considered issues of law, practice and procedure relevant to acting as a designed trading representative.⁷⁶ This type of presentations has an impact on designed trading representatives because it educates them on their duties and obligations. Accordingly, businesses in a similar industry as a promisor may change their practices due to an enforceable undertaking that target an industry rival.

IV CONCLUSION

An enforceable undertaking can have a deep impact on third parties. As noted at least 33% of the undertakings accepted by ASIC had a direct impact on the victims of the alleged offender. The undertaking played a role in protecting their rights when those rights have been harmed. Refund and compensation give the victims of the alleged breach quick solutions by correcting the damage that was caused. Promises made by the alleged offender to disclose an enforceable undertaking to a certain category of the public and community services may also advise the third parties of the occurrence of the alleged breach and inform them of their rights under the law through education. Such occurrences allow the parties affected to take court action if needed.

Accordingly, an enforceable undertaking provides its own justice to victims of the alleged offenders and it affords these people some protection. Further, it warns and educates businesses about potential breaches of the law while playing at the same time a deterrence role. In summary, an enforceable undertaking can be perceived as a vital sanction in the regulator's arsenal because it introduces into the regulatory system a certain level of justice to outsiders whose only other resource (to get such justice) would have been costly and lengthy private actions.

⁷⁶ ASIC, *Enforceable Undertaking, Michael Anthony Casey*, Document No 008547357 (1999).