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THE POWER OF THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION TO ACCEPT ENFORCEABLE UNDERTAKINGS: AIMS AND CURRENT PRACTICES

MARINA NEHME*

The enforceable undertaking is one of the many sanctions available to the Australian Securities and Investments Commission ("ASIC"). An enforceable undertaking is a promise enforceable in court. The alleged offender, known as the promisor, promises the regulator to do or not to do certain actions. The result achieved by the enforceable undertaking reflects the compromise that is agreed on by the parties involved. This sanction is widely used in the regulatory community for it allows regulators to reach plausible solutions to alleged offences without unduly spending the resources of their agencies or those of the courts. This article looks at the use of enforceable undertakings by ASIC. It observes the instances under which ASIC enters into an enforceable undertaking and the alleged offences that lead to the acceptance of an enforceable undertaking. The article also surveys the promises given in an enforceable undertaking and the goals that may be achieved by these promises. Finally, this article reflects on the action that may be taken by ASIC if an enforceable undertaking is not complied with.

This article also considers the origins of the sanction and takes into account the enforceable undertakings accepted by ASIC from 1998 (the date this sanction became available to this regulator) to June 2007.

I INTRODUCTION

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The Australian Law Reform Commission ("the ALRC") has noted that the regulators in Australia have a range of sanctions at their disposal. The ALRC's research shows that there are approximately 2,400 regulatory sanction provisions in areas such as aged care, aviation, banking, border control, customs, environmental protection, social security, corporations and trade practices. One of these sanctions is enforceable undertaking. Such a sanction has been introduced in the Australian system for the first time in 1993.[1] This article will analyse the use of this sanction by the Australian corporate regulator, the Australian Securities and Investments Commission (ASIC).

An enforceable undertaking can be described as a promise enforceable in court.[2] 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, the Australian Securities and Investments Commission ("ASIC")) start their negotiation in relation to the alleged breach. Following this negotiation, the promisor undertakes to comply with the law, to take the necessary steps to prevent future breaches of the law, and to implement corrective action in case the alleged breach affected outsiders. In return, the regulator promises not to take legal action against the promisor in relation to the alleged breach. As in the case of a settlement, the breach of an enforceable undertaking is not considered contempt of court. However, the *Australian Securities and Investments Commission Act 2001* (Cth) ("the ASIC Act")[3] gives ASIC the power to enforce an undertaking in court. If the court orders the promisor to comply with the enforceable undertaking, a breach of such an order will then constitute contempt of court.

This article is divided into four parts. The first part considers the origins of the sanction of enforceable undertakings. The second and third parts respectively look at the nature of the enforceable undertakings and ASIC's policy in relation to the use of enforceable

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[1] Christine Parker, "Restorative justice in business regulation? The Australian Competition and Consumer Commission's use of enforceable undertakings", 67(2) Modern Law Review 209-246;
Marina Nehme "Enforceable Undertakings in Australia and Beyond", (May 2005) 18 *Australian Journal of Corporate Law,* 68- 87.

[2] *Australian Securities and Investments Commission Act,* ss 93AA and 93A.

[3] *Australian Securities and Investments Commission Act,* ss 93AA(4) and 93A(4).

undertakings. The fourth part examines the goals of the sanction. The fith part takes into account ASIC's strategy in relation to the enforcement of enforceable undertakings. Lastly, the six part compares enforceable undertakings with other similar sanctions available overseas.

II ORIGINS OF THE SANCTIONS

The first Australian regulator that was given the power to issue an enforceable undertaking was the Australian Competition and Consumer Commission ("the ACCC") in 1993. The Australian Parliament introduced this sanction because of problems that appeared in relation to the regulatory use of administrative resolutions. This was especiaaly the case because the ACCC applied the pyramid of enforcement when dealing with breaches of the law[4] and it is important as a consequence that the sanctions at the regulator's disposal are effective.

[4] ACCC, *Report on Enforcement Strategies Associated with the National Appliance and Equipment Energy Efficiency Program*, March 2000, <www.accc.gov.au> at 1 August 2007.

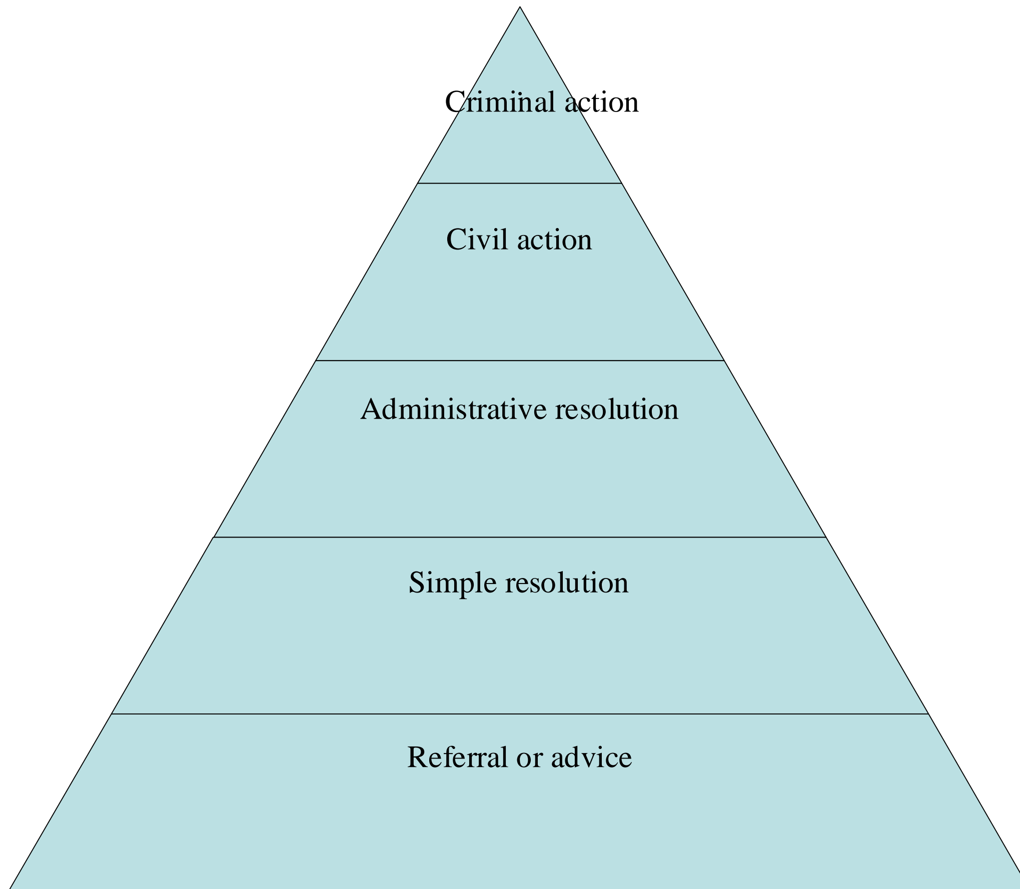

Figure 1: The use of the pyramid of enforcement by the ACCC[5]

Figure 1 characterises the scheme used by the ACCC before 1993. Basically, the ACCC uses the sanctions at the bottom of the pyramid to deal with minor offences, and starts court action when dealing with major offences.[6] Previously, 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

[5] This pyramid is based on Braithwaite and Ayres' pyramid of enforcement. This author has modified it by adding a mix of sanctions available to the ACCC.
[6] ACCC, above n 4.

offenders through administrative resolution. Administrative resolutions are basically the equivalent of a settlement. They may include accepting assurances from the alleged offender to stop the conduct or otherwise modify their commercial practices to ensure compliance with the law. However, such resolutions lacked formal legal enforceability and it was doubtful whether they were legally enforceable.

As a result, the Griffith and Cooney Committees[7] recommended that the ACCC should be given statutory powers to accept undertakings which are legally enforceable. Accordingly, the enforceable undertaking provisions were introduced to the system to legitimate and formalize the negotiated agreements entered into between the ACCC and alleged offenders.[8] When the Bill inserting s 87B into the *Trade Practices Act 1974* (Cth) was introduced, the then Attorney-General explained the purpose of the provision in his second reading speech, as follows:[9]

> *"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 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*

[7] House of Representatives Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition* (May 1989).
[8] House of Representatives Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions- Adequacy of Existing Legislative Controls* (December 1991), recommendation 19; House of Representatives Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition* (May 1989) recommendation 9.
[9] Australia, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2405 (Hon Michael Duffy, Trade Practices Legislation Amendments Bill 1992, Second Reading Speech).

> *promote a greater public awareness of the range of options available in the administration and enforcement of the Act. By providing for the enforceability of undertakings, the scheme will remove the need to rely on means outside the Act to enforce undertakings that people have given, should this prove necessary."*

The then chairman of the ACCC, 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 ACCC's power to accept an enforceable undertaking appears broadly defined. Section 87B(1) of the *Trade Practices Act* states:

> *"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)."*

In short, s 87B constitutes a form of intermediate sanction. It provides a more formal and more powerful deterrent than simple administrative resolution in seeking compliance, but avoids the legal and financial severity and the publicity associated with protracted litigation.[11] Furthermore, this section was extremely popular with the ACCC because it introduced a range of measures to prevent certain breaches of the law.[12] From 1993 to June 2007, the ACCC accepted over 800 enforceable undertakings. Due to the apparent success of the use of enforceable undertakings by the ACCC, other regulators at both

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[10] *Bills Digest No. 164 1999-2000 Aviation Legislation Amendment Bill (No 2) 2000,* <http://www.aph.gov.au/Library/Pubs/bd/1999-2000/2000bd164.htm> at 30 December 2004.

[11] 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.

[12] From 1993 to 2007, the ACCC accepted over 750 enforceable undertakings.

federal and state levels lobbied successfully for the introduction of the sanction into their own regulatory systems.[13]

For instance, ASIC was given the power to accept enforceable undertakings in July 1998 by the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth).[14] 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, ASIC will be given the power to accept a written undertaking without first having to go to court.[15] As a consequence of the passage of the Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998 (Cth), the provisions related to enforceable undertakings are today contained in ss 93AA (generally) and 93A (in relation to registered managed investment schemes) of the ASIC Act.[16] These two sections are similar in content to s 87B of the *Trade Practices Act* and it is due to this similarity that the court's judgements in relation to these sections are regularly cross referenced.

III NATURE OF ENFORCEABLE UNDERTAKINGS

Enforceable undertakings may be considered as an administrative sanction. However, if we look closely at the way enforceable undertakings are used, this sanction does not fulfil the characteristic of an administrative sanction.

An administrative sanction is usually viewed as sanctions imposed by regulatory agencies or by regulator's enforcement of legislation, without intervention of a court or a tribunal. Enforceable undertaking does comply with this definition because it is a form of

[13] Marina Nehme, "Enforceable Undertakings in Australia and Beyond", (May 2005) 18 *Australian Journal of Corporate Law,* 68- 87; Most of the occupational health and safety regulators today have the sanction of enforceable undertakings at their disposal.
[14] *Financial Sector Reform (Amendments and transitional Provisions) Act 1998* (Cth), amending *of the Australian Securities Commission Act 1989* (Cth), Item 11.
[15] Explanatory Memorandum, *Financial Sector Reform (Amendments and transitional Provisions) Bill 1998* (Cth).
[16] *ASIC Act 2001* (Cth), s 93AA and 93A.

settlement that does not require the court interference. However, the ALRC notes that in case of true administrative penalties the regulator has very limited discretion in relation to the manner in which it may use the administrative sanction. The legislation will specify the guideline for their use and the manner in which the penalty is calculated.[17] In the case of an enforceable undertaking, there are no statutory guideline in relation to the manner the sanction is used. It is up to the regulator to decide on when to use the enforceable undertaking and how to use it. Section 93AA(1) of the ASIC Act notes the following:[18]

> *'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.'*

In *ASIC v Edwards*,[19] the court pointed out the wide import of the words "in connection with" that are present in s 93AA of the ASIC Act. This means that ASIC has very few limitations in relation to its use of enforceable undertaking. As a consequence, administrative resolution was classified by the ALRC as a 'quasi-administrative penalty'.[20]

The ACCC also attempted to define the nature of an enforceable undertaking. In *Australian Petroleum Pty Ltd v ACCC*, [21] Australian Petroleum applied for a review of the enforceable undertaking it had given to the ACCC and for an amendment of its terms. The ACCC argued that such a review is not within the court's power since an enforceable undertaking is a contract:[22]

> *"The content of an undertaking is a matter of agreement... A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute; the*

[17] Australian Law Reform Commission (ALRC), *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No 65 (2002) 59.
[18] ASIC Act, s 93A(1): This section has similar content to s 93AA(1)
[19] *Australian Securities and Investments Commission v Edwards* [2004] NSWSC 1044, [16].
[20] ALRC, above n 17, 100.
[21] *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 73 FCR 75.
[22] *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 73 FCR 75 (submission).

> *validity and effect of the contract being determined... by the ordinary laws of contract... The action [resulting from entering into an enforceable undertaking] is contractual, not statutory."*

According to the ACCC's reasoning, since an enforceable undertaking is a contract, it cannot be varied without the approval of all relevant parties. Courts are usually reluctant to engage in the judicial review of contractual behaviour. Accordingly, a review of an undertaking is not possible. However, Lockhart J took the view that the power to accept an enforceable undertaking is not contractual. The authority really comes from s 87B of the Act and as a consequence is statutory in nature. Due to this statutory nature, the ACCC can enforce an undertaking in court in case of a breach of the terms. A breach of a court order then constitutes contempt of court. Accordingly, the court rejected the ACCC's argument, finding that an enforceable undertaking cannot be defined as a contract.

In its annual report, the ACCC usually classifies enforceable undertakings as a form of settlement.[23] However, it is important to remember that such a settlement is special in nature because its terms are available to the public and these terms are subject to enforcement in court based on s 87B(4) of the Act. Such a characterisation may also apply in relation to ss 93AA and 93A of ASIC Act.

This lack of statutory guideline in relation to the use of enforceable undertaking has cause for concern.[24] However, ASIC and the ACCC have remedied to such concerns by issuing clear guidelines in relation to the manner in which they would use the sanction of enforceable undertaking. Such an approach is welcomed because it ensures greater transparency in relation to the use of enforceable undertakings. Furthermore, the fact that

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[23] ACCC, *ACCC Annual Report 1995-1996*, 117.
[24] Frank Zumbo, "Section 87B Undertakings: There's no Accounting for such Conduct!" (1997) 5 *Trade Practices Law Journal*, 121.

all enforceable undertakings are available to the public and can be found on ASIC's website also protect the regulated community from any possible abuse of the system.

IV ASIC'S POLICY IN RELATION TO THE USE OF ENFORCEABLE UNDERTAKINGS

Practice Note 69 ("PN 69") sets out ASIC's views on the policy, interpretation and operation of ss 93A and 93AA of the ASIC Act. Part A describes the circumstances under which ASIC will accept enforceable undertakings. Part B gives 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. Part D explains the circumstances under which ASIC will agree to vary or withdraw an enforceable undertaking.

In March 2007, PN 69 was replaced by a new guideline, *Enforceable Undertakings: an ASIC Guide* ('The ASIC Guide'). The new guideline takes into consideration PN 69 and builds on it by responding to the questions and problems that were raised when dealing with entering into undertakings in the past. The guide is divided into four sections. Section 1 covers what is an undertaking. Section 2 explains the circumstance under which ASIC will accept an undertaking. Section 3 notes the acceptable and unacceptable terminology in the enforceable undertakings. Section 4 explains what happens if an undertaking is breached.

Enforceable undertakings are commonly used by companies and individuals as a way to avoid unnecessary litigation. However, ASIC will not enter into an undertaking that does not offer a more effective regulatory outcome than other penalties.[25] For example, in the enforceable undertaking entered into with Multiplex Ltd, ASIC stated that:[26]

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[25] ASIC, *Enforceable Undertakings, an ASIC Guide* (March 2007), at 3.8 <www.asic.gov .au> at 26 April 2007.
[26] ASIC, Enforceable Undertaking: Multiplex Limited, Document No 017 029 205 (20 December 2006).

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

The use of enforceable undertaking by ASIC is not a sign of weakness of the regulator. It actually illustrates the fact that the regulator is applying the pyr [illegible] ent as seen in Figure 2.

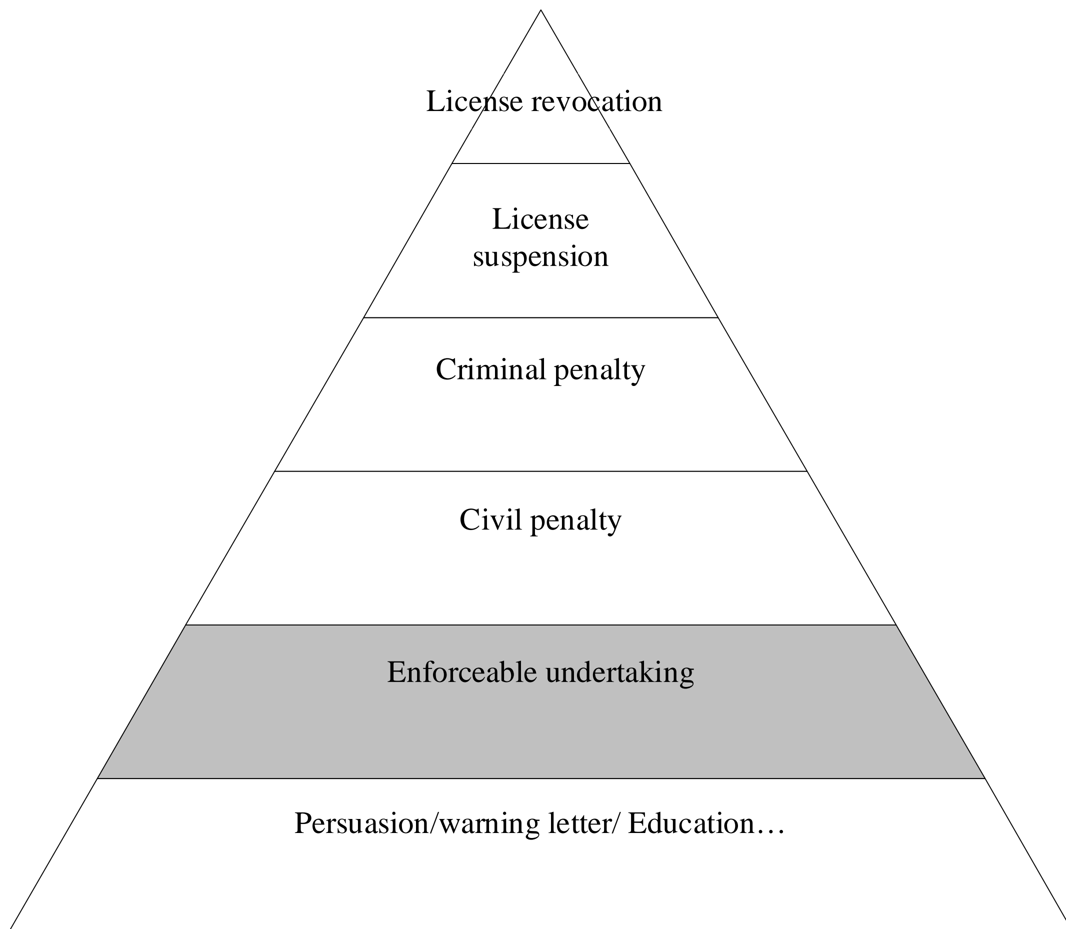

Diagram 2: Enforcement pyramid[27]

ASIC usually uses court action as last resort.[28] Enforceable undertaking may be considered at an earlier stage to deal with minor breaches of the law.[29] Accordingly, the corporate regulator operate on the basis that it is better to start with dialogue and then employ sanctions higher up the pyramid as the conduct goes up in severity. The application of the pyramid allows the regulator to use its full arsenal in appropriate cases.

The use of enforceable undertaking by ASIC has been criticised by some because it may decriminalisation serious offences.[30] However, this is not necessarily the case because ASIC takes into account, when accepting an enforceable undertaking, the fact that the alleged breach of the law is inadvertent.[31] This may distinguish the conduct that led to the acceptance of an enforceable undertaking from other conduct that may lead to criminal offences since the later conducts usually involve an element of dishonesty or recklessness or that the conduct may adversely affect the market.

To ensure further transparency and fairness in relation to the manner enforceable undertakings are accepted, ASIC Guide outlines four critical considerations that are taken into consideration when determining if the regulator should accept an undertaking:

- What is the position of the consumers and investors whose interests have been, or may have been, harmed by the suspected conduct? When accepting an enforceable undertaking, ASIC does not need to consult with victims of the alleged breach. This

[27] This pyramid is based on Braithwaite and Ayres' pyramid of enforcement.
[28] This is confirmed by as study conducted by Helen Bird, David Chow, Jarrod Lenne and Ian Ramsay, 'ASIC Enforcement Patterns' (Centre for Corporate Law and Securities Regulation, The University of Melbourne, 2003), xiv.
[29] ASIC, *Annual Report 2000-2001*, 27.
[30] 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* 137, 154.
[31] ASIC, Regulatory Guide 100, *Enforceable undertakings*, 9.

has been cause of concern[32] because in a number of cases the alleged breach that led to the undertaking has had a negative impact on third parties. However, ASIC usually takes the affected people into consideration. An example that illustrates the fact that ASIC may take into consideration the position of third party may be seen in the case of Multiplex. ASIC ensured the protection of the investors who might have been affected by the alleged offence through the acceptance of an enforceable undertaking. Multiplex Ltd undertook to pay an amount up to $32 million in total to settle claims of ultimate beneficial owners in respect of particular Multiplex stapled securities.

- What is the effect of the enforceable undertaking on the regulated population as a whole?
- What is the effect of the enforceable undertaking on the regulated person's future conduct? Will it deter the alleged offender from future breaches of the law?
- How will the community benefit from entering into an undertaking? A number of promisors have agreed to implement community services projects as part of their undertaking. For example, ASIC believed that Michael Anthony Casey allegedly failed to act efficiently in the performance of his duties as a 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 some educational requirements. He also promised to cooperate with ASIC and the Australian Securities Exchange in the preparation and presentation of seminars in Sydney and Melbourne that would be open to all designated trading representatives. The presentations and seminars were to consider issues of law, practice and procedure relevant to acting as a designed trading representative. [33]

In accordance with its guidance, ASIC will consider the following factors before entering into an undertaking:

- Was the alleged breach of the law inadvertent? In a number of undertakings, ASIC acknowledges that the breach was inadvertent.

[32] Zumbo, above n 24, 121.
[33] ASIC, Enforceable Undertaking, Michael Anthony Casey, Document No 008547357 (9 July 1999).

- Was the alleged breach a result of the conduct of one or more individual officers or employees of the company?
- What is the level of experience and seniority of the alleged offender?
- Has the alleged offender co-operated with ASIC? Most of the undertakings accepted by ASIC include a clause that acknowledges the fact that the promisor co-operated with ASIC.
- Is the alleged offender prepared to publicly acknowledge ASIC's concerns in relation to the conduct? The enforceable undertakings usually have a clause stating that the promisor acknowledges ASIC's concern. Such a clause is not an admission of liability.
- Will it achieve an effective outcome?
- Is the person likely to comply with the enforceable undertaking? This is an important requirement since ASIC does not usually monitor closely the undertakings. The corporate regulator will leave it to the promisor, or to an independent expert hired by the promisor, to monitor its compliance with the undertaking. There is a high reliance on self-regulation. Such self-regulation may be considered as a form of 'corporate probation'. [34] ASIC may use the threat of enforcement of the undertaking to encourage that a company implement a self-regulation system in relation to the enforceable undertaking. The regulator uses the enforceable undertaking to implements measures that may prevent future breaches from occurring.[35]

The ASIC guide notes that ASIC will not accept an enforceable undertaking in relation to a matter that has been referred to a specialist body for determination or resolution. However, is there a specific category that ASIC targets when accepting an enforceable undertaking?

V THE TARGET

[34] Christine Parker, *The Open Corporation* (Cambridge University Press, 2002) 261.
[35] This will be discussed in more detail in the paragraph entitled 'The Aims behind entering into an enforceable undertaking.

The process of entering into an enforceable undertaking may be initiated by a company, an individual or a 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 accept an enforceable undertaking.[36]

A *Problem with Private nature of enforceable undertakings*

This private nature in relation of enforceable undertaking negotiations reduces the transparency of the enforcement process as opposed to taking action in the courts. This may lead to "arm-twisting" by the more powerful party.[37] For example, the ACCC was criticised for using enforceable undertakings to bully or arm-twist businesses into complying with its directives and to extract unjustified and expansive promises from the alleged offenders.[38]

However, it is important to note that the ACCC has responded to the concerns identified by the research conducted by Christine Parker[39] in relation to its enforcement work and the regulator has taken preventive measures in relation to a number of issues raised in the study.[40] Additionally, both the ACCC and ASIC are willing to consider the variation of the enforceable undertaking accepted when needed. Such a possibility will lessen any possible abuse of the system and may show the regulators' flexibility when dealing with the business community.

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[36] ASIC Act, ss 93AA(1) and 93A(1).
[37] Karen Yeung, The Public Enforcement of Australian competition Law (2001, Australian Competition and Consumer Commission), Chapter 5.
[38] Christine Parker, "Arm-Twisting, Auditing and Accountability: What Regulators and Compliance Professionals Should Know about the Use of Enforceable Undertakings to Promote Compliance" (Presentation to the Australian Compliance Institute, 28 May 2002) 15.
[39] The ACCC commissioned Parker's research (in 2000-2002) through the Regulatory Institutions Network in order to ascertain whether its approach had been / is appropriate, to point out actual and potential problems and overall to make recommendations to improve its regulatory practice.
[40] Louise Sylvan (ACCC Deputy Chair), "Future Proofing- Working with the ACCC" (Melbourne Spetember 1 2005), at <http://www.accc.gov.au/content/item.phtml?itemId=706591&nodeId=a5b95d899226cb9db64fcb45b4674b0f&fn=20050901%20ACI.pdf> viewed on 11 October 2007.

However another problem that may appear is in relation to the review of ASIC's decision to accept or reject an enforceable undertaking. Section 244(2) of the ASIC Act does not expressly list the decision to accept or reject entering into an undertaking among those decisions that may be reviewed in the Administrative Appeal Tribunal. Accordingly, ASIC will assess and decide which sanction should be applied.[41] If the regulator believes that enforceable undertaking is not an appropriate solution to the problem than it will reject entering into an enforceable undertaking with the alleged offender and such a decision may not be reviewed.[42] Such lack of review may cause some concerns in relation to the transparency of the undertaking. However, such concerns may be tempered due to the fact that an enforceable undertaking is a form of settlement and requires approval of all parties involved and this settlement may be varied in certain circumstances with the approval of ASIC. Furthermore, when ASIC enforces an undertaking in court, the courts may look at the circumstances that led the promisor and the regulator to accept an undertaking. In *ACCC v Signature Security Group Pty Ltd*,[43] the ACCC sought injunctive relief, declarations and orders in respect to Signature Security Group Pty Ltd's promotion of its security systems to the public. Additionally, the ACCC alleged that Signature Security Group Pty Ltd (Signature) breached certain provisions of an enforceable undertaking it gave to the ACCC. When enforcing the undertaking entered into by the ACCC with Signature, Stone J considered if the

[41] ASIC has a number of administrative and quasi- judicial administrative sanctions at its disposal such as banning order, revocation of licences, infringement notices…

[42] However, 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(Australian Securities and Investments Commission v Donald* [2003] FCAFC 318 (2003) 136 FCR 7 (2003) 203 ALR 566*)* (to enter into an undertaking on behalf of ASIC to remedy certain conduct) may indicate that the AAT looks positively at the sanction of enforceable undertakings and considers this remedy to be a solution when a banning order under review is starting to have a punitive effect even in instances where ASIC believes that the infractions lay at the more serious end of the scale.

[43] *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 375, (2003) 52 ATR 1. Even though this case is in relation to the ACCC, the court's judgements in relation to ss 93A and 93AA of ASIC Act and s 87B of the *Trade Practices Act* are regularly cross referenced. Accordingly such a judgement also apply to ASIC in case it enforces the undertaking in court.

undertakings were properly given by the promisor and properly accepted by the ACCC.[44] This will be added protection for the promisor and will diminish the need for any review of the AAT.

B *Companies and individuals subject to enforceable undertakings*

Even though there is no review process in relation to the use of enforceable undertaking, the register of enforceable undertaking helps us determine the parties that are usually subject to an enforceable undertaking. When looking at ASIC's register of enforceable undertakings, it becomes apparent that the majority of those that gave enforceable undertakings were companies. This trend is normal because we are in a society where corporations are an essential part of our existence and the influence of such organisations is felt more and more every day. As a result, the best way to deal with these entities is by negotiating with them.[45]

As for the individuals that accepted the enforceable undertakings, in 1998 ASIC seemed to target company directors who had breached their directors' duties. But with every year, there seems to be a slide in the number of directors targeted for enforceable undertakings. Most recently, ASIC seems to be targeting another category instead: individuals dealing with securities and investment advice. From 1999 to 2006, this was the dominant group of individuals who give enforceable undertakings.[46] Most of the offences allegedly committed by the individuals were in relation to breaches of their duties as securities dealers or investment advisers. However, from January 2007 to June 2007, the three individuals who entered into enforceable undertakings with ASIC did not deal with securities and investment advice. One was a liquidator while the other two were auditors, and the undertakings were in relation to breaches of their respective duties.

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[44] Ibid, [38].
[45] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 30 June 2007. There are 274 undertakings listed in the register of enforceable undertakings.
[46] Ibid.

When looking at the register of enforceable undertakings, it becomes obvious that from 1998 until June 2007, most of the companies who gave enforceable undertakings were involved in financial services. As a consequence, we can say that ASIC seems willing to give enforceable undertakings to people in that field. It is also important to note that companies of all shapes and sizes have entered into undertakings with ASIC. Listed companies, unlisted public companies and proprietary companies have all entered into undertakings with ASIC. Accordingly, undertakings can be seen as a sanction that can be adapted to any type of alleged offender, be it a company or an individual.[47] A few examples of frequent alleged offences that were subject to undertakings are the following:

- operating and managing an investment scheme without a license;
- carrying on a business of securities or investment advice without a license;
- managing an unregistered investment scheme;
- concerns related to compliance;
- carrying on a business as an insurance company without a license;
- misleading statements in prospectuses; and
- lack of disclosure.

However, from January 2007 to June 2007, ASIC only accepted an enforceable undertaking from one company. The enforceable undertaking was in relation to financial services.[48]

Some enforceable undertakings have been given by corporations and individuals at the same time. Usually, in this case, the individuals are the directors of the companies giving the enforceable undertakings. The individuals will usually agree to ensure that the company will comply with the undertaking. If that does not happen, then the individual

[47] Ibid.
[48] ASIC, Enforceable Undertaking: First Capital Financial Planning, Document No 017 029 207 (11 May 2007).

and the company will find themselves in breach of the undertaking. The risk that they will be held liable for the breach is an incentive for directors to ensure the compliance of their company with the terms of the undertakings.[49]

It is important to remember that the alleged offences that may lead to an enforceable undertaking can cover wide areas of the law. However, an overview of enforceable undertakings shows that even though, from 1998 to June 2007, ASIC accepted 274 enforceable undertakings, a large number of these enforceable undertakings were in relation to alleged breaches of financial services law. This is shown in Figure 3.[50]

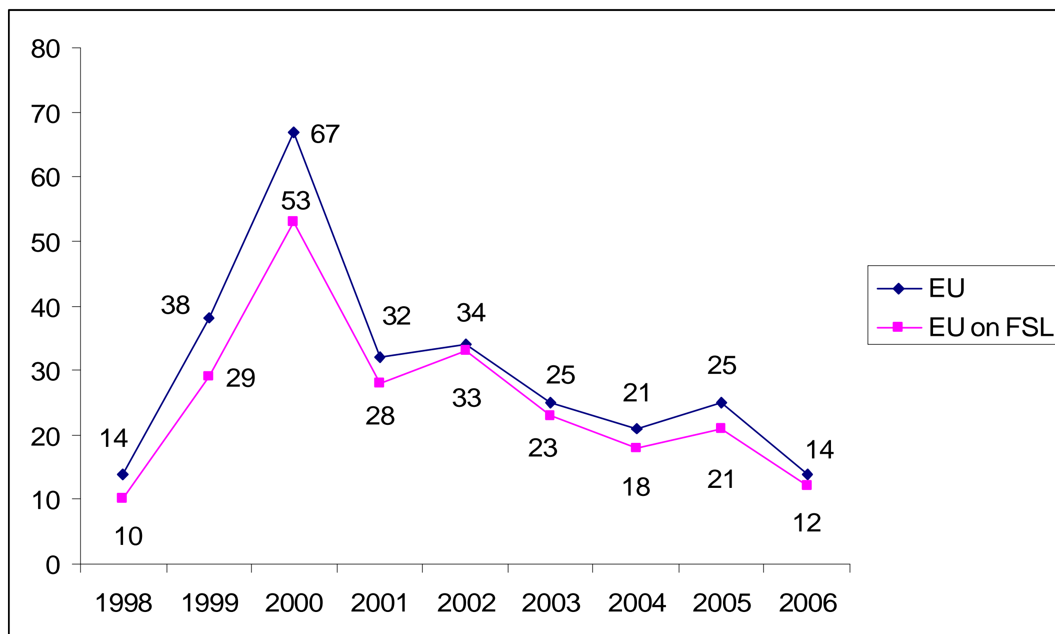

Figure 3: Enforceable undertakings and financial service law[51]

Figure 3 illustrates the fact that most of the enforceable undertakings that were accepted by ASIC were in the area of financial services. In the year 2006, for example, 12 out of the 14 undertakings were in relation to alleged breaches of financial services provisions.

[49] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 3 June 2007.
[50] Ibid.
[51] Ibid. For the purpose of this figure only, enforceable undertaking is abbreviated to EU.

VI THE AIMS BEHIND ENTERING INTO ENFORCEABLE UNDERTAKINGS

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. As an administrative sanction, enforceable undertakings need to fulfil the goal of any administrative sanction. 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:[52]

- preventing similar offences from occurring again;
- protecting the public by stopping the offending conduct; and/or
- corrective action.

Accordingly, when entering into an enforceable undertaking, ASIC hopes to achieve the following goals:

- protecting the public to ensure general and personal deterrence;
- implementing preventive measures to prevent future breaches, for example by using compliance or educational programs; and
- implementing corrective measures such as compensation or corrective advertisement.

These goals can be achieved through a series of promises given in an enforceable undertaking. The content of each undertaking depends on the gravity of the alleged offence. The most common undertakings are to:[53]

- stop committing the alleged offence;

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[52] Australian Law Reform Commission (ALRC), *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 38.
[53] ASIC, Register of Enforceable Undertakings <http://www.asic.gov.au> at 7 January 2005.

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

Other promises, like deregistering a company and suspending or revoking a license, may also form part of an undertaking. However, they are used considerably less often then the promises mentioned above, and are not discussed in this article.

The seven main promises mentioned above interact when dealing with certain alleged offences. Figure 4 is the author's graphical expression of this interaction.

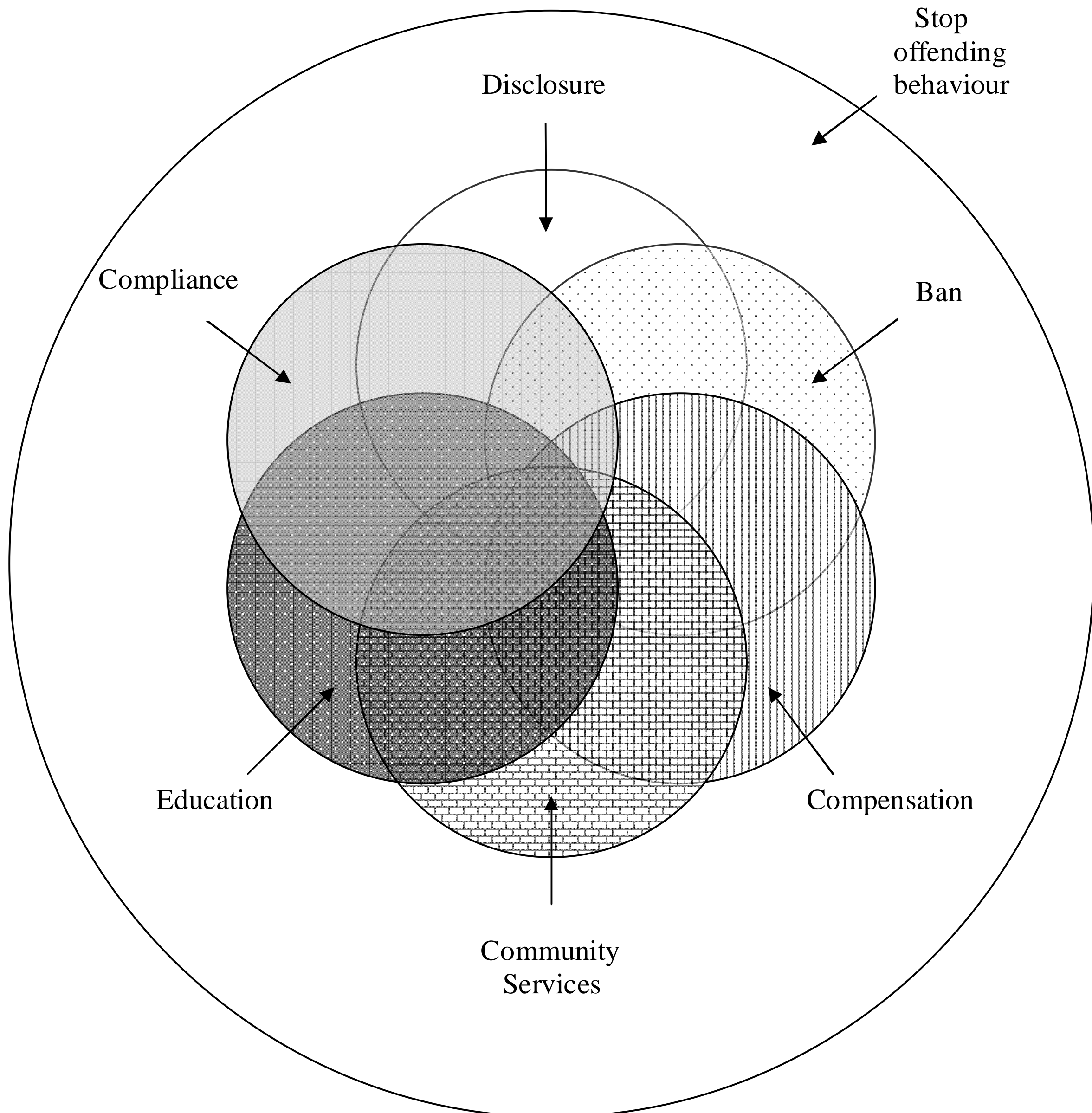

Figure 4: The interaction of the different promises in undertakings

Promises, such as stopping the alleged breach of the law and imposing a voluntary ban on the promisor, are aimed at protection of the public. These promises ensure protection by

deterring the promisor from committing the alleged breach again. They also influence outsiders, who will think twice before committing similar breaches, knowing that ASIC will take action against them. The goals of the promises, such as the implementation of a compliance program and the push for education, are the prevention of future breaches of the law. The promisor will be aware of the law and will implement safeguards for the prevention of similar breaches. The aim of disclosure, compensation and community services is to correct the damage that the alleged offender caused. Such promises have an impact on third parties however they do not derogate the rights of victims of the alleged breach.

One prominent example that illustrates these aims is the case of Multiplex Ltd. ASIC was concerned that Multiplex had breached the continuous disclosure rules. 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.[54] 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. Additionally, the enforceable undertaking dealt with the results of the alleged breach by forcing Multiplex to pay $32 million to people affected by the alleged breach.

In another example, ASIC was concerned that Mortgage and General Financial Services Pty Ltd was selling products in contravention of its licence restrictions. Additionally the regulator believed that this licensed securities dealer was contravening its obligations as a securities dealer by failing to properly train and supervise the representatives involved in selling certain financial products. An enforceable undertaking was entered into in which Mortgage and General Financial Services Pty Ltd undertook to stop the sale of the product and to send letters to clients notifying them of the enforceable undertaking and of

[54] ASIC, Enforceable Undertaking: Multiplex Limited, Document No 017 029 205 (20 December 2006).

their rights to rescind their agreement with the promisor if they wish to do so. The company also promised to ensure that license condition were complied with through the establishment and implementation of certain compliance measures. It also undertook to ensure that its representatives completed the necessary training.[55] In this case, it can be seen that the public was protected through ASIC's action since the organisation stopped the breach. ASIC took corrective action to fix the consequences of the alleged breach by ensuring that the promisor publicised its action to the clients and by informing the clients of their rights. Finally, the undertaking prevented future breaches of the license condition from occurring through the establishment of compliance measures and staff training.

Another example where the goals of an enforceable undertaking were achieved is the enforceable undertaking given by Robert Hugh Iddon to ASIC. In this case, ASIC suspected that Iddon was promoting investment schemes that were not registered under the *Corporations Act* and that he did not hold a license to deal in securities or to provide investment advice. As a result of such alleged action, ASIC entered into an enforceable undertaking with Iddon in which he undertook to stop his conduct, inform his clients about the content of the enforceable undertaking, and advise the clients of their rights to receive a refund. Additionally, Iddon promised not to deal with investment advice until he had been issued a license.[56] Thus, the enforceable undertaking protected the public by stopping the alleged breach from occurring. The undertaking also led to the rectification of the consequences of the alleged breaches through the disclosure of the undertaking to the affected clients and through the offering of a refund to those people. Such an undertaking may have resulted in the return of more than $90,000 to investors. Additionally, this undertaking prevented future breaches through the promise not to deal with securities or investment advice without a license.

VII ENFORCEMENT OF ENFORCEABLE UNDERTAKINGS

[55] ASIC, Enforceable Undertaking: Mortgage and General Financial Services Pty Ltd, Document No 01702960 (17 October 2002).
[56] ASIC, Enforceable Undertaking: Robert Hugh Iddon, Document No 008 547 513 (27 April 2001).

When ASIC discovers that an enforceable undertaking has been contravened, it will not go directly to the court to enforce the undertaking using ss 93A(4) and 93AA(4) of the ASIC Act.

Rather, if an undertaking is not complied with, ASIC usually enters into negotiations with the alleged offender. If the consultations fail, ASIC then commences an action 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 managed investment schemes. It promised in the undertaking to stop operating an unregistered 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.[57] But it 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.[58]

In case the promisor breaches the undertaking, ASIC sometimes encloses another promise within the first undertaking. ASIC may state that if the alleged offender does not comply with the undertaking, more drastic undertakings will come into play. For example, on 22 June 2000, Neil John White and Glen Rainer Meuwissen gave ASIC an undertaking in relation to their alleged breaches of the duties of a representative of a securities dealer. In it, they promised to put in place a compliance program and to disclose the undertaking to their clients. However, ASIC added an extra clause to the undertaking stating that if the undertaking was breached in the future, both promisors would agree to a voluntary ban from dealing with securities or investment advice.[59]

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[57] ASIC, Enforceable undertaking: Perpetual Plantations of Australia, Dee Dee Fleming (formerly Margaret Dianne Fleming) and Donald Brownlie Fleming, Document Nos 017029077, 017029078, 017029079 (10 February 2003).
[58] 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> accessed 6 May 2005.
[59] ASIC, Enforceable Undertaking: Neil John White and Glen Rainer Meuwissen, Document No 008547449 (22 June 2000).

It can be clearly seen that in this case there was an escalation in the gravity of the additional promise. ASIC started with a relatively light undertaking (implementing a compliance program). But if there was a breach of this promise, it was willing to move toward the tougher sanction of a voluntary ban. If the breach persisted, then ASIC could go to court. Such an escalation is illustrated by Figure 5.

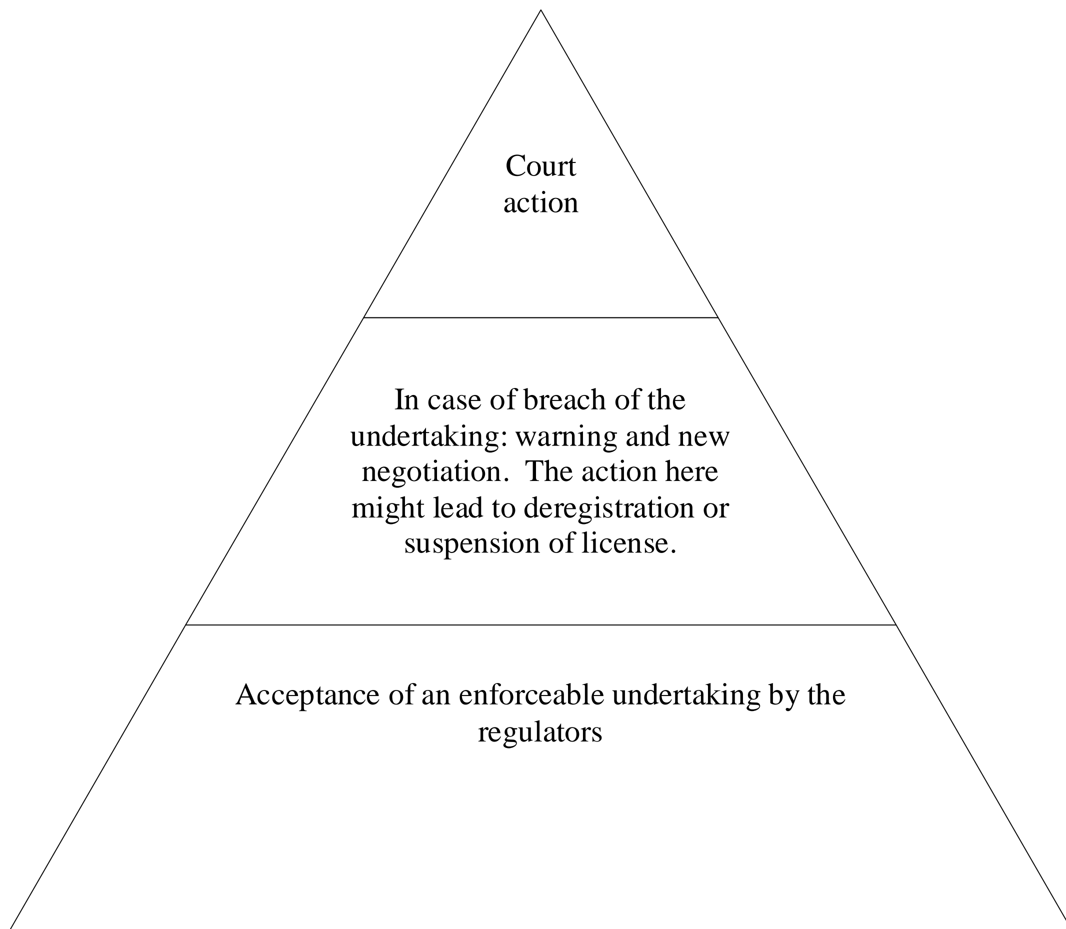

Figure 5: Steps taken when an enforceable undertaking is breached[60]

The fact that an enforceable undertaking can be enforced in court is a significant feature of this sanction. It provides a strong incentive for alleged offenders to comply with the undertakings they give. They will be aware that if they do not comply, they may end up in court. Such an outcome will not appeal to them on the assumption that they accepted the enforceable undertaking to escape litigation in the first place.

VIII INTERNATIONAL PERSPECTIVE

The ALRC has noted that enforceable undertaking is a sanction unique to Australia. However similar sanctions exist overseas.

A *United States*

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.[61] 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.[62] 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.

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[60] This pyramid is based on Braithwaite and Ayres' pyramid of enforcement. This author has modified it by adding enforceable undertakings to the mix of sanctions available to the regulators. Ian Ayres and John Braithwaite, *Responsive Regulation* (Oxford University Press, 1992), at 35-36.

[61] 15 U.S.C. § 16.

[62] ASIC Act, s 93A(4).

An introduction of a similar requirement in Australia in relation to enforceable undertakings may stop the criticism that Australian regulators face in relation to the lack of internal or external review of an undertaking. However, the American system has its share of problems. There are concerns that the court may just rubber stamp the consent decree. The statute has attempted to limit such risk by noting that the court will usually accept the proposed decree if the decree will serve the public interest.[63] But, 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]

Even though the consent decree provisions differ from the enforceable undertaking provisions, both remedies save agency resources. A similar remedy to enforceable undertaking can also be found in the United Kingdom.

B *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 article 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.[65] 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

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[63] 15 U.S.C. § 16.
[64] American Bar Association (ABA), *Antitrust Consent Decree Manual: Section of Antitrust Law* (ABA, 1979) 8.
[65] 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.

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.[66] This may be undesirable in Australia especially due to the fact that enforceable undertakings are a quasi administrative sanction and should not have a punitive effect. Considering that a breach of an undertaking automatically is an offence may be unacceptable especially due to the lack of merit review of this sanction.

IX CONCLUSION

An enforceable undertaking is a new form of settlement. This sanction has an edge over other negotiated penalties because of the ability of ASIC to enforce the undertaking in court in case of non compliance. Furthermore, this sanction allows regulators to be more proactive when dealing with breaches of the law. Through the promises given in an enforceable undertaking, ASIC may prevent breaches from occurring in the future. The undertakings also consider the impact of the alleged offence on third parties. The importance of the sanction of enforceable undertaking is also emphasised due to the fact that ASIC will use the remedy of enforceable undertaking to provide a more effective regulatory outcome than non-negotiated, administrative or civil sanctions.

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