

The Use of Enforceable Undertakings by the Australian Competition and Consumer Commission

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Abstract

An enforceable undertaking under the s 87B of the *Trade Practices Act* 1974 (Cth) is one of the many sanctions available to the Australian Competition and Consumer Commission ('the ACCC'). 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 the ACCC. It observes the origins of the sanction, the instances in which the ACCC enters into enforceable undertakings, and the alleged offences that lead to the acceptance of such undertakings. Finally, this article reflects on the action that may be taken by the ACCC if an enforceable undertaking is not complied with.

Introduction

An enforceable undertaking is defined, under the *Trade Practices Act* 1974 (Cth) ('the Act'), as a promise enforceable in court.¹ Section 87B(1) of the Act notes that '[T]he 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).' Accordingly, an enforceable undertaking takes the form of a settlement in which the alleged offender (who may be called 'the promisor') and the regulator,

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¹ *Trade Practices Act* 1974 (Cth), s 87B.

the Australian Competition and Consumer Commission ('ACCC'), seek a negotiated settlement in relation to the alleged breach. Once an agreement is reached, the promisor undertakes to fulfil a number of promises that may vary depending on the alleged breach.

The sanction of an enforceable undertaking is very flexible because the promises included in the undertaking directly deal with the alleged breach and its consequences. This allows the undertaking to prevent similar breaches from happening in the future and correct any adverse effects that the alleged conduct may have had on the general public. As a result, the ACCC considers that an enforceable undertaking is 'an important tool for use in situations where there is evidence of a breach of the Act that might otherwise justify litigation'.² For this reason, this sanction is used by the ACCC in instances where the regulator believes that an enforceable undertaking would provide a better outcome than court action.³

Additionally, as in the case of a settlement, the breach of an enforceable undertaking is not considered contempt of court. However, this sanction deems that the promisor is on probation. Section 87B(3) of the Act gives the ACCC the power to enforce the undertaking in court in cases where the regulator believes that the terms of the undertakings have not been complied with.⁴ Such a feature of an undertaking plays an important role in providing insurance that the promisor will abide by the terms of the undertaking. In case of breach of an undertaking, the court may then order the promisor to comply with the enforceable undertaking.⁵

While the sanction of an enforceable undertaking is available to a number of Australian regulators at both Federal and State levels, this article focuses on the use of enforceable undertakings by the ACCC because the ACCC was the first regulator that was granted the power to accept an enforceable undertaking to deal with alleged breaches of the law. Further, it was due to the apparent success of the use of the enforceable undertaking by the ACCC that this sanction became available to other Australian regulators such as the Australian Securities and Investments Commission, the Australian Prudential Regulatory Authority and the Civil Aviation Safety Security.⁶

² ACCC, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (August 1999), 1, <www.accc.gov.au> at 12 March 2009.

³ *Ibid.*

⁴ *Trade Practices Act 1974* (Cth), s 87B(3).

⁵ In such instances, a breach of such an order would constitute contempt of court; *Trade Practices Act 1974* (Cth), s 87B(4); Marina Nehme, 'Enforceable Undertakings and the Court System' (2008) 26 *Company and Securities Law Journal* 147 at 160-162.

⁶ For more detail see C Parker, 'Restorative Justice in the Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *Modern Law Review* 209 at 214; Marina Nehme,

Overseas systems have also shown an interest in enforceable undertakings, with New Zealand introducing this sanction into its legal system in 2002.⁷ Similarly, in the United Kingdom, a review of sanctions was undertaken in 2006.⁸ One of the recommendations of Professor Macrory was the adoption of innovative remedies such as the Australian enforceable undertaking in the legislation.⁹ This led to the introduction of this sanction in the United Kingdom under the name of 'enforcement undertakings' in 2008.¹⁰

Due to the wide-spread adoption of enforceable undertakings around the world and based on the use of this sanction in Australia, this article starts by looking at the origin of enforceable undertakings. It also considers the manner in which the ACCC applies the sanction of enforceable undertakings to different situations. Such considerations pave the way to a deeper understanding of enforceable undertakings. Accordingly, one of the issues discussed in this paper is the existence of any negative impacts that this sanction may have on the initiation of litigation by the regulator. Additionally, the article observes the types of alleged offences that have been the subject of an enforceable undertaking. Further, it studies the benefits that may arise from the promises that are given in such undertakings. Ultimately, this article should provide the reader with an understanding of the manner in which enforceable undertakings are used by the regulator.

Origins and nature of an enforceable undertaking

The sanction of enforceable undertaking became available to the ACCC in 1993 through the introduction of s 87B of the *Trade Practices Act 1974* (Cth). Prior to this, 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 from potential offenders

'Enforceable Undertakings in Australia and Beyond', (2005) 18 *Australian Journal of Corporate Law* 68.

⁷ Securities Act 1978 (NZ), ss 69J and 69K. Under this provision, an enforceable undertaking is a written undertaking between an alleged offender and the Securities Commission. Such undertakings are enforceable in Court; Marina Nehme, 'Enforceable Undertakings in Australia and Beyond', (2005) 18 *Australian Journal of Corporate Law* 68, 86.

⁸ Richard Macrory, *Regulatory Justice: Making Sanctions Effective, Final Report* (November 2006).

⁹ *Ibid* at 8. Before that date, the United Kingdom had a sanction called enforceable undertaking. However, it differed from the Australian enforceable undertakings; Nehme, above n 5 at 84- 85.

¹⁰ Regulatory Enforcement and Sanctions Act 2008 (UK), s 50.

through negotiation and settlement.¹¹ As a consequence, administrative resolutions were extremely popular in cases of mergers.¹²

However, it was doubtful whether such administrative resolutions were legally enforceable.¹³ As a result, the Griffith and Cooney Committees 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 formalize the negotiated agreements entered into between the ACCC and the alleged offender.¹⁴ When s 87B was being introduced into the Act, the then Attorney-General explained the purpose of the provision in his second reading speech, as follows:¹⁵

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 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.

Similarly, 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

¹¹ Christine Parker, 'Restorative Justice in the Business Regulation? The Australian Competition and Consumer Commissions' Use of Enforceable Undertakings' (2004) 67 *Modern Law Review* 209 at 214.

¹² Karen Yeung, *The Public Enforcement of Australian Competition Law* (2001), 108.

¹³ ACCC, *Annual Report 1998-1999* at 7.

¹⁴ 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.

¹⁵ Australia, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2405 (Hon Michael Duffy, Trade Practices Legislation Amendments Bill 1992, Second Reading Speech).

avoid court procedures.’¹⁶ Further, the ACCC has noted that ‘the importance of s 87B is that it greatly increases the effectiveness of the administrative resolution approach as undertakings are ultimately enforceable in court.’¹⁷

In summary, s 87B may be viewed as a form of intermediate sanction. It provides a more formal and more powerful deterrent than a simple administrative resolution in seeking compliance, but without the legal and financial severity and the publicity associated with protracted litigation.¹⁸ However, such a remedy has some drawbacks. For example, Karen Yeung observed that the private nature of the negotiations that lead to the acceptance of an enforceable undertaking reduces the transparency of the enforcement process and this may result in ‘arm-twisting’ by the more powerful party.¹⁹

Further, the introduction of enforceable undertakings into the regulatory environment has raised questions in relation to the nature of such undertakings: Since an enforceable undertaking may be seen as an agreement between the ACCC and the alleged offender to do or not to do certain things, and since this agreement cannot be entered into without the approval of both parties, can it be said that an enforceable undertaking has a contractual effect and should be treated the same way as a contract?

In *Australian Petroleum Pty Ltd v ACCC*,²⁰ 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:²¹

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

¹⁶ *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.

¹⁷ ACCC, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission’s Use of Enforceable Undertakings* (August 1999), <www.accc.gov.au> at 12 June 2008.

¹⁸ 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.

¹⁹ Yeung, above n 12, Chapter 5. Such concern and others (lack of admission of guilt) are considered in more detail later on in this paper.

²⁰ *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 143 ALR 381.

²¹ *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 143 ALR 381, 391.

not given force and effect by the empowering statute; the validity and effect of the contract being determined... by the ordinary laws of contract... The action [resulting from entering into an enforceable undertaking] is contractual, not statutory.

Since the ACCC saw an enforceable undertaking as a contract by, it could not be varied without the approval of all relevant parties, as courts are usually reluctant to engage in the judicial review of contractual behaviour. As a consequence, a review of an undertaking is generally 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, it is statutory in nature. It is due to this statutory nature that the ACCC can enforce an undertaking in court in the case of a breach of the terms. A breach of the court order therefore 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.²² However, it is important to remember that such a settlement is special in nature because of its flexibility, its availability to the public and the ability to enforce the undertaking in court. Due to this specific nature, the ACCC has issued a guideline²³ to help understand when this sanction is relied on by the regulator. The guideline attempts to enhance the transparency of the process that leads to an enforceable undertaking.

Policy behind the acceptance of enforceable undertakings and protections provided to the promisors

The ACCC, as an independent regulatory body, endeavors to improve competition and efficiency in markets. Further, it promotes compliance with fair trading practices in a well informed market. To achieve such outcomes, the ACCC has a range of remedies at its disposal. It may take legal action against the alleged offenders. However, it is not possible for the regulator to pursue all perceived breaches of the Act. Other innovative remedies are at its disposal such as the reliance on compliance and educational programs or enforceable undertaking.²⁴ Ultimately, the ACCC will choose the enforcement method that is most appropriate to deal with a particular situation.

²² ACCC, *ACCC Annual Report 1995-1996*, 117; more recently this was noted in ACCC, *Annual Report 2006-2007* at iv.

²³ ACCC, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (August 1999), <www.accc.gov.au> at 12 March 2009.

²⁴ ACCC, *Annual Report 1995-1996* at xv.

As noted before, an enforceable undertaking is used by the ACCC where the regulator believes that accepting an undertaking would provide a better outcome than other sanctions.²⁵ A better outcome is possible because the regulator's power to enter into an enforceable undertaking appears broadly defined under s 87B(1) of the Act. As a result of this section, an enforceable undertaking may enable a more flexible and arguably appropriate resolution than court order. As an administrative sanction, an enforceable undertaking aims to achieve a number of goals:²⁶

- Protection of the public;
- Prevention of future breaches of the law;
- Corrective measures such as compensation or corrective advertisement.

Accordingly, an enforceable undertaking does not only provide a remedy to alleged breaches of the law but also provides compensation for victims of the alleged conduct²⁷ and improves the corporate governance of the organisation which is subject to the enforceable undertaking.²⁸ This flexibility is highlighted in *ACCC v Woolworth (South Australia) Pty Ltd*²⁹ where Mansfield J observed that the words 'in connection with' (that are present in s 87B(1) of the Act) have a wide import. His Honour noted that the power of a statutory authority empowered by such a provision to accept an enforceable undertaking is more comprehensive than that of a court, which is subject to certain restraints.³⁰ For instance, in *BMW Australia Ltd v ACCC*,³¹ the court observed that, even though the ACCC may accept an undertaking that requires an expert to audit a compliance program, the court may have no power under s 86C of the Act to make such an order.³² Similarly, as a result of *Cassidy v Medibank*

²⁵ ACCC, above n 2 at 2.

²⁶ Australian Law Reform Commission, *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; Marina Nehme, 'Enforceable Undertakings: A New Form of Settlement to Resolve Alleged Breaches of the Law' (2007) 11 *University of Western Sydney Law Review* 104, 117; Yeung, above n 12 at 110-111.

²⁷ This point will be discussed in more detail later on in this paper.

²⁸ This is possible through the implementation and improvement of existing compliance programs.

²⁹ *Australian Competition and Consumer Commission v Woolworth (South Australia) Pty Ltd* (2003) 198 ALR 417.

³⁰ *Australian Competition and Consumer Commission v Woolworth (South Australia) Pty Ltd* (2003) 198 ALR 417 at 433.

³¹ *BMW Australia Limited v Australian Competition & Consumer Commission* (2004) 207 ALR 452

³² *Ibid* at 468. However this decision is illustrative rather than determinative as it may be seen in *Australian Competition & Consumer Commission v Auspine Ltd* [2006] FCA 1215; the *BMW Australia Limited v Australian Competition & Consumer Commission*

Private,³³ the ACCC cannot obtain refunds as a remedy unless it initiated a representative action. Accordingly, an enforceable undertaking may allow the ACCC to achieve certain results that may not be achievable through court proceedings.

To understand the broad application of s 87B, the ACCC issued a guideline in relation to its policy and interpretation of the operation of the section in 1999.³⁴ Although enforceable undertakings are commonly used by companies and individuals as a way to avoid unnecessary litigation, the ACCC will not enter into one unless it offers a better solution than other sanctions.³⁵ To be able to make such an assessment, the ACCC takes a number of factors into consideration. The most prominent of these factors are:

- The nature of the alleged breach;
- The history of the alleged offender;
- The cost-effectiveness of the enforceable undertaking for all parties; and
- The apparent good faith of the promisor.³⁶

These criteria are discussed below.

The nature of the alleged breach

The ACCC looks at the impact of the alleged breach on third parties and the community at large. The greater the impact, the less likely it is that the ACCC will accept an enforceable undertaking. The ACCC also considers the type of practice that has led to the alleged occurrence of the offence and the size of the business involved.³⁷

The history of the alleged offender

The ACCC checks whether any complaints have been received in the past against the business of the alleged offender and if such complaints have led to court action.³⁸ This is an important requirement since the ACCC

underlines the problem found in the application of s 86C of the *Trade Practices Act*. However, an enforceable undertaking does not only escape the limitation that may be faces by s 86C but it also provide the regulator with a mean by which it can make a difference in the compliance culture of an organisation while at the same time compensating parties that have suffered a loss due to the conduct of the alleged offender.

³³ *Cassidy v Medibank Private* [2003] M176/2002 (Unreported, McHugh, 20 June 2006).

³⁴ ACCC, *Section 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings* (August 1999), <www.accc.gov.au> at 12 June 2008.

³⁵ *Ibid* at 4.

³⁶ *Ibid*.

³⁷ *Ibid*.

³⁸ *Ibid*.

usually does not closely monitor the undertakings. There is a high reliance on self-regulation monitoring.³⁹ However, it is important to observe that an enforceable undertaking may allow the ACCC and the alleged offender to write a set of undertakings that are tailored to remedy the incidents that initiated the ACCC's investigation. Instead of having the regulator enforce the promise, in the majority of cases, the task is delegated to an independent expert hired by the promisor. The main function of the ACCC would be to ensure the independence of this internal monitoring process and to audit its efficiency in certain scenarios. As a consequence, a form of enforced self-regulation is created.⁴⁰

Furthermore, a form of 'corporate probation' may also be formed.⁴¹ In instances where the ACCC believes that a breach of the enforceable undertaking has taken place, the regulator may use the coercive powers of the court to implement the enforceable undertaking. To maximise the chances of compliance with an enforceable undertaking, the ACCC is unlikely to enter into an undertaking with entities that do not have a good record of compliance with the law given that a breach of an undertaking by itself is not an offence. Similarly, it may be unlikely for such an organisation to change their compliance culture.

The cost-effectiveness of pursuing an enforceable undertaking rather than a court action

From the point of view of the promisor in most instances, the cost of entering into an enforceable undertaking would be less than the costs associated with contesting the results of the investigation, civil litigation and the adverse publicity. Similarly, from the point of view of the regulator, it may be cheaper than starting civil action.⁴²

The apparent good faith of the promisor

The co-operation of the alleged offender with the ACCC may illustrate good faith. A number of ACCC undertakings acknowledge cooperativeness on the part of the promisor.⁴³ For instance in an undertaking entered into with Goodyear Tyres Pty Ltd, the ACCC noted that '[T]he Commission acknowledges that Goodyear Tyres has cooperated in resolving this matter.'⁴⁴

³⁹ This point will be discussed in more detail later on in this paper.

⁴⁰ Ian Ayres and John Braithwaite, *Responsible Regulation: Transcending the Deregulation Debate* (1992) 106.

⁴¹ Christine Parker, *The Open Corporation* (2002) 261.

⁴² ACCC, above n 34 at 4.

⁴³ *Ibid.*

⁴⁴ ACCC, Enforceable Undertaking: Goodyear Tyres Pty Ltd, Document No D08/65865 (25 June 2008).

All these criteria provide certain protection to outsiders as noted in the next paragraph.

Possible protection to alleged offenders

The absence of any statutory criteria indicating the circumstances under which an enforceable undertaking may be entered into in s 87B of the Act has been subject to criticism. It is argued that this absence affords the ACCC with great discretion in relation to the circumstances under which it would wish to accept an undertaking. Such discretion lessens the transparency of an undertaking.⁴⁵ However, as noted previously, the ACCC issued a guideline in 1999 in relation to its policy on the use of enforceable undertaking. While the information set up in s 87B of the Trade Practices Act: A Guideline on the Australian Competition and Consumer Commission's Use of Enforceable Undertakings⁴⁶ is not binding, the criteria (discussed in the previous paragraphs) enhance the transparency of an enforceable undertaking. Such directives supply information to the alleged offender about the circumstances under which a person may be eligible to enter into an enforceable undertaking.

Furthermore, even though an enforceable undertaking is a compromise between an alleged offender and the regulator, the ACCC was criticised by business commentators alleging that it had bullied or arm-twisted businesses into complying with its directives and extracted unjustified and expansive promises from the alleged offenders when seeking certain enforceable undertakings.⁴⁷ However, it is important to note that the ACCC has responded to such concerns and it has taken preventive measures in relation to a number of issues raised in the study.⁴⁸ Additionally, the ACCC is willing to consider the variation of the enforceable undertaking accepted when needed. Such a possibility will lessen any potential for abuse of the system and may illustrate the regulator's flexibility when dealing with the business community. The ACCC guideline in relation to enforceable undertakings observes that the

⁴⁵ Frank Zumbo, 'Section 87B Undertakings: There's No Accounting for Such Conduct!' (1997) 5 *Trade Practices Law Journal* 121 at 123.

⁴⁶ ACCC, above n 34 at 4.

⁴⁷ 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.

⁴⁸ The ACCC supported 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. 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>> at 11 October 2007.

regulator may allow variation of the undertaking⁴⁹ when the undertaking is too hard to comply with or is impractical; or where a change of circumstances occurs.

Other protections are also available from the point of view of the promisor. Judicial review for procedural fairness of an ACCC decision to accept an undertaking may be available under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (“the ADJR Act”). In *Australian Petroleum Pty Ltd v ACCC*,⁵⁰ Australian Petroleum Pty Ltd successfully appealed an ACCC decision to refuse to vary an undertaking to the Federal Court. The ACCC maintained that its decisions in relation to undertakings were not reviewable. The Federal Court observed that the power to enter into an undertaking flows from s 87B of the Act. As a result, the decision to refuse to vary an undertaking is one made under an enactment for the purpose of the ADJR Act and as a consequence is therefore reviewable. The court has also found that, by analogy and extension of this statement, a refusal to enter into an undertaking is likewise reviewable under the ADJR Act.⁵¹

Lastly, when an enforceable undertaking is being enforced in court by the regulator due to a breach of the terms of the undertaking, the court will not automatically enforce the undertaking. One of the factors the court may consider when enforcing the terms of an undertaking relates to the circumstances that led to the acceptance of the undertaking.⁵²

In short, a number of protections are there to ensure the transparency and accountability around the acceptance of an enforceable undertaking so as to limit any abuse that may arise from the use of this sanction. Accordingly, in this author’s view, the benefits of the enforceable undertakings regime far outweigh the risks of its abuse due to the checks and balances that are in place. Another element that may provide clarity on the manner in which the enforceable undertakings are used is related to the structure and the content of such undertakings.

⁴⁹ Section 87B(2) states that: the person may withdraw or vary the undertaking at any time, but only with the consent of the Commission. ACCC, above n 2 at 12-13.

⁵⁰ *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 73 FCR 75, (1997) ATPR 41-555.

⁵¹ *Glass v Australian Prudential Regulation Authority* [2003] FCA 1105 (Unreported, French J, 26 September 2003), at [14].

⁵² *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd and Others* (2003) ALR 417, FCA 530 at [44]; *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 375, (2003) 52 ATR 1 at [38]; Marina Nehme, ‘Enforceable Undertakings and the Court System’ (2008) 26 *Company and Securities Law Journal* 147 at 160-162.

Content of the enforceable undertakings and the associated problems

The ACCC has not committed itself to a fixed formula in relation to the content of enforceable undertakings.⁵³ On one hand, this allows the regulator and the alleged offender to write a set of rules that are tailored to the breach allegedly committed by the promisor. On the other hand, this may lead to inconsistency in the use of an enforceable undertaking. However, a look at the enforceable undertakings accepted by the ACCC demonstrates that there is a consistency in the structure of the undertakings given to the ACCC.⁵⁴

Structure of an enforceable undertaking

While the regulator is not committed to a particular structure, the ACCC's guide to s 87B contains a sample of a hypothetical undertaking.⁵⁵ According to the information available from this guide and the ACCC register of enforceable undertakings, an enforceable undertaking usually has the following structure:⁵⁶

- **Background:** This section sets out the names of the parties involved in the enforceable undertaking and describes the alleged breach;
- **Commencement of the undertaking:** This section notes the time when the enforceable undertaking is to come into effect;
- **Undertaking:** This section outlines the undertakings the promisor will implement. For instance, the alleged offender may promise to cease the offending conduct, to rectify his/her conduct, and/or to compensate the people affected;
- **Acknowledgement:** In this section the promisor acknowledges that the enforceable undertaking will be available to the public and that the undertaking will not affect the rights of outsiders; and
- **Signature of parties:** Without the signature of the parties, the undertaking has no effect.

Undertakings that deal with complex and technical issues may also have a glossary to define the terms used.

Most of the undertakings accepted by the ACCC follow this structure and this ensures the consistency of enforceable undertakings because parties are aware of what to expect. However, other guidelines present in s 87B such as the Guideline on the Australian Competition and Consumer

⁵³ ACCC, above n 2, 6.

⁵⁴ ACCC, Undertakings Register (s 87B), <<http://www.accc.gov.au/content/index.phtml/itemId/6029>> at 23 March 2009.

⁵⁵ ACCC, above n 2, 14.

⁵⁶ *Ibid.*

Commission's Use of Enforceable Undertakings⁵⁷ have not been followed. One such issue is relating to admission of liability.

Admission of liability

The ACCC guideline in relation to the use of s 87B states that the ACCC will not accept an undertaking if it contains a clause denying liability. Even though such clauses are not explicitly included in undertakings, some clauses may be formulated in a way that implies a denial of liability. For example, one undertaking, agreed between British American Tobacco and the ACCC, stated the following:

In response to the commission's views and without admission: that any of the Commission's views including but not limited to the matters referred to in clause 8.1 are correct; that any one or more of the Representations, if made were made in contravention of the Act; and of any liability arising by reason of the Commission's views as expressed in this Undertaking, the Company has offered to give this undertaking to the Commission pursuant to s 87B of the Act.⁵⁸

The fact that it is specified in the enforceable undertaking that British American Tobacco Australia Ltd does not admit that it has actually committed the alleged breaches may be construed as a denial of liability.⁵⁹ In other enforceable undertakings, the promisor has used different terminology that may also be construed as a denial of liability. For instance, the following was stated in an enforceable undertaking between St John of God Health Care Inc and Lake Imaging Pty Ltd and the ACCC:

SIGHC and Lake: do not agree with the concerns expressed by the Commission; do not agree that either SIGHC or the SJGHC ultrasound restraints or the exercise by Lake of the Lako ultrasound restraint expose any relevant concern under s 50 of the Act; and are of the view that no part of the Proposed Acquisition, including the acquisition by Lake of the ultrasound component of the SJGHC diagnostic imaging business in Ballarat, would result in a substantial lessening of competition in any relevant market.⁶⁰

The promisors, St John of God Health Care Inc and Lake Imaging Pty Ltd, observed that they do not agree with the ACCC's concerns and this

⁵⁷ Ibid at 4.

⁵⁸ ACCC, Enforceable Undertaking: British American Tobacco Australia Ltd, Document No D05/2381 (11 May 2005).

⁵⁹ 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, 157-158.

⁶⁰ ACCC, Enforceable Undertaking: St John of God Health Care Inc and Lake Imaging Pty Ltd, Document No D06/19231 (3 March 2006).

can be viewed as a denial of liability. However, such clauses are not very common in enforceable undertakings accepted by the ACCC. In most undertakings, the promisor will note that he/she 'may' have breached the law.⁶¹ For instance, the ACCC entered into an enforceable undertaking with Southern Motors Pty Ltd in which the promisor observed that:

Southern Motors acknowledges the ACCC's concerns that by failing to disclose that dealer delivery charges were applicable, it may have engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 52 of the TPA.⁶²

In other instances, the promisor may admit that a breach of the law has occurred. For instance, Baby Dynamic Pty Ltd entered into an undertaking with the ACCC because some of its products did not comply with safety standards. In such a case, the promisor informed retailers to which it supplied the product that it did not comply with the required safety standards and consequently breached s 65C of the Act.⁶³ Such an admission in an undertaking may allow the parties that have suffered a loss due to the alleged conduct to be able to use the enforceable undertaking as evidence in court proceedings (which they may initiate to recoup their losses) to prove that a breach of the law has actually occurred.⁶⁴

Furthermore, some of the alleged breaches are technical and it can be proven that they have actually occurred. This is especially the case for enforceable undertakings accepted in relation to non-compliance with the safety product standard or in relation to misleading conduct. For example, Domayne Pty Ltd is a supplier of 'Domayne Essential quilts' in its retail stores in Australia. It claimed that the quilts it provided contained 95% to 100% duck down. Tests conducted by the ACCC illustrated that the claim was false and the quilts actually contained 70% to 75% duck down.⁶⁵ In such instances, even if there is no admission of liability, an outsider may prove in private proceedings that misleading and deceptive conduct has occurred.⁶⁶ While on the spot fines may be appropriate to deal with such breaches, an enforceable undertaking would achieve a better outcome since it not only aims to change the culture of an

⁶¹ ACCC, Undertakings Register (s 87B), <www.accc.gov.au> at 10 August 2008.

⁶² ACCC, Enforceable Undertaking: Southern Motors Pty Ltd, Document No D06/30176 (15 May 2006).

⁶³ ACCC, Enforceable Undertaking: Baby Dynamics Pty Ltd, Document No D06/29863 (10 May 2006).

⁶⁴ Marina Nehme, 'The Impact of Enforceable Undertakings on Third Parties' (2008) Paper presented at the CLTA Conference, Sydney, 3-5 February 2008.

⁶⁵ ACCC, Enforceable Undertaking: Domayne Pty Ltd, Document No D07/4783 (14 January 2007).

⁶⁶ Nehme, above n 5 at 32.

organisation but also to compensate affected third parties. These aims are not achievable with spot fines.

The fact that an enforceable undertaking provides protection to affected third parties does not derogate the right of these parties to initiate their own lawsuit if they are not satisfied by the compensation provided by the enforceable undertaking.⁶⁷ However, the lack of admission of liability may be problematic because it will not allow outsiders to use the enforceable undertaking as evidence that a breach of the law has actually occurred. Nonetheless, certain parties affected by an enforceable undertaking have attempted to use the breach of the undertaking to help in private court proceedings. For instance, in *Dresna Pty Ltd v Misu Nominees Pty Ltd*,⁶⁸ the court noted that a breach of s 87B can constitute ‘unlawful means’ for the tort of conspiracy and gave leave for the appeal to proceed.⁶⁹

Availability of defenses

Another interesting point in relation to the remedy of an enforceable undertaking is that the ACCC guideline notes that undertakings should not contain terms that may set up defences for possible non-compliance with the law. Despite this, a number of enforceable undertakings have included clauses that deal with possible breaches of the terms of the enforceable undertaking. For example, one undertaking noted that:

If the Company is unable to comply with its obligation under this undertaking [...] the Company and the Commission will review this undertaking and negotiate in good faith the withdrawal or variation of all or a part of this undertaking pursuant to s 87B(2) of the Act.⁷⁰

Such a clause may be seen as opening the door for non-compliance with the undertaking. Promisors may see it as an excuse for non-compliance. If they do not comply with the terms of the enforceable undertaking, they may simply apply for variation of the undertaking.

Another clause that has been included in an enforceable undertaking is that Austar will not be liable for any failure to perform any obligation

⁶⁷ ASIC, Enforceable Undertaking: David William Wolstencroft, Document No 017 029 213 (24 October 2007); *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061 (Unreported Judgment, Finkelstein J, 19 July 2007); *Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission* (2005) ATPR 42-082.

⁶⁸ *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2003] FCA 1537, (2004) ATPR (Digest) 46-245.

⁶⁹ *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2003] FCA 1537, (2004) ATPR (Digest) 46-245; For more information: Marina Nehme, ‘Enforceable Undertaking and its Impact on Private Lawsuits’ (2008) 22(3) *Australian Journal of Corporate Law* 275.

⁷⁰ ACCC, Enforceable Undertaking: British American Tobacco Australia Ltd, Document No D05/2381 (11 May 2005).

under these undertakings if the failure is due to force majeure.⁷¹ In this case, force majeure can be seen as a defence available to the promisor. It may be used by the alleged offender in a case of non-compliance with the terms of the enforceable undertaking to counteract an action by the ACCC. Even though such a defence has very limited impact and can only be applied in rare circumstances, its inclusion is not really required since the ACCC will most likely be willing to vary or withdraw the terms of the undertaking in the case of a force majeure. For example, one undertaking, which referred to the two reasons for altering an undertaking given in the ACCC guideline, stated the following:

If the Company is unable to comply with its obligations under this undertaking, or believes variation is indicated due to changed circumstances, the Company and the Commission will review this undertaking and negotiate in good faith the withdrawal or variation of all or part of this undertaking pursuant to s 87B(2) of the Act.

The Commission acknowledges that a variation of this undertaking may be indicated in the future to take account of further research or technological progress. In particular, the Commission will consider the variation of this undertaking in circumstances where the Commission is satisfied that the Company has sufficient and reasonable grounds to make statements otherwise prevented by the operation of this undertaking. This would include reliable scientific evidence, which is approved or endorsed by governmental or internationally recognised and credible organisations.⁷²

From 1993 to 2006, the ACCC accepted the variation of 32 enforceable undertakings.⁷³ A number of these variations were made because the promisor could not comply with the undertaking. For example, in an undertaking given to Moore Talk Communication, the promisor was supposed to conduct audit reports on certain dates. However, due to delays in the formulation of the trade practice compliance program, the alleged offender did not manage to comply with the auditing requirements. As a consequence, the ACCC agreed to the variation of the enforceable undertaking in relation to the auditing dates.⁷⁴ However, it is important to note that the ACCC takes breaches of the undertaking very seriously.

⁷¹ ACCC, Enforceable Undertaking: Austar Entertainment Ltd (21 November 2002) (document number not available).

⁷² ACCC, Enforceable Undertaking: British American Tobacco Australia Ltd, Document No D05/23081 (11 May 2005).

⁷³ ACCC, Undertakings Register (s87B), <www.accc.gov.au> at 10 August 2008.

⁷⁴ ACCC, Enforceable Undertaking: Moore Talk Communication, Document No D01/43263 (12 September 2001).

Graeme Samuel noted the following:

It is important businesses and directors recognise court enforceable undertakings impose serious obligations which, if undertaken, must be complied with. The ACCC will not hesitate to enforce such undertakings.⁷⁵

Recap

The consistent use of the same structure in most of the enforceable undertakings accepted by the ACCC once again clarifies the use of this sanction and helps businesses to determine the likely content of an enforceable undertaking. Further, the fact that there is no admission of liability in an undertaking is not of major concern since the affected third parties can initiate private proceedings irrespective of the presence of an enforceable undertaking. Similarly the presence of an undertaking may be used as evidence in private lawsuits started by outsiders. Lastly, defences should not be present in an enforceable undertaking because such clauses are redundant. In cases where a person has a genuine excuse for not complying with the undertaking, the regulator is willing to modify and vary the terms of the undertaking. Accordingly, an enforceable undertaking is a flexible sanction that takes the interest of the promisor into consideration through variation or withdrawal of the undertaking. It is also protective of the right of third parties who may be compensated by the undertaking and may still start their own private lawsuits if they are not satisfied with the remedy provided by the undertaking. These features may explain the reason behind the popularity of the use of enforceable undertakings. Such popularity is considered in the next paragraph.

Undertakings accepted by the ACCC

When assessing the popularity of the use of enforceable undertaking, this paragraph considers three matters which are the following: the impact of enforceable undertakings on litigation; the fluctuation of the use of enforceable undertaking over the years; and; the situations in which an undertaking is accepted.

Impact of enforceable undertakings on litigation

As noted in part three of this paper, the ACCC has a number of remedies at its disposal. As well as accepting an undertaking, the ACCC can also initiate court proceedings against the alleged offender. With 711 enforceable undertakings accepted from 1993 to 2006, there has been a concern that the ACCC has increasingly used more enforceable undertakings over the years at the expense of litigation.

⁷⁵ ACCC, 'Introduction Agency, Director Breached Undertakings: Court Orders Payment of Refunds of \$118,476' (Media Release MR 255/08, 5 September 2008).

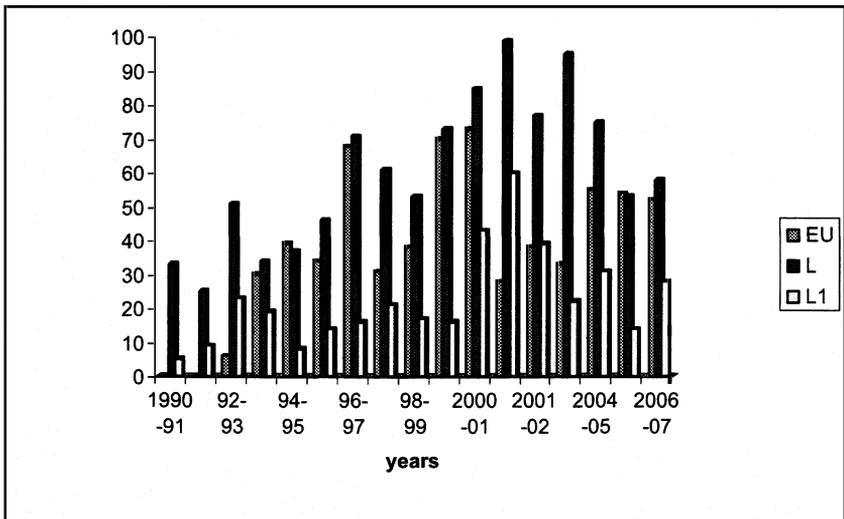


Figure 1: Enforceable undertakings and litigation⁷⁶

However, Figure 1 illustrates that is this not necessarily the case. In most instances, the number of proceedings that are before the courts exceeds or is equivalent to the number of enforceable undertakings accepted by the ACCC. Further, when comparing the number of litigation before and after the introduction of enforceable undertakings, the amount of litigation does not seem to have been reduced by the introduction of the sanction of enforceable undertakings in the regulatory system.

While the overall amount of litigation is usually higher than the number of enforceable undertakings accepted, it is important to acknowledge that the number of actions initiated every year by the ACCC is usually lower than the number of enforceable undertakings accepted. Accordingly, it is not every matter that will lead to litigation. In relation to this, the ACCC noted that it 'has had a consistent position of being selective in its choice of enforcement actions involving litigation and of giving priority to cases which are most likely to improve overall compliance with the Act.'⁷⁷

⁷⁶ The information in Figure 1 was gathered from the Trade Practices Commission (TPC) and the ACCC's Annual Reports (starting with TPC Annual Report 1990-1991 to ACCC Annual Report 2006-2007). In Figure 1, EU stands for enforceable undertakings, L stands for Litigation matter before the court and L1 stands for Litigation initiated in that year.

⁷⁷ ACCC, *Annual Report 2004-2005* at 24.

As seen in Figure 1, in 2005-2006, the composition of ACCC's litigation activities appears to have shifted with a greater number of enforceable undertakings entered into.⁷⁸ The Annual Report of 2005-2006 noted that the reasons behind the rise in number of enforceable undertaking were the following:⁷⁹

- The ACCC is accepting undertakings when the outcome of such undertakings is broadly the same as the outcome that would be achieved through litigation;
- The issue of timeliness is considered by the ACCC when considering entering into an enforceable undertaking. An undertaking resolves a breach of the law faster than litigation;
- An enforceable undertaking can include promises such as compliance programs and refund which may not be reached through litigation; and
- Litigation is relied on in situations where the use of such litigation is likely to improve overall compliance with the Act.

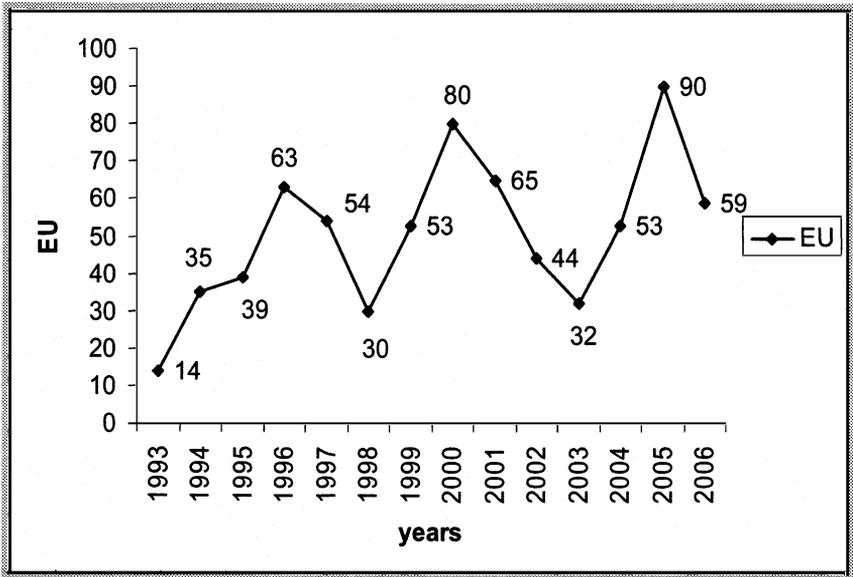
All these are arguments that support the use of enforceable undertakings by the ACCC.

The fluctuation of the use of enforceable undertakings over the years

However, the use of undertakings by the ACCC has fluctuated over the years, as it can be seen in Figure 1 and Graph 1.

⁷⁸ Figure 1 noted that in the year 2005-2006, the ACCC has accepted 54 enforceable undertaking while the number of cases in front of the court was 53. Similarly the number of action started in that year was low, only 14. This is less than half the number of cases initiated in 2004-2005 (31 cases where started in that year).

⁷⁹ ACCC, *Annual Report 2005-2006* at 4.



Graph 1: Enforceable undertakings accepted by the ACCC from 1998 to 2006⁸⁰

From 1993 to 1996, enforceable undertakings are used extensively by the ACCC. However, a steady decline in their use is apparent from 1997 to 1999. As noted in Figure 1, such a decline in the number of enforceable undertakings was not accompanied by a major rise in the amount of litigation. The number of cases started in 1997-1998 was 21, only 5 more cases than the previous year.⁸¹ The decline in the use of enforceable undertakings could be the result of an internal review of the use of this sanction by the ACCC. The report of the internal review noted the following:

Circumstance may dictate a course of action which not only publicises the matter [via an enforceable undertaking that is publicly available], but takes the next step of clothing it with the authority of the court so as to further ensure compliance by others - perhaps a court order prohibiting specified conduct. Finally, further circumstances may dictate that the additional step of public and judicially determined punishment is warranted to influence compliance by others.⁸²

Additionally, some interviews conducted by Christine Parker confirm that there was a conscious scaling back of the use of enforceable undertakings

⁸⁰ For the purpose of this diagram, enforceable undertaking is abbreviated as EU.

⁸¹ There were 16 cases initiated in 1996-1997.

⁸² D Watt, 'Evaluation of use of s 87B undertakings' (1998) 13 *ACCC Journal* 7 at 8.

by the ACCC at this time.⁸³ However, even during this period, the ACCC continued to look favourably at the remedy of enforceable undertakings. For instance, the ACCC noted that the 'administrative resolution under s 87B is increasingly important, an avenue made more effective by the introduction of an Australian standards for compliance programs.'⁸⁴

Further, Graph 1 shows that the number of enforceable undertakings was on the increase in 1999, 2000 and the first half in 2001. The rise in the number of undertakings accepted during that period may be explained by the ACCC's temporary jurisdiction to act against misconduct in relation to the introduction of a goods and services tax ("GST") in Australia.⁸⁵ The ACCC noted that it 'aims to quickly resolve GST-related matters to minimise confusion and consumer losses'. The Commission therefore accepted court enforceable undertakings rather than taking direct court action in relation to GST-related matters when the breach of the law was not deliberate.⁸⁶ As a result, in 1999, six enforceable undertakings were accepted in relation to the new tax system. In 2000, 27 enforceable undertakings dealt with alleged breaches in relation to GST matters. Additionally, a number of undertakings were accepted as a supplement to litigation, especially in cartel court cases.

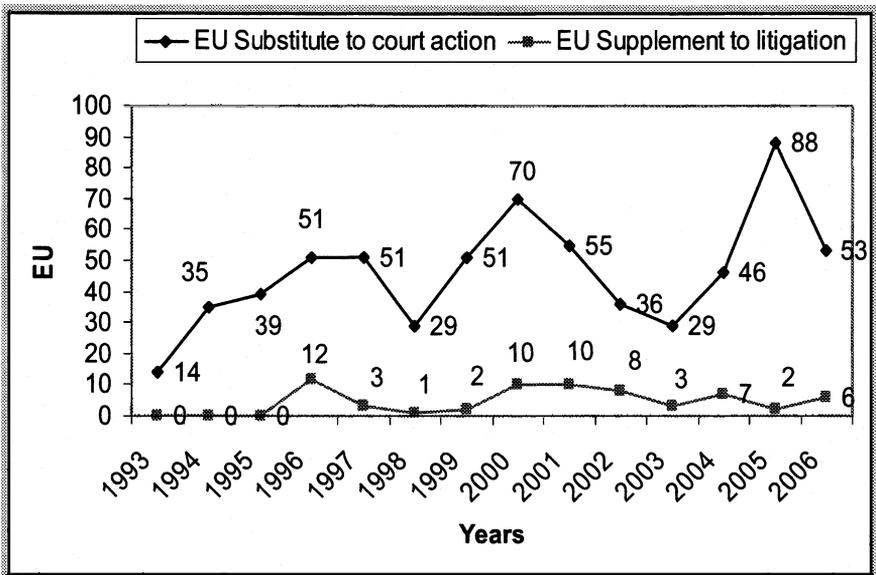
As can be seen from Graph 2, out of 80 enforceable undertakings accepted by the ACCC in 2000, 70 undertakings (including the 27 dealing with GST alleged breaches) were used as a substitute for court proceedings, and 10 (including the cartel cases) were accepted as a supplement to court proceedings. In 2001, eight enforceable undertakings were accepted in relation to the introduction of the new tax system. Furthermore, as is evident in Graph 2, out of the 65 enforceable undertakings accepted by the ACCC in 2001, 55 undertakings (including eight dealing with GST alleged offences) were accepted as a substitute for proceedings, and 10 were considered a supplement to litigation. These numbers demonstrate that, during the period when the ACCC had jurisdiction to deal with breaches in relation to the new tax system, the enforceable undertaking was one of the main sanctions used to deal with breaches of the new tax system. Additionally, as may be seen from Graph 2, during this period enforceable undertakings were used as a tool to supplement litigation.

⁸³ Parker, above n 6 at 217.

⁸⁴ ACCC, *Annual Report 1998-1999*, 15. Similar comments were made in: ACCC, *Annual Report 1997-1998* at 9.

⁸⁵ Parker, above n 6, 217- 218.

⁸⁶ ACCC, *Annual Report 2000-2001* at 30.



Graph 2: Comparison between enforceable undertakings acting as a substitute for litigation and as a supplement to litigation⁸⁷

After the ACCC's role in the transition to the new tax system ceased, the number of enforceable undertakings accepted by the ACCC declined. In 2003, it reached lows similar to 1998, with the regulator accepting only 32 undertakings, three of which were supplements to litigation. However, the number of enforceable undertakings rose again in 2004 and reached 90 in 2005, only two of which were supplements to litigation. This jump may have been the result of several factors.

One of these factors may have been the resignation of Allen Fels in June 2003, from his position as Chairman of the ACCC. This position was filled by Graeme Samuel. This change of leadership might explain a shift in policy toward the use of enforceable undertakings. Like Allen Fels, Graeme Samuel appears to support ACCC's use of enforceable undertakings. He noted that enforceable undertaking 'can be used to protect consumers and the competitive process.'⁸⁸

⁸⁷ For the purpose of this diagram, enforceable undertaking is abbreviated as EU.

⁸⁸ Australian Trade Practices News, Issue 543 (5 December 2003)

< <http://ww5.cch.com.au/atp/atp543.html> > at 1 March 2009; Similar comments were made in: ACCC, *Annual Report 2005-2006* at 4.

Furthermore, the ACCC's annual report of 2004-2005 observes that litigation will only be undertaken in serious cases⁸⁹ and the ACCC will try to solve problems through settlement wherever possible.⁹⁰ Similarly, the ACCC's annual report of 2003-2004 notes the following:

The ACCC is convinced that it is more sensible to encourage business to comply with the law in the first place rather than trying to undo the damage after the law has been broken. Litigation is not undertaken lightly and most of our efforts are directed at education, advice and persuasion.

The ACCC derives little satisfaction from winning cases some years down the track when consumers and business customers have already suffered harm. The ACCC believes that educating business about its rights and obligations under the law will reduce potential breaches of the Trade Practices Act and the need for legal proceedings.⁹¹

Another reason that may account for the shift in policy is that the ACCC was suffering severe financial difficulties. For instance, in 2003-2004 the ACCC had an operating deficit of \$7 million.⁹² This deficit was the result of expensive and costly litigation that the ACCC lost. Due to this financial difficulty, the regulator may have used the cheaper sanction of enforceable undertaking to save costs. Although currently the ACCC is no longer in deficit, it is still using the sanction of enforceable undertaking frequently. However, as seen in Figure 1, this does not seem to have affected the number of actions instituted in court.

In summary, it is important to acknowledge that the ACCC does not consider enforceable undertakings as a 'soft option' and it does not 'accept them lightly'.⁹³ As noted before, the regulator has accepted undertakings when it believed that such a remedy would provide the best possible outcome. For this reason, enforceable undertakings have been accepted as a supplement to court proceedings.

The situations where an undertaking is accepted

The ACCC has accepted enforceable undertakings for a number of reasons. In most instances, enforceable undertakings have been accepted as a substitute for litigation. For example, in one case the ACCC was concerned that Imperial Tobacco Australia Ltd was involved in representations about low-yield cigarettes in contravention of ss 52, 53 and 55 of the Act. The ACCC accepted an enforceable undertaking from Imperial Tobacco Australia Ltd as a substitute for litigation, noting that

⁸⁹ It is important to acknowledge that the ACCC will not shy from the use of litigation when needs be as shown in Figure 1; ACCC, ACCC, *Annual Report 2004-2005* at 24.

⁹⁰ *Ibid.*

⁹¹ ACCC, *Annual Report 2003-2004* at 3.

⁹² ACCC, *Annual Report 2003-2004* at 3.

⁹³ ACCC, above n 2 at 3.

'the Commission is satisfied that this Undertaking addresses, without the need for litigation, the alleged conduct...'⁹⁴ However, not all the undertakings have been accepted when the ACCC has considered taking civil action against the alleged offender.⁹⁵ They have also been used after the regulator has started or finished such action, as shown in Figure 2, below.

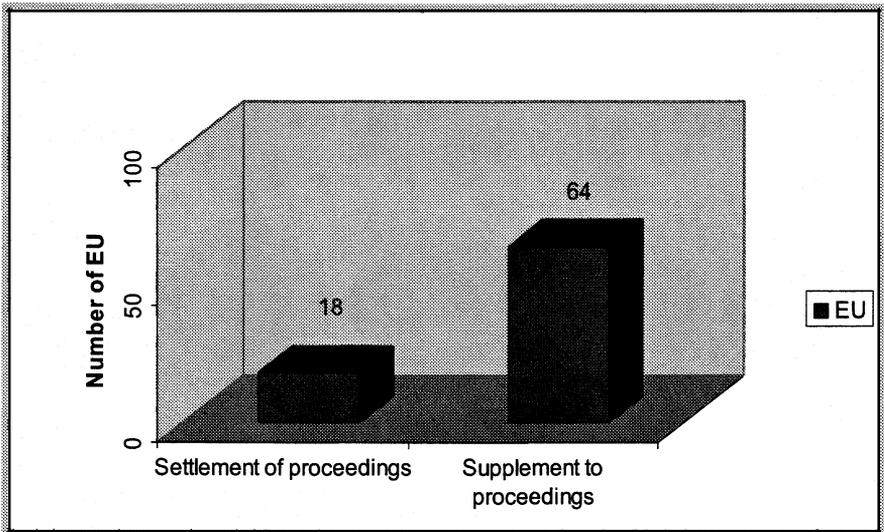


Figure 2: Enforceable undertakings and court proceedings⁹⁶

Accordingly, enforceable undertakings are not always used as a substitute for litigation. From 1993 to 2006, the ACCC accepted 64 enforceable undertakings as a supplement to litigation, and 18 enforceable undertakings to settle court proceedings.⁹⁷

Enforceable undertakings accepted to settle court proceedings

As noted above, 18 enforceable undertakings were accepted by the ACCC to settle court proceedings. Nine of these related to alleged misrepresentation by the promisor. An example is the ACCC's initiated court proceedings against Morgan Buckley Pty Ltd.⁹⁸ The regulator had concerns about the manner in which Morgan Buckley Pty Ltd had

⁹⁴ ACCC, Enforceable Undertaking: Imperial Tobacco Australia Ltd, Document No D05/68710 (7 November 2005).

⁹⁵ This is illustrated in Graph 2.

⁹⁶ For the purpose of this diagram, enforceable undertaking is abbreviated as EU.

⁹⁷ ACCC, Undertakings Register (s87B), <www.accc.gov.au> at 10 August 2008.

⁹⁸ ACCC, Consumer Protection, Morgan Buckley Pty Ltd, <www.accc.gov.au> at 4 September 2008.

calculated certain invoices. The ACCC believed that the company may have been engaged in misleading conduct. The regulator accepted an enforceable undertaking from Morgan Buckley Pty Ltd in which the promisor undertook to endeavour to retain its Quality Assurance Accreditation under AS/NZS ISO9001:2000.⁹⁹

Seven other enforceable undertakings were accepted by the ACCC in relation to alleged breaches of s 45 of the Act. For instance, on 16 April 2002, the ACCC started proceedings against Dr Paul Pong Tiah Khoo and Paul P. T. Khoo Pty Ltd, alleging that they entered into arrangements with other doctors to not provide private in-hospital obstetrics services on a 'no-gap' billing basis to their privately insured patients. The ACCC believed that such conduct amounted to a primary boycott in contravention of s 45. The regulator settled the proceedings through an enforceable undertaking that involved disclosure of the conduct to the clients affected and a refund of their money.¹⁰⁰ Such an undertaking corrected the action of the alleged offenders. Further, other undertakings have been accepted as a supplement to litigation.

Enforceable undertakings accepted as a supplement to litigation

In certain cases, the ACCC may agree to enter into an enforceable undertaking after the start of court proceedings. This may result in the undertaking being annexed to the proceedings. In these circumstances, the undertaking does not interrupt the continuity of the litigation. For instance, on 22 April 2002, the ACCC started a legal action against the Advanced Medical Institute (AMI) and its managing director in relation to alleged contravention of ss 52, 53, 55 and 55A of the Act. On 2 December 2003, the court declared that AMI and its managing director had breached those sections. In order seven of the court's orders, AMI agreed to provide an enforceable undertaking pursuant to s 87B to the ACCC within 14 days of the making of those orders. AMI undertook to refund a number of consumers affected by the breach.¹⁰¹

However, most of the enforceable undertakings that supplemented litigation were in relation to s 45 of the Act. For example, the ACCC was successful in pursuing a fire protection equipment cartel in Queensland where the Federal Court imposed fines totalling \$15 million against a large number of corporations and individuals.¹⁰² However, the ACCC was faced with a dilemma. The smaller firms that had been involved in the

⁹⁹ ACCC, Enforceable Undertaking: Morgan Buckley Pty Ltd, Document No D04/19629 (27 April 2004).

¹⁰⁰ ACCC, Enforceable Undertaking: Dr Paul Pong Tiah Khoo and Paul P.T.Khoo Pty Ltd, Document No D02/54768 (9 October 2002).

¹⁰¹ ACCC, Enforceable Undertaking: Advanced Medical Institute Pty Ltd, Document No D04/14715 (26 February 2004).

¹⁰² ACCC, *ACCC Annual Report 2000-2001* at 38.

cartel were at risk of shutting down and therefore avoiding the payment of the fines imposed by the court. The ACCC decided to accept certain enforceable undertakings signed by some of the individual directors and senior management of these small cartels. Among other things, the promisors undertook to do their best to keep their firms in business until they had paid all of their fines.¹⁰³

In other cases, the ACCC may accept an enforceable undertaking before taking court action against the alleged offender. The ACCC guideline on s 87B notes that there may be circumstances that lead the ACCC to accept an enforceable undertaking while continuing to investigate the alleged breach. Such investigation may later lead to legal action in relation to past or associated conduct. For instance, in one enforceable undertaking the following clause was added in the acknowledgement section:

Ramsay acknowledges that nothing in this undertaking is intended to restrict the right of the Commission to take enforcement action under s 50 or any other provision of the Act.¹⁰⁴

Enforceable undertakings have also been used during court proceedings to protect the rights of certain outsiders that may be affected by the litigation. This occurred when the ACCC commenced proceedings in the Federal Court against Beaver Sales Pty Ltd. The ACCC alleged that the company had distributed products that did not comply with the consumer product safety standard. The ACCC was concerned that, during the proceedings, Beaver Sales Pty Ltd would continue supplying the product. Therefore, Beaver gave the ACCC an enforceable undertaking promising to stop supplying the product until the matter was finished in court. This undertaking was accepted in lieu of an interlocutory order from the court.¹⁰⁵

Alleged offences that lead to enforceable undertakings

An enforceable undertaking can be initiated by the ACCC, a company or an individual as a result of an ACCC investigation. However, the ACCC cannot compel a person to enter an enforceable undertaking. Similarly, a person cannot oblige the ACCC to accept an enforceable undertaking.¹⁰⁶ When looking at the ACCC's register it becomes apparent that most enforceable undertakings have been accepted by companies rather than individuals. The companies that accepted an enforceable undertaking

¹⁰³ ACCC, Enforceable Undertaking: John Preece, Roy Tesch, Dennis Brett and Nigel Rehbock- Trident Fire Protection Pty Ltd, Document No D01/1074 (9 January 2001).

¹⁰⁴ ACCC, Enforceable Undertaking: Ramsay Health Care Limited, Document No D05/17510 (13 April 2005).

¹⁰⁵ ACCC, Enforceable Undertaking: Beaver Sales Pty Ltd, Document No D06/49236 (28 July 2006).

¹⁰⁶ *Trade Practices Act*, s 87B(1).

varied in size. Some were proprietary companies; others were public listed or unlisted companies.¹⁰⁷

A small number of undertakings were accepted by individuals. Most of these individuals were directors or senior managers in corporations that had allegedly breached the law. In a number of the undertakings, these individuals were knowingly concerned with the contravention committed by the company they worked for. For instance, the ACCC alleged that Greg Norman Production Company and Universal Sports Challenge Ltd made false and misleading representations about the nature of prizes offered in relation to competitions that they organised together. The regulator also alleged that one of the directors, Monique Tompson, was knowingly involved in this conduct. Accordingly, the ACCC accepted an undertaking from Tompson herself.¹⁰⁸

The catalyst for the introduction of enforceable undertakings into the regulatory system was the inquiry conducted by the House of Representatives Standing Committee on Legal and Constitution Affairs into the merger control provisions of the Act that led to the Griffiths Report. The initial discussion arose from problems with enforcing administrative resolutions in the context of mergers. Before 1993, it was a common practice for the ACCC to allow a merger to proceed if the relevant parties were willing to give an administrative resolution in relation to divestiture of certain assets held by the parties. However, when s 87B was introduced into the Act, the section did not limit the use of enforceable undertakings to mergers. In fact, s 87B(1) states that the ACCC may accept a written undertaking in connection with a matter in relation to which the ACCC has a function or power under this Act. This gives the ACCC a broad field to work within.¹⁰⁹

Accordingly, the alleged offences that may lead to an enforceable undertaking cover a huge range of breaches of the law. They range from concerns about misleading and deceptive conduct through to more serious allegations of price fixing. As a consequence, the subject of enforceable undertakings may vary. The most common alleged offences that lead to an enforceable undertaking were: misleading and deceptive conduct (ss 52 and 53 of the Act); price fixing, price maintenance and cartels (ss 45 and 48); acts that lessen competition (s 50); and failure to comply with a prescribed standard (s 65C). However, as mentioned earlier, the regulator may enter into enforceable undertakings in relation to other

¹⁰⁷ A number of these companies were running retail businesses; ACCC, Undertakings Register (s87B), <www.accc.gov.au> at 10 August 2008.

¹⁰⁸ ACCC, Enforceable Undertaking: Monique Tompson, Document No D02/64174 (8 August 2001).

¹⁰⁹ This point was illustrated earlier on in this paper when looking at the policy behind the acceptance of enforceable undertakings.

alleged offences such as unconscionable conduct. In all the enforceable undertakings, the undertaking is an attempt to change the compliance culture of an organisation.

Promises given in enforceable undertakings

As noted in paragraph III, when entering into an enforceable undertaking, the ACCC hopes to achieve the following objectives: stopping the alleged breach; corrective action in relation to parties adversely affected; implementation of compliance measures to prevent future breaches of the law; and creating a deterrent effect.¹¹⁰ Such goals may be achieved through the promises given by the promisor.

The promises in an enforceable undertaking

The most common undertakings that may achieve such outcomes are to require the promisor to:

- Stop committing the alleged offence;
- Put a compliance program in place;
- Implement training programs for employees;
- Implement complaint handling systems;
- Compensate affected parties;
- Be involved in community services; and
- Disclose the undertaking to a certain category of people.¹¹¹

¹¹⁰ ACCC, above n 2, 3; Yeung, above n 12 at 113-116.

¹¹¹ ACCC, Undertakings Register (s 87B) <<http://www.accc.gov.au>> at 26 April 2008.

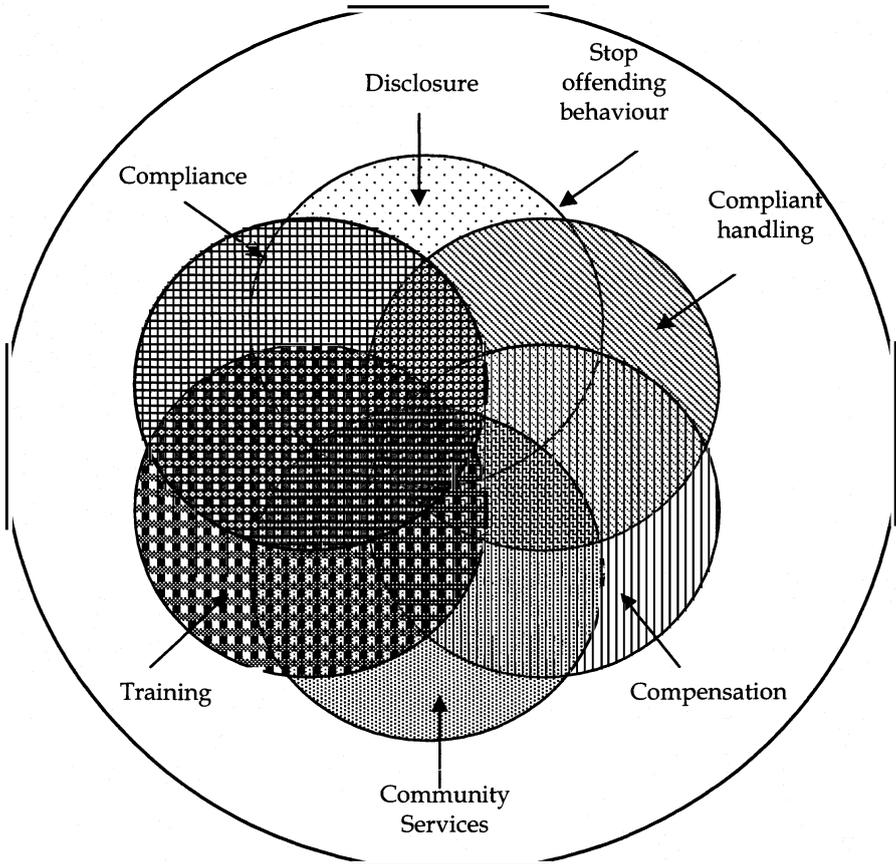


Figure 3: The interaction of the different promises in undertakings

As illustrated in Figure 3, all the promises mentioned above interact when dealing with certain alleged offences in order to achieve the above mentioned goals. Other promises, such as conducting certain tests on certain products, may also form part of an undertaking. Accordingly, there are no limits to the promises the ACCC may require, as long as the promises deal with the alleged breach. The interaction of these promises is illustrated in the next paragraph.

An example

For instance, in 2007, the ACCC entered into an enforceable undertaking with Ausia Australia Pty Ltd and the company's directors because the ACCC suspected that the baby cots and baby walkers that the company was selling were not in compliance with product safety standard.¹¹² As a consequence, Ausia Australia Pty Ltd and its directors promised to implement a compliance program. Such a move is valuable to the promisor because it may prevent future breaches of the law from occurring because the implementation of such a compliance program may change the culture of an organisation.¹¹³ Such an implementation may help the promisor ascertain the cause of the problem that has resulted in the alleged breach, and may prompt a commitment from the organisation to change. It may also 'nurture compliance skills, knowledge and professionalism' in the organisation.¹¹⁴ Further, the auditor requirements that are usually included in the undertaking help the organisation to self-evaluate and improve its performance.¹¹⁵ This may allow the organisation to comply with the spirit of the law rather than only comply with the letter of the law. Accordingly, an enforceable undertaking endeavors to change the compliance culture of an organization. While the cost of implementing a compliance program is high and can run into the millions, the promisor ultimately benefits from the change in culture which may lead to less breaches of the law in the future.¹¹⁶

Ausia Australia Pty Ltd also undertook to issue corrective advertisement in the newspapers to advise consumers of its alleged conduct. Furthermore, it undertook to initiate a voluntary recall and offer refunds to consumers who acquired the goods. Such promises illustrate the corrective action an enforceable undertaking may have, for it provides a remedy to third parties who have suffered a loss, without requiring them to go to court to enforce their rights.¹¹⁷ The availability of refund to consumers plays a major role in restabilising a situation and protecting consumers. The ACCC has noted that the availability of compensation and corrective advertisement through an enforceable undertaking 'is an

¹¹² ACCC, *Enforceable Undertaking: Ausia Australia Pty Ltd, Kang Chan and Ho Pang Sie*, Document No D07/2007 (6 March 2007).

¹¹³ Parker, above n 18, 249-250; While businesses are required in a number of instances to have compliance programs in place, such programs may be flawed. An enforceable undertaking attempts to fix the problem that led to the alleged breach through the auditing and improvement of the compliance program which results in the introduction of new measures that help in the prevention of future breaches in the future.

¹¹⁴ *Ibid* at 252.

¹¹⁵ *Ibid*.

¹¹⁶ ACCC, *Enforceable Undertaking: Ausia Australia Pty Ltd, Kang Chan and Ho Pang Sie*, Document No D07/2007 (6 March 2007).

¹¹⁷ *Virgin Blue Airlines Pty Ltd v Australian Competition and Consumer Commission* (2001) 186 ALR 377 at 390.

efficient method of achieving redress which would be difficult to achieve through litigation.’¹¹⁸

Benefits

While court action has a limited impact on promisors and outsiders, an enforceable undertaking may benefit a number of parties. From the point of view of the promisor, the introduction of compliance programs through court orders, while possible in some instances, has its limitation under s 86C.¹¹⁹ This is not the case in an enforceable undertaking. Including the promise to implement a compliance program in an undertaking can be considered today as a standard promise present in most of the undertakings.¹²⁰ As noted before, such a compliance program may lead to the change in the compliance culture of an organisation. The only limitation that would be present on a compliance program in an undertaking is that the compliance program that is being implemented needs to be linked to the alleged breach. Such a requirement is reasonable because if the compliance program is unrelated to the alleged breach, it may be deemed punitive in nature. If that is the case, the court can refuse to enforce the undertakings.¹²¹

From the point of view of the affected third party, an enforceable undertaking provides them with a mode of redress without the need for them to go to court and initiate legal action.¹²² For instance, the ACCC’s investigations into a GST related matter and the enforceable undertakings that ensued from those investigations resulted in obtaining refunds of nearly \$10.1 million for approximately 990,000 consumers.¹²³ Further, the speed of entering into an undertaking has certain benefits to consumers because the corrective advertisement (which is a promise that has been included in undertaking when consumers have been affected by the alleged breach) is placed immediately after the alleged breach has occurred. This means that the conduct is still fresh in the consumers mind and they can easily remember the incident and relate to it.¹²⁴ In summary, an enforceable undertaking allows outsiders that may have suffered from the alleged conduct to recuperate some of their loss through the process of restorative justice.

¹¹⁸ ACCC, *Annual Report 1996-1997* at 8.

¹¹⁹ Tania Voon, ‘Overstated Undertakings: Recent Developments for Compliance Programs’ (1998) 6 *Trade Practices Law Journal* 196.

¹²⁰ ACCC, *Annual Report 1999-2000* at 8.

¹²¹ Nehme, above n 5, 163-166; An undertaking should not be punitive in nature.

¹²² As noted before the undertaking does not derogate the right of outsiders to initiate private legal action.

¹²³ ACCC, *Annual Report 2000-2001* at 30.

¹²⁴ ACCC, *Annual Report 1996-1997* at 8.

Conclusion

An enforceable undertaking is one of many regulatory tools available to the ACCC. Through negotiation, it allows the regulator to reach plausible outcomes to deal with alleged breaches of the law. Essentially, an enforceable undertaking may be viewed as a new type of settlement that may in some instances incorporate a form of corporate probation. Further, unlike traditional settlements that are private in nature, this sanction enhances the transparency of regulatory dealings because the undertakings are available to the public. Further, the process of entering into an enforceable undertaking may be subject to judicial review.

Since the introduction of this sanction into the system in 1993, the ACCC has relied on enforceable undertakings to remedy a variety of breaches of the law on a number of occasions. On one hand, the sanction may allow the ACCC to remedy certain breaches of the law without initiating court proceedings. It may even be used as a supplement to court proceedings in other instances.

On the other hand, the enforceable undertaking may enable the parties to agree to a number of promises that may arguably be more appropriate than court orders. This is due to the fact that an enforceable undertaking attempts to achieve a number of goals such as protection of the public, prevention of future breaches and corrective action. Accordingly, this remedy may not only be beneficial to the promisor but also to members of the public that may have suffered a loss due to the alleged breach. The undertaking may include a promise by the promisor to compensate these people for their losses. This may allow the victims of the alleged breach to recover damages without initiating any court proceedings.

Even though the sanction cannot be viewed as a contract because of its statutory nature, an enforceable undertaking is a very flexible remedy because it is the result of negotiation between the parties. Such negotiations allow the promises in the enforceable undertaking to be tailored toward the alleged conduct. In summary, an enforceable undertaking is speedy, flexible and may result in a better outcome than court action. However, the popularity of an undertaking does not seem to have impacted the number of legal proceedings initiated by the ACCC.