Research Working Paper Series

An Empirical Analysis of Enforceable Undertakings by the Australian Securities and Investments Commission between 1 July 1998 and 31 December 2015

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AN EMPIRICAL ANALYSIS OF THE USE OF ENFORCEABLE UNDERTAKINGS BY THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION BETWEEN 1 JULY 1998 AND 31 DECEMBER 2015

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EXECUTIVE SUMMARY

This working paper reports the findings of a detailed empirical study of 414 enforceable undertakings accepted by the Australian Securities and Investments Commission (ASIC), the corporate, market, finance and credit services regulator from July 1998 to 31 December 2015, a period of 17.5 years.

The study is unique in size, scope and comprehensiveness. It presents a detailed profile of all parties giving enforceable undertakings and the misconduct issues in their undertakings over a 17.5 year period; and breaks new ground by offering the first empirical analysis of the core commitments or undertakings given by parties to enforceable undertakings to rectify their misconduct. It constructs a much needed road map through the maze of regulated firms, activities, misconduct and undertakings involved in ASIC’s deployment of enforceable undertakings.

Characteristics of Regulated Individuals and Firms

The study offers a comprehensive profile of the regulated firms and individuals who are the subject of ASIC accepted enforceable undertakings. Key findings were that:

- ASIC accepted almost identical numbers of enforceable undertakings from companies (n=174) and individuals (n = 176). Enforceable undertakings by companies in combination with individuals (n = 64) declined in number over the study period.
- The most common regulated entities from whom ASIC accepted enforceable undertakings were private companies (n = 156 or 50.2% of all companies giving EUs) and individuals in their position as directors (n =137 or 57.8% of all individuals giving EUs).
- Publicly listed companies were a small subset of parties giving enforceable undertakings (n = 30 or 9.6% of all companies giving EUs).

Activities and Misconduct Regulated by Enforceable Undertakings

The study also offers a detailed profile of the types of misconduct addressed by enforceable undertakings accepted by ASIC. Key findings were that:

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1 Helen Bird is a Senior Research Associate, George Gilligan is a Senior Research Fellow, Andrew Godwin is a Senior Lecturer, Jasper Hedges is a Research Fellow and Ian Ramsay is the Harold Ford Professor of Corporations Law and Director of the Centre for Corporate Law and Securities Regulation (CCLSR), Melbourne Law School. We acknowledge the financial support for the project ‘An Analysis of Penalties Under ASIC Administered Legislation’ received from The University of Melbourne and the Centre for International Finance and Regulation (CIFR) which is funded by the Commonwealth of Australia and NSW State Government and other consortium members (see http://www.cifr.edu.au).
The most common activity that was the subject of enforceable undertakings was financial services (n = 190), representing 45.9% of the data set. The largest single activity involved in financial services was giving of financial or investment advice, comprising 40% of all financial services activity.

Enforceable undertakings concerning financial services involved three common types of activity: the promotion, marketing, advertising and sale of financial services; the provision of specific financial advice or product recommendations; and the governance of financial services firms.

Financial services laws was the most common misconduct issue, present in 50% of all enforceable undertakings followed by misleading and deceptive conduct, present in 30.4% of all enforceable undertakings.

Types of Undertakings Given in Enforceable Undertakings

The study of core undertakings in enforceable undertakings revealed:

- The most common types of undertaking proffered by regulated parties were compliance review undertakings. They were present in 42.3% of enforceable undertakings.

- Compliance systems reviews and reviews of compliance with specific legal obligations were the dominant types of review undertakings. The appointment of an independent expert was a requirement of 85% of all review undertakings, typically for a review that took up to 12 months to complete.

- Voluntary management and other activity bans were a feature of 36.5% of all undertakings, the majority of which were given by individuals. In 36% of cases, the bans were for a period of between 2 and 5 years. In 20% of the undertakings, the bans were permanent in effect.

- Directors’ voluntary management bans were typically accompanied by a second ban from providing financial services in one quarter of enforceable undertakings.

- Training or continuing professional education was a key feature of enforceable undertakings by auditors and liquidators, where they are subjected to a voluntary ban for a specific term or practice supervision by their peers. The professional education requirement was not as common in relation to other enforceable undertaking groups.

- A strategically directed, industry-wide approach to enforceable undertakings was evident in ASIC’s acceptance of enforceable undertakings relating to financial services, specifically financial planning or wealth management activities. Regulated firms typically committed to legal compliance systems review and individual representatives committed routinely to cease working in the sector.

These findings offer rich insights into the dynamics of negotiated settlements in the public enforcement of business laws in Australia. With ASIC’s increased emphasis on co-operation in its investigation and enforcement work, a detailed understanding of these issues has never been more timely or important.
AN ANALYSIS OF PENALTIES UNDER ASIC ADMINISTERED LEGISLATION: OTHER PUBLICATIONS


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This working paper advances understanding of the use of formally negotiated settlements in the public enforcement of laws in Australia. It reports the findings of a detailed empirical study of enforceable undertakings accepted by the Australian Securities and Investments Commission (ASIC), the corporate, market, finance and credit services regulator. Enforceable undertakings are legal binding settlement agreements, negotiated between a regulator and regulated firm or individual, to resolve issues of non-compliance under laws administered by the regulator. A standard feature of many Australian public enforcement regimes, this paper offers insights into their use and application in the context of laws relevant to business firms.

This working paper is an analytical study of enforceable undertakings accepted by ASIC from July 1998 to 31 December 2015, a period of 17.5 years. The study is unique in size, scope and comprehensiveness. It builds on an earlier study by Carol Taing of enforceable undertakings accepted by ASIC up to 31 December 2008. Taing’s study examined the characteristics of individuals who gave enforceable undertakings, but not the equivalent characteristics of companies who gave enforceable undertakings either on their own or in conjunction with individuals. It examined misconduct arising under enforceable undertakings given by companies, but not under enforceable undertakings given by individuals. This working paper: (1) presents a detailed profile of all parties giving enforceable undertakings and the misconduct issues in their undertakings over a 17.5 year period; and (2) breaks new ground by offering the first empirical analysis of the core commitments or undertakings given by parties to enforceable undertakings to rectify their misconduct.

The working paper draws on a database of 414 enforceable undertakings accepted by ASIC since 1 July 1998 in relation to contraventions of the Corporations Act 2001 (Cth) and its predecessors, the ASIC Act 2001 (Cth) and its predecessors, and the National Consumer Credit Protection Act (Cth) 2009. This rich collection of primary source material offers unprecedented insights into the dynamics of the regulatory space in which parties co-operate and resolve issues through formally negotiated settlements. With ASIC’s increased emphasis on co-operation in its investigation and enforcement
work, a detailed understanding of these issues has never been more timely or important.\(^4\)

The structure of this working paper is as follows. Part II discusses the importance of the empirical study for advancing understanding of formally negotiated settlements in the public enforcement of business regulation. Part III examines the legal and regulatory framework that supports ASIC’s use of enforceable undertakings. Part IV discusses the research methodology and data relied on to undertake the empirical study. Part V presents the findings of the empirical study and Part VI summarises the research conclusions drawn from the study.

II. IMPORTANCE OF RESEARCH STUDY

This working paper makes an important contribution to knowledge and understanding of the use of enforceable undertakings in the public enforcement of laws relevant to business in five respects.

First, the working paper provides a comprehensive account of the context and circumstances in which enforceable undertakings have been accepted by ASIC for 17.5 years, commencing 1 July 1998. It constructs a much needed road map through the maze of regulated firms, activities, misconduct and undertakings involved in ASIC’s deployment of enforceable undertakings. Enforceable undertakings accepted by ASIC impact firms, investors, consumers and other participants in many parts of the Australian economy. For example: from the formation of companies to their ultimate dissolution; corporate governance of companies; managed investment schemes; Australian Financial Services Licensees; Australian Credit Licensees; the issue of and trading in securities; the giving of financial advice; dealing in financial products including superannuation, managed funds, insurance, and loan facilities; and the provision of consumer credit.\(^5\) The firms and individuals giving those undertakings are part of the 2.25 million companies, 24 investment banks, 3642 registered managed investment schemes, 4964 Australian Financial Service Licensees, 5779 Australian Credit Licensees, 33736 credit representatives, 4596 registered company auditors, 711 registered liquidators and 9177 companies entering external administration in Australia that were subject to regulation under the laws administered by ASIC as at 30 June 2015.\(^6\)

Secondly, the working paper highlights patterns of use in ASIC’s acceptance of enforceable undertakings between 1998 and 2016. Most significantly, it finds

\(^4\) ASIC, ‘ASIC releases policy on cooperation and third enforcement report’ (Media Release, 13-073MR, 9 April 2013); ASIC, Cooperating with ASIC, Information Sheet 172, February 2012; ASIC, ASIC’s approach to enforcement, Information Sheet 151, September 2013.

\(^5\) See Part V.D.2. (Tables 8-18) below.

evidence of the strategic use of enforceable undertakings to bring about systemic changes in the financial services industry, specifically in relation to the quality of advice provided by the financial planning sector. The requirement to undertake legal compliance reviews has enabled ASIC to influence approaches and attitudes towards legal compliance from within financial planning and wealth management firms. Voluntary activity and management bans have been negotiated to stop financial services misconduct by individual advisors and limit opportunities for recurrent non-compliance. These approaches illustrate the potential benefits and outcomes of enforceable undertakings for regulators whose aspirational objectives include influencing behaviour and encouraging a culture of compliance in relation to the laws that they administer. They also demonstrate the potential outcomes for regulated parties of being ready, willing and able to co-operate with the regulator, in an era where the regulator is pro-actively encouraging co-operation.

Securing quick and effective remedies like enforceable undertakings obviated the need for adversarial proceedings by ASIC in 414 instances between 1 July 1998 and 31 December 2015. With budgetary pressures and deteriorating government balance sheets, pressure on regulators to do more with less draws inevitable attention to the cost advantages of enforceable undertakings including that enforceable undertakings internalise the costs of rectifying non-compliance and monitoring future compliance.

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9 ASIC, Enforceable Undertakings, Regulatory Guide 100, February 2015 (‘Regulatory Guide 100’) RG 100.6.

10 Clifford Chance, ‘Negotiated Settlements with regulators: The Courts have the final word’ (Clifford Chance Briefing Note, June 2013); Joanne Cameron and Fleur Shand, ‘Regulatory Pragmatism – ASIC’s approach to investigation and enforcement’ (2012) 15 In-House Counsel 224; ASIC, above n 4.

11 See Part V.B.1. (Table 1) below.
on the regulated firm breaking the law, not upon the regulator.12 Cost considerations are also relevant to regulated firms, but an added incentive is that enforceable undertakings allow regulators to adopt a more constructive, flexible and individually tailored, fit-for-purpose approach that takes business considerations into account when determining how best to deal with regulatory non-compliance.13

Thirdly, the working paper publishes the first empirical analysis of the core undertakings given by parties to ASIC to address or rectify their identified misconduct. The study reveals an increasing focus on legal compliance review undertakings and voluntary management and activity bans in ASIC accepted enforceable undertakings. The findings provide real world context for assessing claims about the supposed utility of enforceable undertakings. For example, that enforceable undertakings:

- enable outcomes that cannot generally be achieved in court or by using the range of other sanctions available to regulators;14
- contribute to the goals of rehabilitative and restorative justice, sit comfortably within the theoretical framework of responsive regulation15 and ‘open up’ the regulatory space traditionally occupied by only the regulator and regulated firms;16
- by requiring undertakings to be monitored and supervised by independent experts and professional peers, new actors enter the regulatory space and become involved in the regulatory project and that richer dynamic helps to promote management commitment, induces firms to ‘learn how to comply’ and institutionalises long-term compliance.17

Fourthly, this working paper provides a comprehensive profile of the regulated firms and individuals who are the subject of ASIC accepted enforceable undertakings and

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14 Johnstone and Parker, above n 12, 3.

15 As to restorative justice and responsive regulation, see John Braithwaite, Restorative Justice and Responsive Regulation (Oxford University Press, Oxford, 2002); Ian Ayres and John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford University Press, New York, 1992). As to restorative justice and responsive regulation involving enforceable undertakings, see Parker, above n 12.


17 Johnstone and Parker, above n 12, 2.
the nature of their misconduct addressed by those undertakings. The size, scope and range of issues explored in the empirical study are larger than those of previous studies\textsuperscript{18}, allowing for a more definitive analysis than was previously possible. This profile can enliven debates about the use of enforceable undertakings by regulators and ASIC, in particular.\textsuperscript{19} There is a perception in some quarters that enforceable undertakings are ‘soft regulation’, relied on for resolving misconduct by large entities, often involving commitments that bear no obvious correlation to the related misconduct.\textsuperscript{20} An alternate view is that regulators, not regulated firms, hold the upper hand in enforceable undertakings and this raises the risk of ‘arm twisting’ by regulators to secure desired undertakings from regulated firms.\textsuperscript{21} In the push to get quicker, lower cost results, there is an apprehended risk that enforceable undertakings do not sufficiently take account of the concerns of consumers and investors in relation to the damage caused to them and to public confidence in markets by the misconduct of the parties giving undertakings.\textsuperscript{22} Concerns have also been raised about enforceable undertakings post their acceptance: in particular, about the adequacy and transparency of mechanisms for monitoring compliance with enforceable undertakings\textsuperscript{23} and ASIC’s overall approach to monitoring described as

\begin{itemize}
  \item \textsuperscript{18} Taing, Nehme, above n 3.
  \item \textsuperscript{19} Commonwealth of Australia, Senate Economic References Committee, \textit{Performance of the Australian Securities and Investments Commission} (Canberra, June 2014) (‘Performance of ASIC Report’) 17.19-17.31.
  \item \textsuperscript{20} See for example, ibid 17.21, O’Brien and Gilligan, above n 3, 3; Dimity Kingsford Smith, Submission No 153 to Senate Economic References Committee, \textit{Inquiry into Performance of the Australian Securities and Investments Commission}, 21 October 2013, 7; Evidence to Senate Economic References Committee, \textit{Inquiry into Performance of the Australian Securities and Investments Commission}, Canberra, 21 February 2014, 2 (Niall Coburn); and Anne Lampe, Submission No 106 to Senate Economic References Committee, \textit{Inquiry into Performance of the Australian Securities and Investments Commission}, undated, 2.
  \item \textsuperscript{22} Suzanne Le Mire, David Brown, Christopher Symes and Karen Gross, Submission No. 152 to Senate Economic References Committee, \textit{Inquiry into Performance of the Australian Securities and Investments Commission}, 18 October 2013.
  \item \textsuperscript{23} \textit{Performance of ASIC Report}, above n 19, 17.30-17.31. Since the publication of this report, ASIC has revised its regulatory practices with respect to enforceable undertakings to address some of these concerns by requiring that, from February 2015, parties to enforceable undertakings must agree to the publication of a summary of any independent expert reports or statements produced as to their ongoing compliance with enforceable undertakings. See ASIC, \textit{Regulatory Guide} 100, above n 9, RG 100.78 – RG 100.85
\end{itemize}
‘reactive rather than proactive’. \(^{24}\) The data revealed in this study increases transparency regarding some of these issues.

Fifthly, insights gained from the current empirical study can contribute to comparative research on the use of negotiated settlements in public enforcement in multiple jurisdictions at a time when regulation of business is increasingly a global project. Enforceable undertakings are an Australian invention that grew out of s 87B of the *Trade Practices Act*. They have been adopted by many federal and state agencies, including the Civil Aviation Authority, the Australian Communications and Media Authority, the Therapeutic Goods Administration and the Workplace Ombudsman. \(^{25}\) Enforceable undertakings are also a feature of legislative schemes in the United Kingdom and similar in form to consent decrees in the United States of America. \(^{26}\)

### III. LEGAL AND REGULATORY FRAMEWORK

#### A Legal Framework

1 *Source Of ASIC’s Powers*

Enforceable undertakings have been variously described as promises enforceable in court\(^ {27}\) or legally binding agreements, \(^ {28}\) negotiated between a regulator and a regulated firm or individual allegedly in breach of the laws administered by the regulator, under which the regulated parties agree to do or refrain from doing specific activities to rectify their non-compliance. Their legal enforceability depends on an explicit grant of statutory power, not the principles of contract law. \(^ {29}\) ASIC has three such powers: *ASIC Act 2001* (Cth) (‘ASIC Act’) ss 93A and 93AA and, since 1 April 2010, *National Consumer Credit Protection Act* (‘National Credit Act’) s 322. \(^ {30}\)

*ASIC Act* ss 93A and 93AA have been in operation for 17.5 years. They are similar in form and content; except that s 93A applies to enforceable undertakings given by responsible entities and s 93AA applies to enforceable undertakings from all other

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\(^{25}\) Parker and Johnstone, above n 12.

\(^{26}\) Nehme, above n 2.


\(^{28}\) Macrory, above n 13, 4.22.

\(^{29}\) Yeung, above n 21, 196.

\(^{30}\) *National Consumer Credit Protection Act 2010* (Cth) (‘National Credit Act’).
persons. Section 93AA has a wider application than s 93A and is more frequently used by ASIC.\[^{31}\] Neither power has been the subject of substantive legislative reform since their simultaneous enactment in 1998.\[^{32}\]

*National Credit Act* s 322 has been in operation for five years. It is also similar to *ASIC Act* s 93AA but applies in connection with matters in relation to which ASIC has a power or function under Commonwealth credit legislation. Commonwealth credit legislation refers to the *National Credit Act* and transitional legislation.\[^{33}\] The *National Credit Act* was enacted on 1 July 2010, following an agreement by the Council of Australian Governments (‘COAG’)\[^{34}\] to establish a robust national legislative framework for the regulation of credit and consumer lending practices in Australia.\[^{35}\] ASIC assumed regulatory responsibility for consumer credit and consumer leases under the new legislation. Chapter 6 of the *National Credit Act* conferred a range of compliance and enforcement powers on ASIC including the power to accept enforceable undertakings under s 322.

### 2 Origins

ASIC first acquired the power to accept enforceable undertakings in July 1998, pursuant to reforms introduced by the *Financial Services Reform Act 1998* (Cth).\[^{36}\] The powers mirrored those given six years previously to the Australian Competition and Consumer Commission (ACCC) by the *Trade Practices Act 1974* (Cth) s 87B.\[^{37}\] Perceived as a very successful reform, the then named Australian Securities Commission (ASC) submitted to the 1996 Financial Systems Inquiry that it should be conferred with a similar power to deal with suspected violations of companies and securities laws.\[^{38}\] The Financial Systems Inquiry Final Report in turn recommended that

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*\[^{31}\]* See Part V.B.1. (Table 1) below.

*\[^{32}\]* In July 2001, *ASIC Act 1989* (Cth) was repealed by *Corporations (Repeals, Consequential and Transitional) Act 2001* (Cth) Schedule 1. *ASIC Act 2001* (Cth) was enacted in its place. The form and content of ss 93A and 93AA were not affected by the reforms.

*\[^{33}\]* *National Credit Act* s 5.

*\[^{34}\]* COAG is the peak intergovernmental forum in Australia, the members of which include the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association. See [http://www.coag.gov.au/](http://www.coag.gov.au/) (accessed 30 December 2015).


the ASC be given the power to accept legally enforceable undertakings. These recommendations were given legal effect by the enactment of Financial Services Reform Act 1998 (Cth). They are now the powers in ASIC Act ss 93A and 93AA.

The rationale for the introduction of ASIC’s enforceable undertakings power is linked to the history of Trade Practices Act s 87B. Section 87B was enacted by amendment to the Trade Practices Act in 1992. The reform gave legislative recognition and force to the ACCC’s pre-existing practice of accepting undertakings from business as a way of avoiding prolonged litigation arising from their unlawful conduct in breaching the provisions of the Trade Practices Act. The undertakings consisted of promises to cease the unlawful conduct or to take action to lessen the undesirable effects of their conduct. Basically the equivalent of a settlement or administrative resolution between regulator and regulated firm or individual, they provided a means for the regulator to accept assurances from the regulated party that it would modify its business practices to ensure compliance with the law. The benefits to both regulator and regulated party were the time and cost savings from avoiding potentially protracted litigation.

3 ASIC Context

Very little is known about ASIC’s administrative settlement practices prior to the enactment of the ASIC Act ss 93A and 93AA reforms. From time to time, ASIC announced the settlement of enforcement matters. However, ASIC did not publish formal guidelines on administrative settlements. This situation changed with the enactment of the ss 93A and 93AA reforms. ASIC began using its new powers almost immediately, accepting 19 enforceable undertakings within the first nine months of their operation. Guidelines on the use and operation of the new powers were first published in April 1999. The guidelines represented ASIC’s first formal articulation of a settlements policy, although the term ‘settlement’ did not appear in the guidelines.

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43 Marina Nehme, above n 27, 106.
44 Commonwealth of Australia, above n 42.
45 ASIC, Public Comment, Policy Statement 47, 8 March 1993, updated 6 September 2000, 47.11.
46 ASIC, ‘Enforceable Undertakings: A New Enforcement Tool in ASIC’s Armoury’ (Media Release, 99/095, 7 April 1999).
47 ASIC, Enforceable Undertakings, Practice Note 69, 7 April 1999.
until much later. ASIC’s guidelines were revised and updated in 2007\(^48\) and 2015\(^49\), taking into account the regulator’s experiences over the previous 10 and 17 years respectively in negotiating and accepting enforceable undertakings. Since 2007, enforceable undertakings have been described as ‘administrative settlements’ and one of a range of remedies available to ASIC for breaches of the legislation it administers.\(^50\)

**B Operation of Powers**

1 **Analysis of Section 93AA**

A brief analysis of s 93AA illustrates the operation of all three of ASIC’s statutory powers to accept enforceable undertakings.

Section 93AA provides:

**Enforcement of undertakings**

(1) ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under this Act.

(2) The person may withdraw or vary the undertaking at any time, but only with ASIC’s consent.

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

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

   - (a) an order directing the person to comply with that term of the undertaking;
   - (b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
   - (c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;
   - (d) any other order that the Court considers appropriate.

Section 93AA is drafted in exceptionally broad terms. It empowers ASIC to: accept a written undertaking given by a person\(^51\) ‘in connection with a matter in relation to

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\(^{49}\) Ibid.

\(^{50}\) Ibid.

\(^{51}\) Other than from a responsible entity, in relation to which ASIC has a specific power under *ASIC Act* 93A.
which ASIC has a function or power’ under the *ASIC Act* (s 93AA(1)); secondly, to consent to the variation or withdrawal of an existing enforceable undertaking (s 93AA(2)); and thirdly, to issue court proceedings against the parties to an enforceable undertaking where ASIC considers the parties have breached a term of their undertaking (s 93AA(3)). The remedies that can be sought in those circumstances are set out in s 93AA(4).

2 Power to Accept Undertakings

The critical power for the purposes of this working paper is the primary power to accept enforceable undertakings (s 93AA(1)). ASIC has no legal power to compel persons to provide enforceable undertakings because s 93AA(1) contemplates that enforceable undertakings are voluntary and consensual in nature. ASIC’s power is limited to accepting, or declining to accept, enforceable undertakings. Acceptance depends on two requirements. First, the undertakings must be in writing. Secondly, the undertakings must be given in connection with a matter/s in relation to which ASIC has a power or function under the *ASIC Act*. The term ‘undertakings’ is not defined but has generally been taken to mean promises. The requirement that the promise be in writing addresses evidentiary and procedural fairness considerations.

The requirement that the undertaking be referable to ASIC’s powers and functions defines the regulatory context in which ASIC may accept written undertakings. That context is very wide because ‘in connection with’ in s 93AA(1) has a wide import. They require only that a ‘substantial relation’ in a practical sense exist between the matters that are the subject of the undertaking and ASIC’s powers and functions under the *ASIC Act*. ASIC’s powers and functions are found in *ASIC Act* ss 11 and 12A. Section 11 provides, *inter alia*, that ASIC has the powers and functions conferred on it by the corporations legislation (s 11(1)) and the general administration of the *ASIC Act* (s 11(6)). Section 12A provides that ASIC also has powers and functions

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52 Yeung, above n 21, 195.

53 The power is discretionary, but there are instances where ASIC has been compelled to accept an enforceable undertaking by the Administrative Appeals Tribunal. See, eg, ASIC, Enforceable Undertaking: Andrew William Donald, Document 017029120, 22 April 2004.

54 For National Credit Code s 322, see n 33 and accompanying text.

55 ALRC, above n 27, 2.159; Nehme, above n 27, 105; and Johnstone and Parker, above n 12, 2.


58 *Berry v Federal Commissioner of Taxation* (1953) 89 CLR 653, 658-659 per Kitto J.
conferred on it by legislation regulating contracts, superannuation, life insurance, retirement savings, consumer credit and business name registration.\(^{59}\)

3 **Regulatory Guide 100**

Current *Regulatory Guide 100* provides that ASIC will only consider accepting an enforceable undertaking where three preconditions are satisfied.\(^{60}\) First, ASIC must believe that a contravention of the laws it administers has taken place and further, either have commenced an investigation or conducted surveillance into the conduct that ASIC believes gave rise to the breach. Secondly, ASIC must form the view that the negotiated settlement will provide a more effective regulatory outcome than would be gained by adversarial action to pursue administrative or civil sanctions. Thirdly, the regulatory outcome achieved by accepting enforceable undertakings must be appropriate in the circumstances.

ASIC may accept an enforceable undertaking before commencing any enforcement action or as a means of settling enforcement action where proceedings have been commenced.\(^{61}\) The empirical study in Part V reveals that ASIC accepted enforceable undertakings as a means of settling existing enforcement action on 27 occasions between 1 July 1998 and 31 December 2015.\(^{62}\) As a general rule ASIC does not accept enforceable undertakings: as an alternative to criminal proceedings; in respect of deliberate conduct or fraud or to secure payment of a pecuniary civil penalty; after a matter has been referred to a specialist body or ASIC body for determination; for trivial matters; and/or as an alternative form of relief if conditional relief has not been complied with.\(^{63}\) However, a small number of exceptions to these general rules were detected in the empirical study.\(^{64}\) The possibility that enforceable undertakings have also been used in *de facto* criminal proceedings was raised during the Senate Economic References Inquiry into the performance of ASIC in 2013-2014.\(^{65}\)

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59 *ASIC Act* s 12A(1).
60 *ASIC, Regulatory Guide 100*, above n 9, RG 100.17, RG 100.18 and RG 100.20(b).
61 Ibid RG 100.28.
62 See Part V.D.2 (Table 8) below.
63 *ASIC, Regulatory Guide 100*, above n 9, RG 100.21, RG 100.29 and RG 100.30.
65 Commonwealth of Australia, Senate Economic References Committee, *Inquiry into the Performance Performance of the Australian Securities and Investments Commission* (June 2013); Coburn, above n 20, 2.
ASIC’s Approach to Enforcement

ASIC’s acceptance of enforceable undertakings is also influenced by ASIC’s enforcement policy, as currently documented in *Information Sheet 151.*66 This guide explains how ASIC performs its fundamental enforcement responsibilities including how ASIC selects matters for investigation and decides which enforcement tools to use, and the benefits of co-operating with ASIC in its investigation and enforcement actions.67 ASIC’s enforcement tools or remedies include negotiated resolutions. Enforceable undertakings are only one of the forms of negotiated resolution available to ASIC, but *Information Sheet 151* does not specifically discuss the other forms of negotiated resolution. This is surprising in view of ASIC’s express encouragement of parties co-operating with ASIC early in the enforcement processes.68 ASIC anticipates that one of the possible outcomes of co-operation, particularly in reference to civil proceedings, is negotiated resolution.

*Information Sheet 151* states that enforceable undertakings will be considered as an alternative or complementary outcome to an infringement notice, an administrative action or a civil court action.69 This suggests that enforceable undertakings are to be viewed as equivalent enforcement outcomes to these enforcement actions, provided that the preconditions for their use, as set out in *Regulatory Guide 100,* are satisfied. Enforceable undertakings are not the appropriate form of negotiated resolution for resolving the vast majority of complaints concerning suspected contraventions of the law.70 They are for cases of more serious contravention cases, in relation to which ASIC contemplates actual or potential formal enforcement action against regulated parties. Nehme suggests that given their formal context, enforceable undertakings should in fact be viewed as a form of alternative dispute resolution.71

Power to Consent to Variations and Withdrawals

ASIC Act ss 93A(2) and 93AA(2) and *National Credit Act* s 322(2) empower ASIC to consent to a variation or withdrawal of an existing enforceable undertaking (s 93AA(2)). ASIC has indicated that it will only consider a request to vary an enforceable undertaking in a limited range of circumstances,72 and a request to withdraw an

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66 ASIC, *Information Sheet 151,* above n 4. Prior to 2012, guidelines on ASIC’s approaches to enforcement were found in ASIC, *Enforcement action submissions,* Policy Statement 52, 10 May 1993.
67 ASIC Act s 1(2)(g).
68 ASIC, *Information Sheet 151,* above n 4, 10-11.
69 Ibid 7.
71 Nehme, Ibid 107.
72 ASIC, *Regulatory Guide 100,* above n 9, RG 100.50.
undertaking, in even more exceptional circumstances. ASIC considers that variations are mechanisms for making minor modifications to an enforceable undertaking. They are not for altering the spirit of the original undertaking, unless there has been a material change of circumstances or compliance with an undertaking has become impractical. Written variations of enforceable undertakings consented to by ASIC form part of the empirical study in Part V. ASIC accepted 15 written variations during the study period, constituting 3.6% of the total number of enforceable undertakings.

There are no statutorily prescribed writing requirements for variations and/or withdrawals of enforceable undertakings. However, ASIC’s regulatory guide on enforceable undertakings contemplates that requests for variation or withdrawal of undertakings, other than for an extension of time, will only be considered if they are made in writing. ASIC will only give its required consent to variations in writing. This has the effect of making written variations of enforceable undertaking, at least practically, if not legally, enforceable undertakings in their own right. In other words, an undertaking, in writing, signed by both the party offering it and ASIC.

6 Power to Enforce Undertakings

ASIC Act ss 93A(3) and 93AA(3) and National Credit Act s 322(3) empower ASIC to apply to the Court for orders against a person that ASIC believes has breached the terms of enforceable undertaking previously given to ASIC. Regulatory Guide 100 states that ASIC may apply for appropriate court orders where it has reason to believe that there has been a significant breach of the terms of an enforceable undertaking or a failure to perform an obligation by a certain time. The range of possible court orders include orders to compel compliance with the terms of an undertaking, directing the regulated party in breach to transfer money up to the amount of the financial benefit attributable to the breach to persons who have suffered loss or damage from the breach of undertaking and other orders as the court considers to be appropriate. The aim of the orders is to put all parties in a position as if the enforceable undertaking had not been breached.

ASIC’s powers to take court action for breach of enforceable undertakings do not play a role in the empirical study. The current study is concerned with the characteristics of enforceable undertakings accepted by ASIC, not the consequences that result when parties fail to perform their undertakings.

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73 Ibid RG 100.53.
74 Ibid RG 100.49 and 100.50.
75 See Part IV.C. below.
76 ASIC, Regulatory Guide 100, above n 9, RG 100.48 and RG 100.51.
77 Ibid.
78 Ibid RG 100.94.
C  The Content of Enforceable Undertakings

1  Standard Terms

ASIC accepted enforceable undertakings contain background, undertaking, and monitoring terms. Background terms set out the background circumstances and particulars of the conduct or alleged breach of the law committed by the regulated party and ASIC’s concerns about that conduct. Undertaking terms specify how the regulated party will address the conduct in question and ensure that it does not happen again. Monitoring terms provide for supervision and monitoring of compliance with the commitments made in enforceable undertakings and reporting to ASIC.79

Undertaking terms are the substantive part of enforceable undertakings. They represent the regulatory outcomes that ASIC derives from accepting enforceable undertakings in preference to pursuing adversarial solutions. By definition, they are ‘remedial’ in nature.80 ASIC’s Regulatory Guide 100 gives an indication of the kinds of undertaking that ASIC may accept in an enforceable undertaking.81 They include terms regarding compliance and monitoring, rectification or compensatory action, corrective notices and other action undertakings. In addition to offering these undertakings, regulated parties are required to give a commitment to stop their particular misconduct and further, not recommence that conduct.82 This commitment is the foundation of all undertakings.83

The undertakings must include details of the regulated party’s monitoring arrangements and the procedures for reporting to ASIC. An underlying theme of self-regulation is clearly evident in these requirements.84 It is for the regulated party, not ASIC, to adopt monitoring mechanisms including internal controls, compliance programs, statutory declarations and external assessments of changes put in place.85 These are very attractive feature of enforceable undertakings from the viewpoint of regulators because they help the regulator meet its supervisory goals.86

79 Ibid, Table 4, ‘Background’.
80 Yeung, above n 21, 200.
81 ASIC, Regulatory Guide 100, above n 9, RG 100.34-100.38.
82 Ibid 100.34.
83 Yeung, above n 21, 201.
84 Nehme, above n 24, 80.
85 ASIC, Regulatory Guide 100, above n 9, Table 4.
86 Johnstone and Parker, above n 12, 3.
2 Monitoring Terms

Monitoring terms were not considered in the study due to a lack of publicly available data and specificity in guidelines from the regulator. Prior to February 2015, Regulatory Guide 100 offered little guidance on monitoring of enforceable undertakings other than stressing the need for ASIC to be satisfied that the regulated party had put monitoring systems in place. The only real guide on this issue was the actual monitoring terms in the enforceable undertakings accepted by ASIC. A 2009 study by Nehme found that compliance monitoring of ASIC enforceable undertakings relied heavily on self-regulation, in the form of self-reporting of breaches and the submission of statutory declarations and/or independent expert reports attesting to compliance with the terms of undertakings. Nehme concluded that ASIC’s approach to monitoring was ‘more reactive than proactive’.

Complaints about ASIC’s perceived lack of vigilance in monitoring compliance with enforceable undertakings, and the lack of transparency involved in the monitoring mechanisms that were used, led to four key recommendations in the Performance of ASIC Report. ASIC was requested to consider ways of making the monitoring of ongoing compliance with undertakings more transparent, to monitor compliance with enforceable undertakings more vigilantly and to include commentary in its annual reports on these issues. The Auditor General was also requested to conduct a performance audit of ASIC’s enforceable undertakings to assess the arrangements in place for monitoring compliance with ASIC accepted enforceable undertakings.

As a result of the Senate report, ASIC announced revisions to Regulatory Guide 100 with effect from February 2015. One revision was the adoption of a new policy on the use of independent experts to review and supervise the performance of enforceable undertakings. The policy covers the appointment of experts, their independence, managing conflicts of interest that arise during their engagement, and publication of their reports. A second revision was the adoption of a public reporting policy on compliance by regulated parties with the terms of enforceable undertakings accepted from 9 March 2015. Statements on compliance are to be made publicly

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87 Nehme, above n 24, 80.
88 Ibid 99.
89 Performance of ASIC Report, above n 19.
90 Ibid Recommendations 24-27.
93 ASIC, Regulatory Guide 100, above n 9, RG 100.57-RG 100.85.
94 Ibid RG 100.85-RG 100.93.
accessible via ASIC’s website but none had been as at 31 December 2015, the last day of the study reported on in this paper. ASIC has also committed to enhance enforceable undertaking reporting in its Annual Reports.  

The Auditor General delivered its performance audit report on enforceable undertakings in June 2015. The Auditor General’s audit team were given access to ASIC’s Enforcement Manual, an internal procedures manual not available for public access. The Performance Audit Report found that ASIC lacked adequate internal tracking systems and procedures for monitoring the progress of enforceable undertakings once their negotiation and acceptance was completed. It recommended that internal management be strengthened to ensure monitoring of the consistency, timeliness and outcomes of enforceable undertakings. However, despite the lack of systems, the report concluded that the form and extent of monitoring activities by ASIC was adequate having regard to the nature of the enforceable undertakings sampled in the report.

D Summary

The foregoing discussion examined the legal source, origins, policy rationale and regulatory directives that underpin ASIC’s acceptance of enforceable undertakings. Eighteen years on, enforceable undertakings have grown into a sophisticated settlement regime whose significance and impact on the regulation of corporate, market, financial and credit services demands more debate, measurement and analysis, to which this empirical study seeks to contribute.

IV. RESEARCH METHODOLOGY AND DATA DESCRIPTION

A Overview

The empirical study involved an analysis of 414 enforceable undertakings accepted by ASIC during the period 1 July 1998 to 31 December 2015 (17.5 years). The 414 enforceable undertakings were taken from the register of enforceable undertakings, publicly available from ASIC’s website. The register lists every enforceable

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95 Australian National Audit Office (‘ANAO’), Administration of Enforceable Undertakings, Report No 38, (Canberra, 2 June 2015) 2.51 and 4.47.
96 Ibid 2.34.
97 Ibid 4.6.
98 Ibid 2.25-2.28.
99 Ibid 2.57.
100 Ibid 4.11.
undertaking accepted by ASIC during the 17.5 year period, organised in reverse chronological order by date of ASIC’s acceptance of the undertaking. The register supplies basic details of each enforceable undertaking accepted, such as the names of the parties giving the enforceable undertaking, the date of its acceptance by ASIC, the statutory power pursuant to which each enforceable undertaking was accepted, the State or Territory in which it was accepted and its assigned ASIC document number. The register also provides hyper-texted links to digital copies of enforceable undertaking documents accepted by ASIC and media releases issued by ASIC following acceptance of an enforceable undertaking.

B Enforceable Undertaking Documents

Four categories of documents concerning enforceable undertakings are accessible from the ASIC enforceable undertakings register: enforceable undertakings; variations of enforceable undertakings; notifications of withdrawal of enforceable undertakings; and media releases. The first three result from the exercise of ASIC’s powers to accept, vary and/or withdraw undertakings pursuant to ASIC Act ss 93A and 93AA and National Credit Act s 322 discussed in Part II. The fourth set of documents, ASIC media releases, is a function of ASIC’s regulatory practice of issuing media releases when it accepts an enforceable undertaking.102

414 enforceable undertakings accepted by ASIC were accessible from the ASIC enforceable undertakings register as of 31 December 2015. Each undertaking is in writing, signed by the person or persons offering them to ASIC for acceptance.103 While their subject matter and terms vary, the basic form and structure of each enforceable undertaking is similar.104 The presence of the signature of a senior ASIC executive with authority to accept enforceable undertakings in each enforceable undertaking document was taken to signify both acceptance of the undertaking by ASIC and its legally enforceable status.105

Three enforceable undertakings accepted by ASIC and listed on the enforceable undertakings register were not accessible via the register. Two were enforceable undertakings that have been withdrawn since the time of their original acceptance.106 A notice of withdrawal in relation to both undertakings can be downloaded, but the

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102 ASIC, Regulatory Guide 100, above n 9, 100.42.
103 See Part III.B.2. above.
104 Ibid.
105 ASIC, Regulatory Guide 100, above n 9, RG 100.14.
original undertakings have been removed from the register.\textsuperscript{107} The third missing undertaking is simply a function of hyper-text link error.\textsuperscript{108} The link is to the wrong enforceable undertaking. These three enforceable undertakings were excluded from the current study.

The removal of enforceable undertakings from the register on grounds that they have been subsequently withdrawn contrasts with ASIC’s approach to completed undertakings. ASIC does not remove enforceable undertakings from the register when the undertakings given by the parties have been completed. ASIC’s stated practice is to leave them on the public record after they are completed. As ASIC’s regulatory guide on enforceable undertakings explains, ‘The fact that an enforceable undertaking was accepted should remain on the public record and the register should remain a complete record of our use of this remedy.’\textsuperscript{109} It is hard to see why this same rationale should not also apply in relation to withdrawn undertakings.

\textbf{C Variations and Withdrawals of Enforceable Undertakings}

Written variations of existing enforceable undertakings are part of the 414 enforceable undertakings in the current study. There were 15 such variations, comprising 3.6\% of the total number of enforceable undertakings. The enforceable register also contained three withdrawal notifications announcing that three enforceable undertakings were withdrawn across the 17.5-year study period.\textsuperscript{110} These withdrawals affected less than 1\% of enforceable undertakings accepted by ASIC. The small numbers of variations (15) and withdrawals (3) is evidence of ASIC’s cautious approach to variations and withdrawals of enforceable undertakings.\textsuperscript{111} Apart from written variations, \textit{Regulatory Guide 100} allows for informal variations of an enforceable undertaking in the form of an extension of time to comply with time limits in an enforceable undertaking.\textsuperscript{112} Data on the number of variations granted by ASIC pursuant to this method of variation is not public available.

\textsuperscript{107} Media releases issued at the time of the acceptance of the withdrawn undertaking remain on the register. See ASIC, ‘Barton Capital Securities provides enforceable undertaking’ (Media Release 02/162, 9 May 2002, revised 19 December 2002); ASIC, ‘ASIC acts on GE Money’s insurance and debt collection practices’ (Media Release 08-106MR, 22 May 2008); ASIC, ‘ASIC accepts new enforceable undertaking from Wealthsure Pty Ltd and Wealthsure Financial services Pty Ltd (Media Release 15-090MR, 30 April 2015).


\textsuperscript{109} ASIC, \textit{Regulatory Guide 100}, above n 9, RG 100.56.

\textsuperscript{110} Above n 107 and ASIC, Withdrawal of Enforceable Undertaking: Wealthsure Pty Ltd and Wealthsure Financial Services Pty Ltd (12 May 2015)(‘Wealthsure’).

\textsuperscript{111} See Part III.B.5. above.

\textsuperscript{112} ASIC, \textit{Regulatory Guide 100}, above n 9, RG 100.52.
Three different formats were used to communicate the three withdrawals of undertakings during the study period: a note written on the register itself;\footnote{Barton Capital Securities, above n 107.} an ASIC file note;\footnote{GE Personal Insurance, above n 107.} and most recently, a document titled ‘Withdrawal of Enforceable Undertaking’.\footnote{Wealthsure, above n 111.} In each case, ‘withdrawal’ appears on the register, next to the basic details of the original enforceable undertaking to which it relates. Digital copies of two of the three withdrawn undertakings have also been removed from the enforceable undertakings register.\footnote{Barton Capital Securities and GE Personal Insurance, above n 107.}

D Media Releases on Enforceable Undertakings

ASIC media releases issued in relation to the acceptance of enforceable undertakings are also accessible from the ASIC enforceable undertakings register. These media releases typically announce the acceptance of an enforceable undertaking by ASIC, provide background information about the circumstances leading up to the acceptance of the enforceable undertaking and a brief summary of its contents. Media releases are issued in accordance with ASIC’s policy on public comment.\footnote{ASIC, Public Comment, Information Sheet 152, May, 2014.} While ASIC has a discretionary policy of issuing media releases about enforcement matters, that policy is more deliberately applied in the case of enforceable undertakings. ASIC regards it as appropriate that the subject and terms of an enforceable undertaking be made public given that the undertaking is usually offered as an alternative to an adverse court, panel or board finding.\footnote{ASIC, Regulatory Guide 100, above n 9, RG 100.42.} It is therefore ASIC’s stated practice to issue a media release whenever it accepts an enforceable undertaking.\footnote{Ibid.}

An examination of the enforceable undertakings register reveals that linked media releases relating to enforceable undertakings accepted before 2001 are no longer accessible from the register. Secondly, there are 54 enforceable undertakings (12.9\% of the study sample) in relation to which there is no linked media release.\footnote{As at 31 December 2015.} This group includes the 15 variations of enforceable undertakings accepted by ASIC. The ‘missing’ media releases typically concerned enforceable undertakings given by individuals, rather than companies. One possible explanation for this phenomenon is that ASIC’s media release policy on enforceable undertakings is not consistently

\begin{itemize}
  \item \footnote{Barton Capital Securities, above n 107.}
  \item \footnote{GE Personal Insurance, above n 107.}
  \item \footnote{Wealthsure, above n 111.}
  \item \footnote{Barton Capital Securities and GE Personal Insurance, above n 107.}
  \item \footnote{ASIC, Public Comment, Information Sheet 152, May, 2014.}
  \item \footnote{ASIC, Regulatory Guide 100, above n 9, RG 100.42.}
  \item \footnote{Ibid.}
  \item \footnote{As at 31 December 2015.}
\end{itemize}
applied. An alternative explanation is that media releases for enforceable undertakings are not consistently uploaded for access from the enforceable undertakings register.

E  Construction of Database

1  Primary Evidence

The database for the current study was exclusively drawn from the contents of the 414 written enforceable undertakings (399 enforceable undertakings and 15 variations of enforceable undertakings) as now described. Informal variations of enforceable undertakings and withdrawals of enforceable undertakings were not considered in the study. Informal variations were excluded because there were no publicly accessible records of these arrangements. Withdrawals were excluded because the study sample of three withdrawals was deemed too small for meaningful analysis.

Exclusive reliance on the contents of the 414 written enforceable undertakings is a major strength of the current study. The large sample represents a rich body of primary evidence on the types of regulated firms and individuals who gave enforceable undertakings, the different purposes and contexts in which enforceable undertakings have been used and the range and types of commitments in enforceable undertakings. It does not, however, offer insights into the actual process of negotiation that preceded the acceptance of enforceable undertakings or how the precise text and content of the undertakings was arrived at. 121 This project involves a study of the use of enforceable undertakings, once successfully negotiated, as a compliance technique. The behavioural dynamic between ASIC and the parties giving enforceable undertakings was not the focus of the empirical investigation.

As now noted, each undertaking or variation included in the study was in writing and signed by both ASIC and the regulated party. The presence of the signature of a senior ASIC officer signified ASIC’s acceptance of the enforceable undertaking. The same presumption applies to the regulated party, namely, that their signature constituted acceptance of the agreement as set out in the terms of the undertaking. There was no need to go outside the written terms of the enforceable undertakings to independently verify and/or validate the information contained within it. The current study could proceed on the reasonable assumption that the parties to the undertaking and the regulator had verified and validated the information contained in the enforceable undertakings themselves, as part of the negotiation process that preceded acceptance of the undertakings.

121 Yeung, above n 21, 193.
2 Distilling Data

Construction of the dataset involved analysis and interpretation of the terms of the 414 enforceable undertakings, identification and classification of relevant data, reduction to numerical values and statistical analysis. Information was sought on a range of issues and themes, including: the number and type of enforceable undertaking instruments accepted by ASIC; the page length of enforceable undertakings; the number and type of legal persons giving enforceable undertakings; characteristics of these regulatees including profession, industry, principal business activity and company type; the nature and characteristics of the misconduct concerns that gave rise to each enforceable undertaking; the principal undertakings given by the parties, the duration of those undertakings; and the involvement of third parties in the undertaking compliance process. Common features or traits, patterns and trends supplied the basis for both classifying and converting the extracted qualitative data into quantitative data. This in turn enabled the tallying of data and numerical comparisons between data groups and across the years of the data study.

3 Data Counting Issues

Data counting in the current study was complicated by the presence of enforceable undertakings involving multiple parties, multiple misconduct issues and multiple undertakings given to ASIC. Specific counting issues affecting analysis of particular subsets of data are discussed throughout Part V. The discussion here is limited to the overall count of enforceable undertakings in the study. Tallying the total number of enforceable undertakings in the study was complicated by three issues: the involvement of multiple parties in an enforceable undertaking; the inconsistent recording of variations of enforceable undertakings on the register; and the removal of two withdrawn enforceable undertakings from the register.122

Many enforceable undertakings on the ASIC register involve multiple parties. Those parties may have signed the enforceable undertaking together, in which case the enforceable undertakings register provides a single link to a digital copy of that undertaking.123 Where different copies of the same instrument have been separately signed by each of the parties, the register typically provides a digital link to each duly signed copy, as evidence that the enforceable undertaking was truly signed by all of the parties.124 Analysis of the terms of the enforceable undertaking is the only way to determine whether the separately signed enforceable undertaking instrument is identical to, or different from, its counterparts.

122 See Part IV.B. above.
124 See, eg, ASIC, Enforceable Undertaking: The Royal Bank of Scotland plc and The Royal Bank of Scotland N.V., Documents 028492039 and 028492040, 21 July 2014 (‘RBS Undertakings’).
Where several parties were included in the one enforceable undertaking and they simultaneously signed the one single document, their arrangement was counted as one single undertaking in the current study. Where there were links to two or more documents and two or more parties, the documents were counted as different copies of the one enforceable undertaking provided that the documents were identical to each other. This proved to be the case in the majority of cases where the ASIC enforceable undertakings register contained multiple links to enforceable undertakings given in connection with one connected group of parties. However, there were exceptions where the terms of parties’ respective enforceable undertakings differed. Three such occasions were identified in this study. In each case, the enforceable undertaking signed by the relevant party has been separately counted as one enforceable undertaking. This has had the effect of adding 5 more enforceable undertakings to the total list of enforceable undertakings that could be ascertained by manually tallying the enforceable undertakings listed in ASIC’s enforceable undertakings register.

4 Variations of Enforceable Undertakings

The current study determined that there were 15 variations of enforceable undertakings accepted by ASIC during the period of study. Of these, 11 variations were listed separately in the register, in the year in which ASIC consented to them. The remaining four were listed as part of the original enforceable undertaking to which they related, in the year in which that original undertaking was accepted. Presuming that all variations should be counted, these four variations were added to the overall list of enforceable undertakings and specifically, to the tallies of enforceable undertakings for the year in which they were respectively accepted and became enforceable. This had the effect of adding four more enforceable undertakings to the total list of enforceable undertakings in ASIC’s enforceable undertakings register.


5 Impact of Law Reform

Reforms to the Corporations Act, ASIC Act and the introduction of the National Credit Act had three effects on the current study. First, they expanded the range of misconduct issues that were the subject of enforceable undertakings. Secondly, they changed existing statutory rights, duties, obligations, powers, penalties and remedies arising under laws administered by ASIC. Thirdly, they created difficulties for the purposes of making analytical comparisons between enforceable undertakings from different time points within the study period.

The enactment of the National Credit Act in 2010 best illustrates the expansion of misconduct issues in the current study. Pursuant to those reforms, ASIC’s regulatory responsibilities expanded to include credit services and consumer contracts in Australia from July 2010.127 ASIC’s expanded powers included the power to accept enforceable undertakings in relation to credit services, as discussed in Part III. Eighteen enforceable undertakings from parties engaged in these activities now form part of the current study.

Financial services, now regulated by Chapter 7 of the Corporations Act, are the most significant example of the second impact of law reform. Taking effect on 11 March 2004, six years after the start of the current study period, these reforms effected major changes to the way financial services and products excluding credit were regulated so that comparable financial products became subject to the same rules and disclosure standards and providers of financial services and financial markets were subject to the same licensing regimes. The changes make it difficult to compare financial services misconduct occurring under the pre and post 2004 legal regimes.

V. EMPIRICAL STUDY AND ANALYSIS

A Overview

Part V now profiles and analyses enforceable undertakings accepted by ASIC between 1 July 1998 and 31 December 2015. Findings are presented on three categories of data: (1) the characteristics of the parties offering enforceable undertakings; (2) the misconduct or legal concerns that underpin enforceable undertakings accepted by ASIC; and (3) the undertakings or commitments made by the parties and accepted by ASIC as a means of addressing those concerns.

127 See Part III.A.1. above.
B  General Description of the Dataset

1  Snapshot of Dataset

Discussion begins with a general description of the dataset of enforceable undertakings. Table 1 provides a breakdown of the 414 enforceable undertakings included in the current study by year.

<table>
<thead>
<tr>
<th>Year</th>
<th>Source of ASIC's Power to Accept EUs</th>
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<tbody>
<tr>
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<td>Totals</td>
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</table>

Table 1 combines a large number of enforceable undertakings with a small number of variations (3.6% of the study sample) and treats them as one consolidated group of enforceable undertakings. The statutory source of ASIC’s power to accept the enforceable undertakings in the data study was as follows: 12 were accepted pursuant to National Credit Act s 322; four were accepted under ASIC Act s 93A; with the remaining 398 enforceable undertakings accepted under ASIC Act s 93AA. Part III explained that the power in s 93A applies only to enforceable undertakings given by
responsible entities so s 93AA was effectively the primary source of ASIC’s power to accept enforceable undertakings. These numbers confirm that interpretation.

2  **Analysis by Year**

The number of enforceable undertakings accepted by ASIC during each year of the study is depicted in Chart 1.

![Chart 1 - Enforceable Undertakings accepted by ASIC per year 1 July 1998 to 31 December 2015](chart)

The chart highlights variations in the rate of acceptance of enforceable undertaking over the years of the study. Starting modestly in 1998 with 14 enforceable undertakings, rising to 67 in the year 2000, remaining consistently in the mid-20s to low 30s range from 1999 until 2006. In 2006, rates of acceptance plummeted down to single digits, not returning to anything like the numbers of former years until 2011. Since 2011, rates of acceptance have been on the rise but the year levels still remain lower than in the first six years of the enforceable undertakings regime. This may indicate a more cautious approach to the acceptance of enforceable undertakings by ASIC from 2007 onwards. However, analysis by reference to the wider context of ASIC’s enforcement regime and stated priorities is needed before it is possible to be more definitive.

3  **Analysis by Page Length**

Chart 2 depicts the average page length of enforceable undertakings accepted by ASIC during each year of the study.

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128 See Part III.A.1. above.
Average page length was determined by ascertaining the page length of every enforceable undertaking in the current study, tallying their pages and averaging the results for each year of the study. This process revealed that the average page length for an enforceable undertaking over the course of the whole study period was 10.2 pages, with the shortest enforceable undertakings being 2 pages in length and the longest being 140 pages.  

Chart 2 reveals a trend towards longer average page length for enforceable undertakings, observable from 2003 onwards. When compared against the trends in acceptance in Chart 1, it can be observed that the average page length of enforceable undertakings increased at or about the same time as the rate of acceptance of enforceable undertakings declined from its pre 2006 highs. It would appear that enforceable undertakings declined in number at that point but not in documentary length. Further, unlike the rate of acceptance of enforceable undertakings, which ebbed and flowed over the study period, the average page length of enforceable undertakings has been generally longer since 2003.

### C Characteristics of Parties Offering Enforceable Undertakings

#### 1 Overview

This section presents a profile of the parties from whom ASIC accepted enforceable undertakings during the study period. The profile is based on data collected from the enforceable undertakings in the current study concerning the legal person status of

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129 RBS Undertaking, above n 124.
parties offering enforceable undertakings, the occupation of individuals offering undertakings and the legal status of companies offering undertakings.

2 Analysis of Enforceable Undertakings by Legal Persons

Table 2 presents a summary of the enforceable undertakings accepted by ASIC according to the legal person status of the parties giving the enforceable undertakings: individuals (I), companies (C) or companies in combination with individuals (C+I).

<table>
<thead>
<tr>
<th>Year</th>
<th>C</th>
<th>I</th>
<th>C+I</th>
<th>Total EUs</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>6</td>
<td>8</td>
<td>2</td>
<td>16</td>
</tr>
<tr>
<td>2014</td>
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<tr>
<td>1998</td>
<td>5</td>
<td>5</td>
<td>4</td>
<td>14</td>
</tr>
<tr>
<td>Totals</td>
<td>174</td>
<td>176</td>
<td>64</td>
<td>414</td>
</tr>
</tbody>
</table>

Table 2 reveals that the numbers of enforceable undertakings offered by individuals (I, n=176) and companies (C, n=174) are almost the same, with two more undertakings being offered by individuals than companies. The number of undertakings from companies in combination with individuals (C+I, n=64) is significantly smaller than both other groups. Enforceable undertakings offered by individuals and by companies
respectively constitute 42.5% and 42% of the study sample. Enforceable undertakings by companies and individuals (C+I) together represent only 15.5%.

Charts 3, 4 and 5 depict in chart form each group of enforceable undertakings in the dataset. The trends evident in Chart 3 (companies) and Chart 4 (individuals) mirror the trend in the overall numbers of enforceable undertakings accepted by ASIC in Chart 1. However, Chart 5 draws attention to the sharp decline in the number of enforceable undertakings accepted from companies and individuals (C+I) together since 2004.

![Chart 3 - EUs given to ASIC by companies (C)
1 July 1998 to 31 December 2015](image1)

![Chart 4 - EUs given to ASIC by Individuals (I)
1 July 1998 to 31 December 2015](image2)
3 Analysis of Enforceable Undertakings by Individuals

Table 3 provides a profile of the 176 enforceable undertakings accepted from individuals, by reference to their nominated professional occupation. Five common categories of profession were identified in the data: auditors; liquidators; directors; finance industry personnel (FiP); and other (OT).

<table>
<thead>
<tr>
<th>Year</th>
<th>Auditor</th>
<th>Liquidator</th>
<th>Director</th>
<th>FiP</th>
<th>OT</th>
<th>Yr Total</th>
</tr>
</thead>
<tbody>
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<td>3</td>
<td>0</td>
<td>8</td>
</tr>
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<td>2014</td>
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<td>1</td>
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<td>1</td>
<td>2</td>
<td>9</td>
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<td>2</td>
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</tr>
<tr>
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<td>1</td>
<td>0</td>
<td>2</td>
<td>0</td>
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<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>2007</td>
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<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>2006</td>
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<td>3</td>
</tr>
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<td>2005</td>
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<td>4</td>
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</tr>
<tr>
<td>2004</td>
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</tr>
<tr>
<td>2003</td>
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<td>4</td>
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</tr>
<tr>
<td>2002</td>
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<td>0</td>
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<td>10</td>
<td>1</td>
<td>12</td>
</tr>
<tr>
<td>2001</td>
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<td>1</td>
<td>3</td>
<td>6</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>2000</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>19</td>
<td>1</td>
<td>23</td>
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<tr>
<td>1999</td>
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<td>0</td>
<td>6</td>
<td>7</td>
<td>3</td>
<td>17</td>
</tr>
</tbody>
</table>
The category of FIP or ‘finance industry personnel’ is a catch-all term adopted by the study to cover the large number of enforceable undertakings given by persons working in the financial services industry and subject to regulation by Chapter 7 of the Corporations Act. It includes brokers, dealers, investment advisers, financial planners, investment managers and authorised agents and/or representatives of any of these occupations. The common attribute was that they were each described in the enforceable undertakings as either an authorised representative or proper authority holder of an entity licensed under the Corporations Act. This group (n = 74) is much larger than the other occupational categories. The category ‘other’ comprises enforceable undertakings given by individuals that do not fit into the four specific categories. The other category captures two types of individuals: those for whom no occupation was nominated in their enforceable undertakings; and individuals with a nominated occupation that straddled two or more specific occupation categories, such as being both a director and financial industry personnel.

There are interesting trends observable in this data regarding occupation groups. First, in relation to auditors and liquidators, it is evident that very few enforceable undertakings were accepted by ASIC from members of these professions prior to 2005. However, from that time onwards, enforceable undertakings from auditors and liquidators were routinely accepted such that enforceable undertakings by auditors make up 18.1%, and enforceable undertakings by liquidators make up 8% of all enforceable undertakings given by individuals. Secondly, enforceable undertakings given by directors represented 22.2% of all undertakings offered by individuals. In contrast, FIPs dominate the study of undertakings given by individuals. They constitute 42% of all undertakings by individuals.

4 Analysis of Enforceable Undertakings by Companies

<table>
<thead>
<tr>
<th>Year</th>
<th>No of EUs</th>
<th>No of Cos</th>
<th>Pty Ltd</th>
<th>Unlisted Ltd</th>
<th>Listed Ltd</th>
<th>For reg'd</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>6</td>
<td>8</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>2014</td>
<td>13</td>
<td>15</td>
<td>6</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>2013</td>
<td>15</td>
<td>16</td>
<td>9</td>
<td>6</td>
<td>1</td>
<td>0</td>
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</tr>
<tr>
<td>2011</td>
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<td>9</td>
<td>1</td>
<td>7</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2010</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
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<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>2</td>
<td>6</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>
Table 4 provides a profile of the 174 enforceable undertakings offered by companies according to their legal structure status. To ensure the data is comprehensive, Table 4 first lists the number of companies that provided enforceable undertakings in each particular year. 218 companies provided the 174 undertakings given by companies, suggesting that each of these enforceable undertakings given by companies involved an average of 1.25 companies. Alternatively, that 25% of enforceable undertakings in this subset were given by two or more companies.

Table 4 then sorts the 218 companies into four categories of company. The categories are based on the forms of company structure nominated in the enforceable undertakings. Four categories were identified across the subset: proprietary companies (Pty Ltd); unlisted public companies (Unlisted Ltd); listed public companies (Listed Ltd); and registered foreign companies (For Reg’d). Each of these company types has a recognised legal meaning for the purposes of the Corporations Act. Proprietary companies (Pty Ltd) are companies limited by shares or having a share capital, with no more than 50 shareholders and do not do anything requiring disclosure under the fundraising provisions of the Corporations Act. Public companies are companies other than proprietary companies incorporated under the laws of Australia. A listed public company (Listed Ltd) is a public company included in the official list of the Australian Securities Exchange (‘ASX’), a prescribed financial market for the purposes of the Corporations Act. By default, an unlisted public company (Unlisted Ltd) is a public company not listed on the ASX. Registered foreign companies (For Reg’d) are companies incorporated under the laws of a country or territory other than Australia, carrying on business in Australia.

Table 4 reveals that there were virtually identical numbers of proprietary companies (Pty Ltd) and unlisted public companies (Unlisted Ltd) giving enforceable undertakings.

130 Corporations Act s 9.
131 Corporations Act ss 45A and 113.
40.4% of companies giving enforceable undertakings were proprietary companies (Pty Ltd) and 40.8% were unlisted public companies (Unlisted Ltd). The percentage of listed public companies (Listed Ltd) giving enforceable undertakings in the current study was 12.8% (28 out of 218 companies).

5. Analysis of Enforceable Undertakings by Companies in Combination With Individuals

Tables 5, 6 and 7 relate to undertakings accepted from companies in combination with individuals during the study period. Table 5 profiles the 64 undertakings offered by this method and the 202 parties giving them. Table 6 profiles the 93 companies involved in these enforceable undertakings using the same categorisation applied in relation to enforceable undertakings given by companies in Table 4. A further category of unregistered foreign company carrying on business in Australia was also added. Table 7 profiles the professional occupations of the 108 individuals who are also parties to these enforceable undertakings, again in the same way as previously undertaken in relation to enforceable undertakings given by individuals in Table 3.

<table>
<thead>
<tr>
<th>Year</th>
<th>No of EUs</th>
<th>No of Parties</th>
<th>No of Cos</th>
<th>No of Ind'ls</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
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<td>4</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>2014</td>
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<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>4</td>
<td>9</td>
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<td>4</td>
</tr>
<tr>
<td>2010</td>
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</tr>
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<td>6</td>
</tr>
<tr>
<td>Totals</td>
<td>64</td>
<td>202</td>
<td>93</td>
<td>109</td>
</tr>
</tbody>
</table>
Table 6 - EUs given to ASIC by companies and individuals (C+I) from 1 July 1998 to 31 December 2015, by nominated company type

<table>
<thead>
<tr>
<th>Year</th>
<th>No of EUs</th>
<th>No of Cos</th>
<th>Pty Ltd</th>
<th>Unlisted Ltd</th>
<th>Listed Ltd</th>
<th>No Liab Co</th>
<th>For reg’d</th>
<th>For Unreg’d</th>
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</tr>
<tr>
<td>2014</td>
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<td>5</td>
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</tr>
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<td>0</td>
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</tr>
<tr>
<td>2012</td>
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<td>0</td>
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<td>3</td>
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<td>68</td>
<td>21</td>
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<td>2</td>
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</table>

Table 7 - EUs given to ASIC by companies and individuals (C+I) from 1 July 1998 to 31 December 2015, by individual’s nominated occupation

<table>
<thead>
<tr>
<th>Year</th>
<th>No of EUs</th>
<th>No of Ind’ls</th>
<th>Director</th>
<th>FIP</th>
<th>OT</th>
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<td>1</td>
</tr>
<tr>
<td>2014</td>
<td>2</td>
<td>4</td>
<td>4</td>
<td>0</td>
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</tr>
<tr>
<td>2013</td>
<td>0</td>
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<td>0</td>
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<tr>
<td>2012</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2010</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2007</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2006</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

39
Table 5 reveals a relatively even distribution of companies and individuals offering enforceable undertakings in combination, with 109 individuals slightly outnumbering the 93 companies involved. Table 6 reveals that of the 93 companies listed in Table 5, 68 were proprietary companies (Pty Ltd) and 21 were unlisted public companies (Unlisted Ltd). Table 7 reveals that 98 of the 109 individuals who gave enforceable undertakings in combination with companies were directors.

These observations change the overall complexion of the data on enforceable undertakings by occupation and company type. First, the proportions of proprietary and unlisted public companies in the study change. In the isolated context of enforceable undertakings given by companies only (Table 4), the proportions of proprietary and unlisted public companies were almost the same: 40.4% for proprietary companies (Pty Ltd) and 40.8% for unlisted public companies (Unlisted Ltd). However, when companies giving enforceable undertakings in combination with individuals are added to the analysis, the proportion of proprietary companies (Pty Ltd) giving enforceable undertakings in the current study increases to 50.2% (156 of the now 311 companies) while the proportion of unlisted public companies giving undertakings decreases to 35.4% (110 out of 311 companies).

A similar phenomenon takes place in relation to the proportion of enforceable undertakings given by directors in the current study when account is taken of the data in Table 7. In the isolated context of enforceable undertakings given by individuals, the proportion of directors giving enforceable undertakings (Table 6) was 22.4% of all undertakings offered by individuals. However, this figure changes when enforceable undertakings given by directors in conjunction with companies are added to the earlier data set. The percentage of enforceable undertakings given by directors rises to 57.8% (137 of 240 undertakings). The percentage of enforceable undertakings given by finance industry personnel (FIP) decreases from 44.25% of the smaller data subset to 32.5% of the larger data set (78 of 240 undertakings).

6 Recap

The preceding analysis revealed that ASIC accepted almost equal numbers of enforceable undertakings from individuals and companies during the study period. Finance industry personnel were the dominant group of individuals giving enforceable
undertakings. Proprietary companies and unlisted public companies were almost equally represented in the categories of company type. However, when the extra data from enforceable undertakings given by companies in combination with individuals was taken into account, the data took on a different complexion. Factoring in these extra undertakings revealed the dominance of proprietary companies over unlisted public companies in the study. Secondly, more directors than financial service personnel gave enforceable undertakings in the dataset.

D. Misconduct Issues Underpinning Enforceable Undertakings

1 Context

The working paper now analyses data on the circumstances and events that were the springboard for the negotiation of enforceable undertakings in the current study. As Part III has already explained, ASIC has a practice of only negotiating and accepting enforceable undertakings after it has made three key determinations: (1) that the parties offering enforceable undertakings had committed a contravention of the laws administered by ASIC; (2) that the proffered undertakings were a more effective regulatory outcome than would be gained by pursuing non-negotiated, adversarial sanctions and (3) the undertakings were appropriate in the circumstances. The current discussion concerns the first determination. The ‘Background’ and ‘Details of Conduct’ sections of ASIC accepted enforceable undertakings provide particulars of the activities, conduct and/or events performed by the parties that triggered ASIC’s concern that misconduct had taken place (‘the activities’). The ‘ASIC’s Concern’ section articulates ASIC’s views of that conduct, specifically the concern that the activities, conduct or events in question amounted to a contravention of the laws administered by ASIC (‘the misconduct’). A detailed profile of the activities and misconduct that were the subject of the enforceable undertakings is now presented in Tables 8 to 18.

2 Activities Subject of Enforceable Undertakings

2.1 Overall Profile

Tables 8 to 13 profile the activities that were the subject of the enforceable undertakings with Table 8 presenting a macro or overall view of the data and Tables 9 to 13 breaking down that data for further analysis.

<table>
<thead>
<tr>
<th>Table 8 - Summary of activities that were the subject of EUs accepted by ASIC from 1 July 1998 to 31 December 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>EUs given by</td>
</tr>
</tbody>
</table>

132 ASIC, Regulatory Guide 100, above n 9, RG 100.16 and RG 100.17.
Six categories are used in Table 8 to summarise the activities that were the subject of enforceable undertakings: activities involving companies (CO); activities involving managed investments (MIS); activities involving financial services (FS); activities involving credit services (CS); settlements; and miscellaneous activities (OT). The varied nature of the activities reflects the size and scope of activities captured by ASIC’s regulatory remit and the terminology of the laws ASIC administers within that remit, notably, the Corporations Act.

‘CO’ or activities involving companies consisted of activities concerning the administration of companies and activities relating to investing in companies. These activities are profiled in further detail in Table 9. ‘MIS’ or activities relating to management investments comprise activities involved in investing in managed investment schemes and the management of those schemes. They are profiled in greater detail in Table 10. ‘FS’ or activities relating to the provision of financial services and products include activities involving giving advice and dealing in a range of financial products. They are profiled in Tables 11 and 12. Table 13 profiles ‘CS’, being the activities involving credit services. The category ‘Settlement’ covers activities involved in the settlement of a court action brought by ASIC against the parties to the undertaking or the resolution of Administrative Appeals Tribunal (AAT) proceedings brought by the parties challenging an administrative decision made by an ASIC delegate. The final category of ‘OT’ or other/miscellaneous activities’ is a catchall category for activities that were either hard to classify or straddled one or more of the specific categories.

Table 8 reveals that the dominant group of activities in the enforceable undertakings dataset was the activities relating to financial services (FS). Financial services were the activity subject in 190 enforceable undertakings, representing 45.9% of the total number of enforceable undertakings. These findings support ASIC’s contention that the financial services industry has over time become the dominant source of its enforcement work. ASIC has estimated that the financial services industry costs approximately $119 million dollars per year (30.8% of ASIC’s annual costs of $350
million) to regulate, although not all of this money is directed towards enforcement.\textsuperscript{133} The remaining 54.1\% of activities in Table 8 consisted of activities involving companies (CO) (24.9\%), activities involved in managed investments (MIS) (15\%), settlements (6.5\%), activities involving credit (CS) (4.3\%), and other activities (3.4\%).

2.2 Activities involving companies

Table 9 breaks down the 103 activities encompassing the category ‘Activities involving companies’ in Table 8 into 5 sub-groups of activity: reporting and continuous disclosure; auditing; insolvency (including external administrations); issuing of shares, convertible notes and debentures; and secondary trading in securities.

<table>
<thead>
<tr>
<th>EUs given by</th>
<th>Types of Activities</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Reporting &amp; CD</td>
<td>11</td>
<td>0</td>
<td>1</td>
<td>18</td>
<td>5</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>Auditing</td>
<td></td>
<td>32</td>
<td>23</td>
<td>4</td>
<td>2</td>
<td>61</td>
</tr>
<tr>
<td></td>
<td>Insol &amp; Ext Admin</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Issue of shares &amp; debentures</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Secondary trading</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Totals</td>
<td>12</td>
<td>32</td>
<td>25</td>
<td>25</td>
<td>9</td>
<td>103</td>
</tr>
</tbody>
</table>

Table 9 reveals that auditing was the dominant activity in the ‘activities involving companies’ grouping from Table 8. It represented 31.1\% of enforceable undertakings in this group and was followed closely by insolvency and external administration and issuing of shares, convertible notes and debentures, both representing 24.3\% of this data subset. The remaining categories, reporting and secondary trading in securities, respectively represented 11.6\% and 8.7\%. Auditing and insolvency related activities were almost exclusively the subject of undertakings given by individuals. Reporting and issuing of share related activities were mainly the subject of enforceable undertakings given by companies.

‘Reporting’ refers to the activities involved in preparing financial reports for companies, reporting financial results to ASIC and the ASX and making disclosure

\textsuperscript{133} Performance of ASIC Report, above n 19, 2.3 and 25.41-25.42.
pursuant to the continuous disclosure obligations of the *Corporations Act*. ‘Auditing’ refers to the activities involved in independently verifying the accuracy of financial reports and results given by companies. The legal reporting and auditing requirements administered by ASIC are set out in *Corporations Act* Chapters 2M, 2N, 2P and 6CA (continuous disclosure). ‘Insolvency and external administration’ refers to activities where companies are found to be trading whilst insolvent or at risk of insolvency or are in external administration. Insolvency and external administration requirements are set out in *Corporations Act* Chapter 5.

Auditing and insolvency related enforceable undertakings typically addressed concerns about the manner in which audits\(^\text{134}\) and external administrations\(^\text{135}\) of companies were performed. Insolvency, or the threat of insolvency, was also the context for enforceable undertakings accepted from company directors in relation to their management of proprietary companies.\(^\text{136}\) Reporting related enforceable undertakings typically addressed continuous disclosure obligations of listed companies.\(^\text{137}\)

‘Issuing of shares, convertible notes and debentures’ covers activities by which companies or purported companies (not yet incorporated) engage in direct fund raising from members of the public. Investors variously subscribe for shares, debentures or convertible notes. The ASIC administered legal requirements applying to fund raising by issue of shares, debentures or convertible notes are currently set out in *Corporations Act* Chapter 2H, 2L and 6D. ‘Secondary trading in securities’ covers trading in securities, whether on or off market. ASIC administered legal requirements for secondary trading in securities are connected to company disclosure and reporting requirements discussed earlier in relation to the ‘reporting’ activity category but also include certain restrictions on securities transactions set out in *Corporations Act* Chapters 2J, 5C and 6 and misconduct concerns in Part 7.10.

Enforceable undertakings given in connection with fund raising by companies typically raised issues about the accuracy and adequacy of information provided by the companies to potential investors and whether the legal structure of the company in question permitted public fund raising.\(^\text{138}\) Enforceable undertakings given in connection with secondary trading in securities involved three common scenarios.


\(^{135}\) See, eg, ASIC, Enforceable Undertaking: Ross Stephen Turner, Document 029142281 (7 April 2015).

\(^{136}\) See, eg, ASIC, Enforceable Undertaking: Dimitri Amargiantakis, Document 028989760 (12 November 2014).

\(^{137}\) See, eg, ASIC, Enforceable Undertaking: Leighton Holdings, Document 027714755 (16 March 2012).

\(^{138}\) See, eg, ASIC, Enforceable Undertaking: Energetique Pty Ltd, Document 017029226 (11 November 2008).
First, share trading in breach of the substantial shareholder rules,\(^{139}\) takeover rules,\(^{140}\) and/or the continuous disclosure rules\(^{141}\) in the *Corporations Act*. These were exclusively the subject of enforceable undertakings given by companies. Secondly, share trading that involved prohibited practices such as short selling\(^ {142}\) and market rigging.\(^ {143}\) Thirdly, off-market share trading.\(^ {144}\) The second and third scenarios were the subject of enforceable undertakings from both individuals and companies in combination with individuals.

2.3 *Activities Involving Managed Investment Schemes*

Table 10 provides a breakdown of the 62 activities encompassing the category ‘activities involving managed Investments schemes’ from Table 8. Managed investments are schemes under which investors subscribe for or purchase interests in a common enterprise of pooled funds whose purpose is to produce financial benefits for the persons holding interests in the scheme.\(^ {145}\) Examples are managed cash, property or equity trusts, agricultural schemes, timeshare and/or mortgage schemes.\(^ {146}\) The main laws regulating managed investment schemes in Australia are found in *Corporations Act* Chapter 5C.

<table>
<thead>
<tr>
<th>EUs given by</th>
<th>Types of Activities</th>
</tr>
</thead>
</table>

\(^{139}\) See, eg, ASIC, Enforceable Undertaking: Citie Centre 4 Pty Ltd, Citie Centre Ltd, Berela Ltd and Mirani Pty Ltd, Document 008547301 (17 December 1998).

\(^{140}\) See, eg, ASIC, Enforceable Undertaking: Resolute Limited, Killyhelvin Pty Ltd, Paulsens Gold Pty Ltd and Kermia Pty Ltd, Document 008547316 (7 April 1999).

\(^{141}\) See, eg, ASIC, Enforceable Undertaking: NuSep Holdings Ltd, Document 0291693636 (18 September 2014).

\(^{142}\) See, eg, ASIC, Enforceable Undertaking: Daniel Baron Droga and Droga Capital Pty Ltd, Document 0170292316 (17 February 2009).

\(^{143}\) See, eg, ASIC, Enforceable Undertaking: Deszo Sipos, Document 008547396 (9 November 1999).

\(^{144}\) See, eg, ASIC, Enforceable Undertaking: Carmine Claudia Mercorella, Document 017029157 (16 May 2005); ASIC, Enforceable Undertaking: Island Arch Pty Ltd and Michael David Barnett, Document 017029198 (11 May 2006); and ASIC, Enforceable Undertaking: Fendwave Pty Ltd, Document 017029201 (1 August 2006).

\(^{145}\) *Corporations Act* s 9.

Table 10 provides data on the two main types of activities involving managed investments that were the subject of enforceable undertakings: the promotion, advertising, subscription and issue of interests (PMAS) in managed investment schemes; and the governance of managed investment schemes. A combination category was included in Table 10 for those undertakings involving promotion and governance issues.

Promotion, marketing, advertising, subscription and issue of interests in managed funds were the dominant activities in the larger ‘activities involving managed investments’ group from Table 8. They represented 62.9% of enforceable undertakings in this group, followed by governance of managed investment schemes (25.8%) and combined activities (11.3%).

The data on managed investments activities needs to be assessed in its temporal context. The majority of the enforceable undertakings dealing with managed investment schemes were accepted by ASIC in the first 6 years of operation of the enforceable undertakings regime, following the major reform of laws governing managed investments and the enactment of Chapter 5C of the Corporations Act in 1998.\(^\text{147}\) During this early period when the new laws were being established, the majority of the enforceable undertakings accepted by ASIC concerned the promotion of unregistered schemes, by unlicensed entities. Registration and licensing issues declined in number as the legal requirements of Chapter 5C became better understood and more broadly known. Recent enforceable undertakings dealing with managed investment schemes have been concerned more with governance issues,\(^\text{148}\) although there are still exceptions.\(^\text{149}\)

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\(^{147}\) *Managed Investments Act 1998* (Cth).

\(^{148}\) See, eg, ASIC, Enforceable Undertaking: Aurora Funds Management Ltd, Document 028989763 (13 November 2014) (‘the Aurora Funds Undertaking’).

\(^{149}\) See, eg, ASIC, Enforceable Undertaking: Graham Werry, DTC No 1 Pty Ltd and Weriton Finance Pty Ltd, Document 027443583 (7 March 2011).
The promotion, advertising, subscription and issue of interests in managed investment schemes raised similar concerns to those arising in connection with the issue of shares, debentures and/or convertible notes by a company (Table 9). The principal concern was the adequacy and accuracy of the information provided to potential investors. However, the proper registration of managed investment schemes and licensing of their responsible entities were also issues. Enforceable undertakings about the ‘governance of managed investment schemes’ involved management issues such as: calling appropriate meetings of members; engaging in transactions in accordance with the terms of the scheme’s constitution; and diligently monitoring the scheme’s valuation and unit pricing policies. Their common attribute was ASIC’s concern that the responsible entities in charge of the schemes had failed to comply with the statutory duties of responsible entities.

2.4 Activities involving Financial Services and Products

Table 11 profiles the activities involving financial services and products that were the subject of the 190 enforceable undertakings in the category ‘activities related to financial services’ in Table 8.

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150 See, eg, ASIC, Enforceable Undertaking: PCI Equity Pty Ltd, Document 017029212 (27 June 2007).
151 Ibid.
153 Aurora Funds Undertaking, above n 165.
155 Corporations Act s 601FC(1).
Table 11 - Activities involving financial services that were the subject of EUs accepted by ASIC from 1 July 1998 to 31 December 2015

<table>
<thead>
<tr>
<th>EUs given by</th>
<th>Types of Activities</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Giving fin/inv advice</td>
</tr>
<tr>
<td>Companies</td>
<td>29</td>
</tr>
<tr>
<td>Individuals</td>
<td>38</td>
</tr>
<tr>
<td>Companies &amp; Individuals</td>
<td>9</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>76</strong></td>
</tr>
</tbody>
</table>

Table 11 features five groups of activity: giving financial/investment advice; dealing in securities; dealing in insurance; dealing in superannuation; and dealing in banking and finance. ‘Giving investment or financial advice’ covers activities involved in making recommendations to investors in relation to investing in financial and finance related products. They included securities (particularly, shares and managed investment schemes), derivatives, insurance, superannuation, banking and finance products and services. Each of these financial or finance related products is the subject of its own activity sub-category in Table 11, with securities and derivatives combined in one category, and banking and finance in another.

The various categories of ‘giving financial advice’ and ‘dealing’ in Table 11 cover the business activities of financial planners, investment advisors and managers and securities; derivatives; insurance; mortgage; and finance brokers, and banks. ASIC administered requirements for giving financial advice and dealing in financial products are set out in Chapter 7 of the Corporations Act, supported by the consumer protection provisions under the ASIC Act. ‘Giving financial advice’ and ‘dealing’ activities were treated as belonging to separate categories, despite the reasonable possibility that there was overlap between the two activities. The division of the data

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157 Not all of these products are financial services for the purposes of the Corporations Act.
158 ASIC Act Part II, Division 2.
was based on the terms used in the enforceable undertakings from which the data was sourced. A distinction was routinely observed in the drafting between ‘giving advice’ and ‘dealing’ based activities.

Giving financial/investment advice was the dominant activity in the larger ‘financial services and related products’ grouping from Table 8. It represented 40% of this group, followed by dealing in securities (29.5%), dealing in insurance products (13.2%), dealing in banking and finance services (10.5%) and dealing in superannuation products (6.8%). Allowing for the merger of the ‘giving advice’ and ‘dealing categories’ simply strengthens the dominance of ‘giving advice’ as the major activity subject matter of enforceable undertakings in the study. While advice and dealing in securities and derivatives were fairly evenly represented in enforceable undertakings given by companies and individuals, insurance, superannuation, banking and finance activities were predominantly the subject of undertakings given by companies.

A common pattern emerged amongst the enforceable undertakings making up each of the groups of data in Table 11. While the activities in the various groups differed, the concerns raised about those activities were strikingly similar. Three common types of issues kept arising in each of the groups. They were: (1) concerns in relation to the promotion, marketing, advertising and sale of services and products; (2) concerns in relation to specific financial advice given and/or specific dealings in financial services and products; and (3) governance of businesses involved in giving advice about or dealing in financial services products.

Concerns arising in relation to the promotion, marketing, advertising and sale of financial services arose where parties used websites, seminars, weekly financial reports, and subscription services to promote their financial advisory services including specialist financial software. Licensing issues, specifically the failure to hold an Australian Financial Services Licence, were at the heart of these complaints. The second group of concerns was with tailored advice, such as when firms advised specific clients to switch financial products, adopt specific investment strategies,

\[\text{References}\]


160 Ibid.

161 See, eg, ASIC, Enforceable Undertaking: Rene Rivkin, Tarfaya Nominee Pty Ltd and Rivkin Discount Stockbroking Pty Ltd, Document 008547468, 4 October 2000.


164 See, eg, ASIC, Enforceable Undertaking: Paritech Pty Ltd, Document 008547384, 4 August 1999.

and invest in high-risk products, as part of their investment strategy. The third group of issues, the governance of financial advice firms, typically arose out of concerns as to the extent to which firms engaged in supervision, training and monitoring of staff to ensure compliance with the legal obligations of financial service licensees.

Table 12 presents the data findings on the presence of these patterns in relation to the category of ‘giving financial/investment advice’ in Table 11. Based on the identified pattern, it was possible to further divide the 76 enforceable undertakings in this group into three sub-groups. Specific advice (n = 38) was the dominant concern for half this group and also the one most commonly found in enforceable undertakings given by individuals. Governance concerns were most commonly raised in enforceable undertakings given by companies (n = 18 or 95% of the governance category). Issues involving the promotion, advertising and marketing of financial advice were only the subject of enforceable undertakings up to 2006.

<table>
<thead>
<tr>
<th>Party Giving EU</th>
<th>PMAS</th>
<th>Specific Advice</th>
<th>Governance</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Companies</td>
<td>9</td>
<td>2</td>
<td>18</td>
<td>29</td>
</tr>
<tr>
<td>Individuals</td>
<td>4</td>
<td>33</td>
<td>1</td>
<td>38</td>
</tr>
<tr>
<td>Companies &amp; Individuals</td>
<td>6</td>
<td>3</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>Overall Totals</td>
<td>19</td>
<td>38</td>
<td>19</td>
<td>76</td>
</tr>
</tbody>
</table>

These observations are broadly similar to those identified in relation to managed investment schemes (Table 10), discussed above. Enforceable undertakings dealing with promotional, advertising and marketing of financial advice were mainly accepted

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166 See, eg, ASIC, Enforceable Undertaking: Trevor Alan Benson, Document 025136481, 21 December 2011.
169 For the one exception, see ASIC, Enforceable Undertaking: Lifestyle Investor Services Pty Ltd, Lifestyle Trade Pty Ltd and Robert Lloyd Wilson, Document 026213622, 9 August 2011.
by ASIC in the first 8 years of operation of the enforceable undertakings regime. The laws regulating financial services were comprehensively reformed in 2004.\(^{170}\) During the period where the new laws were being established, the majority of the enforceable undertakings accepted by ASIC concerned the promotion of financial advice by unlicensed firms and individuals. Licensing issues appeared to decline as the laws become more broadly known. Recent enforceable undertakings have been concerned more with governance issues affecting firms involved in providing financial advice and wealth management services\(^{171}\) and specific financial advice given by individuals.\(^{172}\)

2.5 **Activities Involving Credit Services**

Table 13 profiles the 18 activities included in the category ‘Activities involving credit services’. Credit services, in this context, refer to credit arrangements that would satisfy the definition of ‘credit contract’ or ‘consumer leases’ in the *National Credit Act*.\(^{173}\) Examples of credit contracts covered by that Act include personal loans, credit cards, small-amount loans, housing loans and contracts for the sale of land or goods by instalments.\(^{174}\) Examples of consumer leases include a rental agreement for furniture or white goods provided that the lease does not give the lessee the right or obligation to purchase the goods. A contract with the right to purchase, alternatively called a hire purchase agreement, would still be regulated by the Act but as a credit contract, not as a consumer lease.\(^{175}\)

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\(^{170}\) *Financial Services Reform Act 2001 (Cth).* Implementation of the reforms was gradual with the laws taking full effect from 11 March 2004.

\(^{171}\) See above n 7 and accompanying text.


\(^{173}\) *National Credit Act* s 4.

\(^{174}\) ASIC, *Do I need a credit licence?*, Regulatory Guide 203, May 2013, RG 203.15.

\(^{175}\) Ibid RG 203.17.
Table 13 - Activities involving credit services that were the subject of EUs accepted by ASIC from 1 July 2010 to 31 December 2015

<table>
<thead>
<tr>
<th>Party giving EU</th>
<th>MB&amp;A</th>
<th>Credit cards</th>
<th>Pay day loans</th>
<th>Solar Credit</th>
<th>Small loans</th>
<th>Home loans</th>
<th>Consumer leases</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>By companies</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>13</td>
</tr>
<tr>
<td>By Individuals</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>By Companies &amp; individuals</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Total</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>7</td>
<td>1</td>
<td>4</td>
<td>18</td>
</tr>
</tbody>
</table>

Table 13 divides the enforceable undertakings concerning credit services into 6 activity groups. They are: mortgage broking and advice (MB&A); credit cards; pay day loans; small or top up loans; home loans; and consumer leases. There is a broad spread of credit service activities in Table 13, with the majority of enforceable undertakings concerning solar credit, small/pay day loans, and consumer leases. Small loans were the largest group, but the data sample was not large enough for this finding to be significant. The small data sample size reflects the fact that the enforceable undertakings in this group date from 2010 onwards, when ASIC became the regulator of credit services and consumer leases under the National Credit Act.

It is interesting to note that ASIC accepted 15 enforceable undertakings in relation to credit activities prior to the enactment of the National Credit Act, relying on its longer held power under ASIC Act s 93AA. The activities that were the subject of the enforceable undertakings accepted before the enactment of the National Credit Act were predominantly concerned with mortgage broking services and credit cards. The enforceable undertakings in question all raised concerns that the consumer protection

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179 See Part III.A.1 above.
provisions under the *ASIC Act* had been breached. Enforceable undertakings accepted since 2010 on similar issues often cite contraventions of the identical provisions in the *ASIC Act* as well as provisions in the *National Credit Act*.

2.6 Summary

The analysis in this section reveals that between 1 July 1998 and 31 December 2015 ASIC accepted enforceable undertakings in relation to a myriad of activities involving companies (24.9% of total sample), managed investment schemes (15%), financial services and products (45.9%), credit services (4.3%) and as part of a settlement of existing enforcement proceedings (6.5%). Activities involving financial services were the most common subject matter of enforceable undertakings in the study, with the activity of giving financial or investment advice being the specific activity that was most commonly raised in those undertakings (76 of 190 enforceable undertakings or 40%). This finding was strengthened by the acknowledgment that some of the categories used in the study could be merged together without detriment to the study’s findings. Specifically, the merger of ‘giving financial advice’ and ‘dealing’ in financial and finance related products.

The analysis also suggested the possibility of a pattern of activities emerging in enforceable undertakings involving managed investments and financial services. In relation to managed investment schemes, two common groups of activities were identified: the promotion, marketing and advertising of managed investment schemes; and the governance of managed investment schemes. Three common groups of activities were identified in relation to financial services: concerns with promotion, marketing and advertising of financial advice services; concerns with specific advice given; and governance concerns relating to Australian Financial Services Licensees.

3. Misconduct Issues in Enforceable Undertakings

3.1 Overview, Classification and Counting Issues

The actual misconduct issues that were the subject of the enforceable undertakings in the current study are now considered. ‘Misconduct’ in this context refers to ASIC’s articulated concern that the parties to an enforceable undertaking had contravened laws administered by ASIC. Details of ASIC’s views were typically found in terms set out under the ‘ASIC’s concerns’ heading of the enforceable undertakings in the current study. They included a list of sections of the *Corporations Act*, *ASIC Act* and/or *National Credit Act* that ASIC believed had been contravened by the parties’ activities. These section references form the basis of the data presented in Tables 14 to 18.

Three issues affected the classification and counting of data in Tables 14 to 18. First, due to the large number of statutory provisions referred to in enforceable

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180 *ASIC Act* Part II Division 2.
undertakings and variations in their degree of specificity, it became necessary to sort the data into groups of related statutory sections. Secondly, a small number of enforceable undertakings did not contain any reference to the statutory provisions involved in the parties’ misconduct. In these cases, the misconduct was interpreted by reference to the legal terms used to describe them and then sorted into groups according to the legislative provisions determined to be relevant to those legal terms. Thirdly, where enforceable undertakings referred to predecessor sections of the Corporations Act, the data was sorted by reference to the current section numbers as if the enforceable undertakings were negotiated under the legislation operative at 31 December 2015.

Counting the number of misconduct issues was complicated by the incidence of enforceable undertakings involving multiple contraventions of the law and therefore giving rise to multiple instances of misconduct. The procedure for counting was undertaken as follows. First, where the enforceable undertaking cited a single contravention of a single statutory provision, the contravention was counted as a one instance of misconduct and allocated to its appropriate category in Table 14. Secondly, when enforceable undertakings cited multiple contraventions of the same statutory provision (e.g. by reference to sub-paragraphs of the same provision, such as in Corporations Act 912(A)(1)), the contraventions were combined and counted as a single contravention giving rise to a single instance of misconduct and allocated to the appropriate category in Table 14.

Thirdly, in the situation where enforceable undertakings cited multiple contraventions of different statutory provisions, their treatment depended on the relationship between the statutory provisions cited in the enforceable undertaking. Where the cited sections formed part of a closely related set of provisions dealing with the same legal subject matter, such as the sections compromising the financial services laws in Corporations Act Chapter 7, the multiple section references were combined together and counted as a single contravention giving rise to a single misconduct issue and allocated to the appropriate category in Table 14. Finally, where the multiple section references were not closely related, then the multiple section references were combined together and counted as a single contravention and allocated to the category of ‘combinations of legal subject matter’ in Table 14. By this process, it was possible to profile the number and type of legal issues arising in enforceable undertakings as a function of the total number of enforceable undertakings.

3.2 Profile of Misconduct Issues in Enforceable Undertakings

The misconduct issues that were the subject of the enforceable undertakings are summarised in Table 14. Tables 15 to 18 supplement Table 14. Table 15 provides a description of the statutory sections that make up the various groups in Table 14. Tables 16, 17 and 18 provide a more detailed analysis of three aspects of the data in Table 14.
Table 14 - Summary of misconduct issues in EUs accepted by ASIC from 1 July 1998 to 31 December 2015

<table>
<thead>
<tr>
<th>Party giving EUs</th>
<th>CP</th>
<th>CS</th>
<th>FS</th>
<th>CG</th>
<th>MIS</th>
<th>TAK</th>
<th>CD</th>
<th>FUND</th>
<th>MM</th>
<th>EXT</th>
<th>COMB</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Companies</td>
<td>38</td>
<td>5</td>
<td>47</td>
<td>3</td>
<td>5</td>
<td>7</td>
<td>7</td>
<td>16</td>
<td>3</td>
<td>0</td>
<td>43</td>
<td>174</td>
</tr>
<tr>
<td>Individuals</td>
<td>7</td>
<td>2</td>
<td>45</td>
<td>47</td>
<td>7</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>4</td>
<td>14</td>
<td>48</td>
<td>176</td>
</tr>
<tr>
<td>Companies &amp; individuals</td>
<td>5</td>
<td>0</td>
<td>9</td>
<td>7</td>
<td>4</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>0</td>
<td>35</td>
<td>64</td>
</tr>
<tr>
<td>Totals</td>
<td>50</td>
<td>7</td>
<td>101</td>
<td>57</td>
<td>16</td>
<td>7</td>
<td>7</td>
<td>20</td>
<td>9</td>
<td>14</td>
<td>126</td>
<td>414</td>
</tr>
<tr>
<td>Category abbreviation</td>
<td>Full name</td>
<td>Misconduct covered by category</td>
<td>Legislative source</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Corporations Act 2001</td>
<td>ASIC Act 2001</td>
<td>National Consumer Credit Protection Act 2009 (Since 1 July 2010)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| CP                    | Consumer protection laws | • Unconscionable conduct  
• Unfair contract terms  
• False & misleading conduct (all forms) | Sections 1041E, 1041H, 1308 | – | Part 2 Division 2 ss 12AC-12GO |
| CS                    | Credit services laws | • Provision of credit services without an ACL  
• Contravention of National Credit Protection Act requirements applying to credit services and consumer contracts | – | – | Sections 29-31, 47-53, Schedule 1 |
| FS                    | Financial services Laws | • Provision of financial services without an AFSL or its antecedents  
• Contravention of other financial services laws or their antecedents | Since 11 March 2002, Chapter 7 ss 760A-1101 excluding market misconduct provisions (see below). | – | – |
| CG                    | Corporate governance | Misconduct concerning:  
• Directors’ and officers’ legal duties  
• Related party transactions  
• Meetings  
• Financial reports & audit  
• the appointment of auditors and the performance of audits | Chapters 2D (ss 179-206M, 588G), 2E (ss 207-230), 2G (ss 248-253N), 2M (ss 285-323DA), Parts 2M.4 – 2M.7 (Sections 324AA – 344) | – | – |
<p>| MIS                   | Managed investment schemes and licensed | Misconduct concerning: | Chapter 5C (ss 601EA-601EB), | – | – |</p>
<table>
<thead>
<tr>
<th>Section</th>
<th>Topic</th>
<th>Misconduct</th>
<th>Relevant Chapters</th>
</tr>
</thead>
<tbody>
<tr>
<td>TAK</td>
<td>Takeover procedures, compulsory acquisitions and buyouts</td>
<td>Misconduct concerning takeover laws</td>
<td>Chapters 6 (ss 602-659C), 6A (ss 660A-669), 6B (ss 670A-670F), 6C (ss 671A-673)</td>
</tr>
<tr>
<td>CD</td>
<td>Continuous disclosure</td>
<td>Misconduct under continuous disclosure provisions</td>
<td>Chapter 6CA (ss 674-678)</td>
</tr>
<tr>
<td>Fund</td>
<td>Fundraising</td>
<td>Misconduct under fund raising provisions of the Corporations Act</td>
<td>Chapter 6D (ss 700-742)</td>
</tr>
<tr>
<td>MM</td>
<td>Market misconduct</td>
<td>Misconduct involving: Off market securities transactions, Market manipulation, False trading &amp; market rigging, Dishonest conduct, Insider trading</td>
<td>Sections ss 1091C, 1091K, 1041A-1041G (excluding false &amp; misleading statements), 1043A-1045A</td>
</tr>
<tr>
<td>EXT</td>
<td>External administration</td>
<td>Misconduct concerning the external administration of companies</td>
<td>Chapter 5 (ss 410 – 600H excluding s 588G)</td>
</tr>
</tbody>
</table>
Table 14 breaks the misconduct data down into 11 groups of statutory provisions allegedly contravened by the parties to enforceable undertakings: consumer protection (CP); credit services (CS); financial services (FS); corporate governance (CG); managed investment schemes (MIS); takeovers (TAK); continuous disclosure (CD); fund raising (FUND); market manipulation (MM); external administration (EXT) and a combination group, for undertakings involving a combination of these misconduct issues (COMB). Table 15 provides a definition of the categories used in Table 14.

Table 14 reveals that a broad spectrum of misconduct issues was the subject of enforceable undertakings over the study period. The most common misconduct issue in the study was non-compliance with financial services laws. Financial services laws were the relevant category for 101 enforceable undertakings, representing 24.4% of all enforceable undertakings. This was followed by corporate governance (57 enforceable undertakings or 13.8% of the total sample), consumer protection (50 enforceable undertakings or 12.1% of the total sample) fundraising (20 enforceable undertakings or 4.8%), managed investment schemes (16 enforceable undertakings or 3.9%), external administration (14 enforceable undertakings or 3.4%), market misconduct (9 enforceable undertakings or 2.1%) and takeovers, continuous disclosure and credit services (each 7 enforceable undertakings or 1.7%). Significantly, almost one third of the study sample (126 undertakings or 30.4%) were enforceable undertakings involving a combination of legal issues. These are discussed further below.

It is interesting to compare the misconduct issues data in Table 14 against the data on activities in enforceable undertakings (Table 8). Activities involving financial services were the subject of 190 undertakings or 46.4% of the activity sample in Table 8. The subset of enforceable undertakings involving financial services misconduct in Table 14 is just over half the size of this activity group. This finding suggests that enforceable undertakings involving financial services and related products did not necessarily give rise to corresponding legal issues under financial services laws. However, this comment is made before taking into account the legal issues raised in the ‘combination of legal issues’ category, which accounts for approximately one third of the Table 14 dataset. Factoring in the combination data alters the conclusions that can be drawn on this issue.
3.3 Financial Services Issues

Table 16 - Misconduct issues involving non-compliance with financial services laws in EUs accepted by ASIC from 1 July 1998 to 31 December 2015

<table>
<thead>
<tr>
<th>Party giving EUs</th>
<th>Financial Services Issues</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>AFSL (s 911A)</td>
<td>FS (other)</td>
</tr>
<tr>
<td>Companies</td>
<td>2</td>
<td>45</td>
</tr>
<tr>
<td>Individuals</td>
<td>4</td>
<td>41</td>
</tr>
<tr>
<td>Companies &amp; individuals</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Totals</td>
<td>9</td>
<td>92</td>
</tr>
</tbody>
</table>

Table 16 provides a breakdown of the 101 instances of non-compliance issues involving financial services laws from Table 14. There are two sub-categories: Australian Financial Services Licence (AFSL); and financial services (FS). The AFSL category encompassed enforceable undertakings where the issue was non-compliance with Corporations Act s 911A, requiring a person who carries on financial services business to hold an AFSL.\(^{181}\) There were just nine enforceable undertakings in this category, representing 8.9% of the financial services laws group in Table 14.

The second category, financial services, encompassed all other contraventions of financial services laws in Chapter 7 of the Corporations Act. These 92 contraventions represent 91.1% of the financial services misconduct in Table 14. Of the 92 contravention cases, 45 were found in enforceable undertakings given by companies, 41 by individuals, and six by companies in combination with individuals. Taking the enforceable undertakings given by companies, 34 of the 45 enforceable undertakings (75%) alleged that the parties had failed to comply with Corporations Act s 912A, which sets out the general obligations of Australian Financial Service Licensees. The most commonly cited contraventions of financial services laws in enforceable undertakings given by individuals were s 946A, which requires entities to give a statement of advice to clients and s 947B, which specifies what the statement of advice must contain.

3.4 Corporate Governance Issues

Table 17 provides a breakdown of the 57 instances of non-compliance issues involving corporate governance laws from Table 14.

Table 17 - Misconduct issues involving non-compliance with corporate governance laws in EUs accepted by ASIC from 1 July 1998 to 31 December 2015

\(^{181}\) Corporations Act s 911A.
<table>
<thead>
<tr>
<th>Party giving EUs</th>
<th>Corporate Governance Issues</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Auditing</td>
<td>Other</td>
</tr>
<tr>
<td>Companies</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Individuals</td>
<td>32</td>
<td>15</td>
</tr>
<tr>
<td>Companies &amp; individuals</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Totals</td>
<td>32</td>
<td>25</td>
</tr>
</tbody>
</table>

Issues involving corporate governance laws were divided into two categories: auditing; and other corporate governance issues as enumerated in Table 15. Compliance with auditing laws was the legal issue for 32 of the enforceable undertakings in this sub-category, representing 56.2% of the corporate governance sample. Other governance issues encompassed contraventions of directors’ duties and other related provisions, prohibitions against being involved in management of a corporation and financial reporting requirements. The latter category encompassed 25 enforceable undertakings or 43.8% of the Table 17 sample.

3.5 Combinations of Legal Issues

Almost one third of the enforceable undertakings (126 enforceable undertakings) in the data study involved combinations of legal issues. They alleged non-compliance with two or more statutory provisions under ASIC administered laws and those provisions were not related to each other. Table 18 presents a breakdown of the legal issues that featured in the ‘combinations of legal issues’ category in the study. Table 18 provides data on the number of times that specific non-compliance issues are mentioned in these enforceable undertakings. There are more instances of non-compliance than there are enforceable undertakings.

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183 See Part V D.3.1. above.
Table 18 – Combinations of Legal Issues in Enforceable Undertakings given to ASIC from 1 July 1998 to 31 December 2015

<table>
<thead>
<tr>
<th>EUs given by</th>
<th>Comb EUs</th>
<th>CP</th>
<th>CS</th>
<th>FS</th>
<th>CG</th>
<th>MIS</th>
<th>TAK</th>
<th>CD</th>
<th>FUND</th>
<th>MM</th>
<th>EXT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Companies</td>
<td>43</td>
<td>21</td>
<td>10</td>
<td>24</td>
<td>3</td>
<td>13</td>
<td>3</td>
<td>2</td>
<td>8</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Individual</td>
<td>48</td>
<td>36</td>
<td>0</td>
<td>53</td>
<td>10</td>
<td>15</td>
<td>0</td>
<td>0</td>
<td>6</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Companies &amp; Individuals</td>
<td>35</td>
<td>19</td>
<td>4</td>
<td>29</td>
<td>8</td>
<td>11</td>
<td>0</td>
<td>1</td>
<td>10</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>126</td>
<td>76</td>
<td>14</td>
<td>106</td>
<td>21</td>
<td>39</td>
<td>3</td>
<td>3</td>
<td>24</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 18 brings into focus two issues. First, the important role that consumer protection laws play in enforceable undertakings. Consumer protection laws, chiefly misleading and deceptive conduct, feature in 60.3% of enforceable undertakings involving combinations of legal issues (76 of 126 enforceable undertakings). When this data is added to the direct data on consumer protection as a specific misconduct issue in Table 14, consumer protection emerges as an issue in 30.4% or approximately one third of all enforceable undertakings.

Secondly, Table 18 reinforces the earlier finding that financial services laws were the dominant legal issue in the current study (Table 14). Financial services laws feature in 84% of enforceable undertakings involving combinations of legal issues (106 of 126 enforceable undertakings). When this data is added to the direct data on financial services laws in Table 14, financial services laws can be seen as a legal issue in 50% of all enforceable undertakings. This finding corresponds with the activity data in Table 8.

3.6 Summary

The empirical study revealed a broad spread of legal issues in enforceable undertakings accepted by ASIC (Table 14). The spread of misconduct in the study demonstrated ASIC’s willingness to accept formal settlements in relation to a wide range of activities involving contraventions of the laws that it administers. One third of the enforceable undertakings involved combinations of legal issues arising under two or more different chapters or sets of statutory provisions administered by ASIC. This finding is a salient reminder of the multi-dimensional nature of the activities falling with ASIC’s regulatory remit and the web of laws that apply to them. Financial services laws and consumer protection laws emerged as the most significant legal
issues in the study, with contraventions of financial services laws named as a legal issue in 50% and, consumer protection, in 30.4%, of all enforceable undertakings.

E Core Undertakings Given to ASIC

1 Context

The working paper now analyses the specific undertakings given by enforceable undertaking parties to redress their misconduct. These undertakings represent the regulatory outcomes that ASIC derives from accepting enforceable undertakings in preference to pursuing adversarial solutions in misconduct cases. Part III described the different kinds of commitments that might typically be found in enforceable undertakings accepted by ASIC.184 This section goes one step further and provides an empirical analysis of the core undertakings present in the 414 enforceable undertakings in the current study. The analysis is the subject of Tables 19 to 24 below.

2 Core Undertakings

‘Core undertakings’ refer to the term or terms in enforceable undertakings that directly concern and commit the parties to taking action to stop their misconduct and prevent it from reoccurring. Not every term in the ‘Undertakings’ section of enforceable undertakings is a core undertaking. It was necessary to distinguish between terms containing the substantive commitments made by the parties to ASIC and those dealing with procedural and incidental matters. Procedural and incidental terms ‘fleshed out’ the commitments made in the core undertakings, but did not add anything substantially new to the core undertakings.

The difference between core and non-core undertakings is best illustrated by example. A core undertaking present in many enforceable undertakings in the current study was the requirement of a legal compliance review. The terms of enforceable undertakings governing legal compliance reviews were usually lengthy and complex, involving a legal commitment to a review being undertaken, the description of the stages, steps and procedures to be followed in the undertaking and the appointment of independent expert(s) to oversee the review.185 For the purposes of analysis, the core undertaking was taken to be the actual commitment to legal compliance review. The remaining terms fleshed out the core commitment but were considered to be of an incidental or procedural nature. Terms of an incidental or procedural nature were not included in the empirical study and are not discussed in this paper.

184 See Part III.C. above.
3  *Relevant Data*

Table 19 summarises the core undertakings accepted by ASIC in the 414 enforceable undertakings.
<table>
<thead>
<tr>
<th>EUs given by</th>
<th>No of EUs</th>
<th>Cease &amp; Desist</th>
<th>Core undertakings</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>General</td>
<td>Training</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cancel regn</td>
<td>Vol A/M Ban</td>
</tr>
<tr>
<td>Companies</td>
<td>174</td>
<td>71</td>
<td>0</td>
</tr>
<tr>
<td>Individuals</td>
<td>176</td>
<td>19</td>
<td>15</td>
</tr>
<tr>
<td>Companies &amp; individuals</td>
<td>64</td>
<td>34</td>
<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>414</td>
<td>124</td>
<td>15</td>
</tr>
</tbody>
</table>
The core undertakings are divided into 7 broad categories: cease and desist undertakings (Cease and Desist); training undertakings (Training); supervision undertakings (Supervision); review undertakings (Review); rectification undertakings (Rectification); refund and/or compensation undertakings (Refund/Compensation); and other undertakings (Other). Cease and desist undertakings are divided into three sub-groups: general cease and desist undertakings (General); cancellation of registration undertakings (Cancel regn); and voluntary activity and management bans (Vol A/M Ban). The categories were determined after consulting ASIC’s regulatory guide on enforceable undertakings and following analysis of the undertakings found in enforceable undertakings in the current study. The analysis was also informed by Yeung’s analysis of enforceable undertakings accepted pursuant to Trade Practices Act s 87B. A description of each of the categories is provided below.

Table 19 presents data on the number of times that core undertakings belonging to one of the 6 enumerated categories were present in the enforceable undertakings in the study. The number of core undertakings in Table 19 (838) exceeds the total number of enforceable undertakings (414) in the study. This means that each enforceable undertaking had an average of two core undertakings.

4 Cease and Desist Undertakings

4.1 Overview

The category of ‘cease and desist’ undertakings encompassed all undertakings by which the parties committed to stop the misconduct and/or alleged breach of the law identified in their enforceable undertakings. The terminology of ‘cease and desist’ was not found in the enforceable undertakings themselves, nor in Regulatory Guide 100. However, it is the essential characteristic of this group of undertakings and the foundation of all undertakings accepted by the regulator. Three groups of cease and desist undertakings are found in enforceable undertakings accepted by ASIC. The first group is the general commitment to cease and desist. The second are undertakings to cancel registration, which then prevents the registrant from carrying on a particular activity. The third group is undertakings to cease being involved in management of a corporation and/or providing particular services. The three groups of undertakings require separate analysis.

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186 ASIC, Regulatory Guide 100, above n 9, Table 4.
187 Yeung, above n 21, 200-204.
188 ASIC, Regulatory Guide 100, above n 9, Table 4.
189 Yeung, above n 21, 201.
4.2 General Undertakings to Cease and Desist

The form and content of these undertakings loosely aligns with injunctions and related forms of relief available to ASIC if it had instead opted to pursue court based enforcement under Corporations Act ss 1323 and 1324, ASIC Act 12GD, 12GD and associated provisions, and NCCP Act s 177 and associated provisions. They typically involved two commitments: a commitment to stop or cease the contravening conduct; and a commitment to future compliance with the laws relevant to the activities in question. These undertakings were found in enforceable undertakings concerning advertising, promotional material, disclosure documents, member information statements, consumer credit contracts and debt collection practices.

4.3 Cancellation of Registration

Cancellation of registration undertakings, as the name suggests, were undertakings pursuant to which the parties committed to apply to ASIC to cancel their registration under the Corporations Act. These undertakings were found exclusively in enforceable undertakings given by auditors and liquidators. The undertakings loosely aligned with Corporations Act s 1290, which empowers ASIC to cancel the registration of an auditor or liquidator at her/his request.

4.4 Cessation of Specific Activity and Involvement in Management

This group encompassed specific undertakings given by parties pursuant to which they committed to stop providing particular services, stop being involved in the management of a corporation and/or a combination of both commitments. The commitment could be for either a specified period of time or permanent. They were typically expressed in negative terms, as an undertaking not to provide services or to

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be involved in management. Undertakings not to provide services were found in enforceable undertakings given by auditors,\(^{197}\) liquidators,\(^ {198}\) directors,\(^ {199}\) and finance industry personnel.\(^ {200}\) Undertakings not to be involved in the management of corporations were found in enforceable undertakings given by directors,\(^ {201}\) finance industry personnel,\(^ {202}\) and persons who held both positions.\(^ {203}\) Undertakings not to provide services appeared loosely to align with the cancellation and disqualification provisions applying to auditors and liquidators under \textit{Corporations Act} ss 1290A-1292 and those applying to persons providing finance services under ss 902B and 921A. Undertakings not to be involved in management of a corporation loosely aligned with the management disqualification provisions in ss 206D, 206E, 206EB and 206F of the \textit{Corporations Act}.

5 \textit{Training and Supervision Undertakings}

5.1 \textit{Training}

Training or supervision undertakings encompassed commitments given by parties to undertake further education or professional development courses in their specific field of business activity. Training commitments were mainly found in enforceable undertakings given by individuals. Details of training commitments varied between enforceable undertakings. Some specified courses run by professional membership organisations including the Securities Institute of Australia,\(^ {204}\) Chartered Accountants Australia,\(^ {205}\) the Australian Institute of Company Directors,\(^ {206}\) and the Australian

\(^{197}\) Ibid.
\(^{198}\) See, eg, ASIC, Enforceable Undertaking: Adam Edward Patrick Farnsworth, Document number 029305780 (17 December 2015).
\(^{199}\) For e.g. ASIC, Enforceable Undertaking: Dimitri Amargianitakas, Document number 028989760 (12 November 2014). See also ASIC, ASIC Media Release 14-318MR (28 November 2014).
\(^{200}\) See, eg, ASIC, Enforceable Undertaking: Seamus O'Brien, Document number 028989969 (8 December 2014).
\(^{201}\) ASIC, above n 200.
\(^{202}\) See, eg, ASIC, Enforceable Undertaking: Jimmy Truong, Document number 028183476 (8 January 2013).
\(^{203}\) See, eg, ASIC, Enforceable Undertaking: James Thomas Banfield, Document number 028179642 (20 September 2013).
\(^{204}\) See, eg, ASIC, Enforceable Undertaking: Daniel Mulcahy, Document number 008547456 (27 July 2000).
\(^{205}\) See, eg, ASIC, Enforceable Undertaking: Stephen John Cougle, Document number 027958170 (19 November 2012).
\(^{206}\) See for e.g ASIC, Enforceable Undertaking: Deszo Sipos, Document number 008547396 (9 November 1999).
Restructuring Insolvency and Turnaround Association. Others simply specified a number of hours of training at an educational institution approved by ASIC. Training undertakings were usually coupled with undertakings not to provide services or be involved in company management. The most comprehensive use of training undertakings in the study was found in enforceable undertakings given by accountants and liquidators.

5.2 Supervision Undertakings

Supervision undertakings comprised two sorts of supervision arrangements. First, arrangements pursuant to which the parties to one enforceable undertaking agreed to supervise the performance of another enforceable undertaking. Secondly, arrangements under which the parties to an enforceable undertaking were required to regularly notify ASIC of their work arrangements and any changes of appointment or employment. An example of the first arrangement was a commitment given by the partners of an auditing firm pursuant to one enforceable undertaking to supervise the performance of a separate enforceable undertaking by one of their partners. Examples of the second arrangement were found in undertakings given by auditors and by finance industry personnel. The supervision requirement in both examples was coupled with undertakings not to provide services for a specified period. However, as will be seen, supervision undertakings, as defined in this working paper, were not a common feature of enforceable undertakings in the study.

6 Review Undertakings

Review undertakings were commitments by parties to review their compliance programs or, in other words, the mechanisms by which they took steps to ensure their activities met their legal obligations and thereby reduced the risk of breaking the law. A range of review undertakings, varying in nature and scope, were the subject of enforceable undertakings. They included commitments to review the parties’ compliance with: the terms of its enforceable undertaking; particular laws.

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207 Ibid.
208 ASIC, above n 204.
209 ASIC, Enforceable Undertaking: All the partners of PKF Victoria: Michael John Phillips; Noel Francis May; Simon John Marsh; Dennis Anthony Turner; Richard Albert Dean; John Pasias; Scott Michael McKay and John Paolacci, Document number 017029169 (16 September 2005).
211 See, eg, ASIC, Enforceable Undertaking: Joe Chan, Document number 027954608 (1 June 2012) and ASIC, Enforceable Undertaking: Christopher Baker, Document number 027954053 (3 April 2012).
212 See Part III.C. above.
213 See, eg, ASIC, Enforceable Undertaking: NuSep Holdings Ltd, Document number 029169362 (18 December 2014).
administered by ASIC; legal compliance systems central to the parties’ business activities; compliance with accounting standards; compliance with procedures for determining unit prices and monetary values of financial products; compliance with complaints, claims and compensation procedures; and combinations of compliance issues.

Review undertakings typically provided for an assessment of existing compliance arrangements, identification of deficiencies in those arrangements, a commitment to improved compliance through new or revised compliance arrangements and a remediation plan. Performance of the review was usually monitored by independent experts, reporting to ASIC. As Part III noted, review undertakings are regarded highly by ASIC because they are seen as representing the type of regulatory outcome that justifies ASIC’s use of enforceable undertakings in preference to adversarial enforcement measures. They evidence a commitment by the parties to ensure that the misconduct underpinning the enforceable undertaking is not only addressed but does not occur again. ASIC believes that an ongoing commitment to improved compliance by these parties has both specific firm and industry as a whole deterrence benefits.

7 Rectification, Refund and Compensation Undertakings

Rectification undertakings encompassed a wide range of commitments by parties to repair and redress the harms caused by their misconduct. Their common

________________________________________________________________________


218 See, eg, ASIC, Enforceable Undertaking: Wealthsure Pty Ltd, Document number 029142378, 30 April 2015.


220 ASIC, Regulatory Policy 100, above n 9, RG 100.19.

221 Ibid.

222 Ibid Table 4.

223 Ibid RG 100.25.
characteristic was that they involved action to put or set things right, after acknowledging ASIC’s concern that a contravention of the law had taken place. Rectification here meant rectification according to its commonly understood meaning, not as a form of equitable remedy.\textsuperscript{224} Examples of rectification undertakings in the current study included: a requirement that the parties to enforceable undertakings publish corrective notices to misleading impressions for which they are responsible;\textsuperscript{225} notify parties of the terms of their enforceable undertakings and rights to seek legal redress;\textsuperscript{226} file outstanding reports and pay outstanding fees to ASIC;\textsuperscript{227} perform community service obligations;\textsuperscript{228} and pay money to a charity or community organisation.\textsuperscript{229} A subset of rectification, treated separately for the purposes of the analysis in Table 17, were commitments to give refunds, compensate and/or reimburse parties adversely affected by the misconduct that was the subject of enforceable undertakings.

8 Data Observations

8.1 Profile of Core Undertakings

Table 19 provides a breakdown of the core undertakings, as now described, given to ASIC by companies, individuals and by companies in conjunction with individuals. Table 19 reveals that review undertakings were the most common core undertaking, found in 175 enforceable undertakings (42.3\% of all enforceable undertakings and representing 20.9\% of the core undertakings in the study). This was closely followed by rectification undertakings (found in 168 or 40.9\% of all enforceable undertakings and representing 20\% of the core undertakings in the study), voluntary activity and management ban undertakings (found in 151 or 36.5\% of all enforceable undertakings and representing 18.1\% of the core undertakings in the study) and general cease and desist undertakings (found in 124 or 30\% of all enforceable undertakings and representing 8.5\% of the core undertakings in the study). The other categories of

\begin{itemize}
\item \textsuperscript{224} Ian Spry, Equitable Remedies, (Lawbook Library, Australia, 9\textsuperscript{th} ed, 2013) 630-1.
\item \textsuperscript{225} See, eg, ASIC, Enforceable Undertaking: Host-Plus Pty Ltd, Document number 017029164 (1 September 2015).
\item \textsuperscript{226} See, eg, ASIC, Enforceable Undertaking: Amazing Rentals Pty Ltd, Document number 029269078 (25 May 2015).
\item \textsuperscript{227} See, eg, ASIC, Enforceable Undertaking: Colin Roland Tuckwell, Document number 029142060 (18 February 2015).
\item \textsuperscript{228} See, eg, ASIC, Enforceable Undertaking: Avco Access Pty Ltd, GE Automotive Financial Services, GE Capital Finance Australia, GE Personal Finance Pty Ltd and GE Finance Australasia Pty Ltd, Document number 017029220 (22 May 2008).
\item \textsuperscript{229} See, eg, ASIC, Enforceable Undertaking: Royal Bank of Scotland plc and Royal Bank of Scotland N.V., Document number 02892040 (21 July 2014).
\end{itemize}
cancelled registration, training, supervision and refunds/compensation were present in much smaller numbers in the study.

It is interesting to compare the profile of core undertakings between the three groups of parties providing enforceable undertakings in Table 19. A pattern emerges whereby the majority of general cease and desist, review and rectification undertakings in the current study were found in enforceable undertakings given by companies. By contrast, the majority of voluntary activity and management bans, supervision and training undertakings were found in enforceable undertakings given by individuals. The most common core undertaking in enforceable undertakings given by a company was evenly divided between compliance review (n = 110) and rectification undertakings (n = 110). The most common core undertaking in enforceable undertakings given by individuals was a voluntary activity and/or management ban (n = 132). The most common core undertaking in enforceable undertakings given by a company in conjunction with individuals was a rectification undertaking (n = 34).

8.2 Profile of Review Undertakings

Tables 20, 21 and 22 present the results of a more detailed empirical inquiry into compliance review undertakings given by companies. Table 20 profiles the types of compliance reviews found in enforceable undertakings. Table 21 examines the role of independent experts in the review process and Table 22 considers the time commitment involved in compliance reviews under enforceable undertakings.
Table 20 - Types of review undertakings given to ASIC by companies from 1 July 1998 to 31 December 2015

<table>
<thead>
<tr>
<th>Year</th>
<th>No of Co EUs</th>
<th>No of Co EUs with review undertaking</th>
<th>Types of Review Undertakings</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Compliance with EU</td>
</tr>
<tr>
<td>2015</td>
<td>6</td>
<td>5</td>
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</tr>
<tr>
<td>2014</td>
<td>13</td>
<td>10</td>
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<td>1</td>
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</tr>
<tr>
<td>2008</td>
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<tr>
<td>2007</td>
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<td>2</td>
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</tr>
<tr>
<td>2006</td>
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<td>9</td>
<td>2</td>
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<tr>
<td>2002</td>
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<td>14</td>
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<td>1998</td>
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</tr>
<tr>
<td>Totals</td>
<td>174</td>
<td>110</td>
<td>10</td>
</tr>
</tbody>
</table>
8.21 Types of Compliance Review

Table 20 classifies the compliance review undertakings into seven different groups based on an analysis of the compliance reviews in the dataset. The groups comprised: reviews of parties’ compliance with the terms of their undertaking; review of parties’ compliance with specific legal obligation arising under ASIC administered laws; reviews of legal compliance systems; reviews of parties’ compliance with accounting standards for the preparation of financial reports; reviews of unit pricing and monetary values attaching to financial products; reviews of compliance with complaints, claims and compensation procedures; and reviews involving a combination of the various compliance reviews now described. These were also the examples of review undertakings discussed earlier in this section.

Table 20 presents data on the frequency of use of particular types of compliance review undertakings. It reveals that legal compliance systems reviews and reviews of compliance with specific legal obligations were the dominant types of review in enforceable undertakings given by companies, with the latter slightly out numbering the former type of review. Legal compliance systems reviews were the more comprehensive and far-reaching of these two reviews. Two well-known examples of legal system compliance reviews in the current study are the enforceable undertaking given by Commonwealth Financial Planning Ltd (‘CFPL’) in 2011 and the enforceable undertaking given by Macquarie Equities in 2013 (‘Macquarie’). Both CFPL and Macquarie gave enforceable undertakings in response to ASIC’s concern that there were recurring compliance deficiencies in the respective operations of their financial planning and wealth management businesses respectively. Both entities committed to a compliance review of their entire risk management framework including their legal compliance systems, operating models and training, monitoring and supervision procedures for authorised representatives, with a specific emphasis on the provision of financial services.

An example of the narrower form of review, concerned with specific legal compliance, is the enforceable undertaking given by Commonwealth Securities Ltd and Australian Investment Exchange Ltd in 2013. This undertaking was given in response to ASIC’s

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230 See V.E.6. above.
concern that the parties had breached the client money handling requirements in \textit{Corporations Act} s s 981B and 981C in the course of providing financial services. Breach of these provisions simultaneously resulted in a breach of their general obligations as AFSL holders under s 912A(1) and the conditions of their AFSL licences. Pursuant to their enforceable undertaking, the parties committed to carry out an independent expert review of their internal controls, systems and processes for client money handling arrangements. The stated object of the review was to address the causes of money handling breaches and to ensure their future compliance with those laws.\footnote{Ibid 5.10.}

8.22 \textit{Experts Involved in Review Undertakings}
Table 21 - Independent experts for compliance reviews pursuant to EUs accepted by ASIC from 1 July 1998 to 31 December 2015

<table>
<thead>
<tr>
<th>Year</th>
<th>No of Co EUs</th>
<th>No of Co EUs with review undertaking</th>
<th>Independent expert required</th>
<th>ICE</th>
<th>Acct/Auditor</th>
<th>Reg Liquidator</th>
<th>Other</th>
<th>Totals</th>
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<tr>
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<tr>
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</tr>
<tr>
<td>Totals</td>
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<td>110</td>
<td>93</td>
<td>74</td>
<td>11</td>
<td>1</td>
<td>15</td>
<td>100</td>
</tr>
</tbody>
</table>
Table 21 presents data on the appointment of experts to oversee whole or parts of compliance reviews in enforceable undertakings given by companies. Table 21 reveals that experts were appointed to 85% of the review undertakings given by companies in the current study. Table 21 also provides a breakdown of the types of experts that were appointed. The categories were: independent compliance expert (ICE); accountants and auditors (ACC/Aud); registered liquidators (Reg Li’or); and other experts. The other experts category included independent investment advisers, unit pricing experts, compensation experts and governance experts, independent claims reviewers, legal and cultural experts and ‘suitably qualified’ experts. ASIC’s regulatory guide on enforceable undertakings indicates that the nomination of appropriate experts for the purposes of enforceable undertakings was a task sometimes done by ASIC and sometimes by the parties themselves, subject to ASIC’s consent.

Two observations arise from this data. First, 74 of the 100 experts in the study (74%) were described as independent compliance experts, also variously referred to as external compliance experts or independent compliance consultants. ASIC’s regulatory guide offers guidance on the appointment of independent experts, which presumably applies to independent compliance experts. ASIC generally appoints independent experts when the compliance review is large and complex in scale, involves a significant remediation or compensation scheme and/or there has been a history of shortcomings in compliance work undertaken by the parties and a repeated failure to adequately address compliance issues in the past. Data on the reasons for the appointment of independent experts for specific enforceable undertakings is not publicly available.

235 See, eg, ASIC, Enforceable Undertaking: Resolute Limited, Killyhelvin Pty Ltd, Paulsens Gold Pty Ltd and Kemia Pty Ltd, Document number 008547316 (7 April 1999)


238 See, eg, ASIC, Enforceable Undertaking: Express Loan and Finance Pty Ltd, Document number, 017029114 (29 October 2003).


241 ASIC, Regulatory Guide 100, above n 9, RG 100.62.

242 Ibid.
The second observation from Table 21 is that the total number of experts appointed (n = 100) exceeded the total number of compliance review undertakings that required an expert to be appointed (n = 93). This discrepancy was due to the fact that several enforceable undertakings required the appointment of more than one expert to oversee different aspects of the same compliance review.

8.23  Time Involved in Review Undertakings

<table>
<thead>
<tr>
<th>Year</th>
<th>No of Reviews</th>
<th>Periods of time</th>
</tr>
</thead>
<tbody>
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<td></td>
<td>0-3mths</td>
<td>3-12mths</td>
</tr>
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<tr>
<td>2001</td>
<td>10</td>
<td>4</td>
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</tbody>
</table>
Table 22 profiles the estimated time periods involved in the performance of compliance review undertakings by companies. The time period for each compliance review was determined by calculating the period of time between the date of acceptance of an enforceable undertaking and the completion date for the final obligation forming part of the compliance review. The accuracy of these calculations depends on the assumption that the involved parties commenced to undertake their compliance review on the date of acceptance of their enforceable undertaking. Secondly, that the compliance review went strictly according to plan such that there were no unexpected delays and variations to the timetable. Even allowing for those assumptions, the calculations should be viewed as best estimates of the timetables agreed between ASIC and the parties.

Table 22 reveals that the estimated time periods involved in compliance review undertakings by companies can essentially be divided into two groups: those review undertakings where the review would take up to 12 months to complete; and those for which a period in excess of 12 months was required. Estimated review periods of 12 months or less represented almost half or 47.3% (52 of 110 reviews) of the dataset. Reviews between 12 and 18 months represented 26.4% (19 out of 110 reviews), 18 months to 24 months represented 10.9% (12 of 110 reviews) and 2-3 years represented 14.5% (16 out of 110). The longest review period was 5yrs. However, these cases were not common.

### 8.3 Profile of Voluntary Activity and Management Bans

Tables 23 and 24 present further data on voluntary activity and management bans in enforceable undertakings. The tables supplement the data in Table 19, which revealed the high incidence of activity and management ban styled undertakings in enforceable undertakings given by individuals in the current study. Table 23 presents data on the length of time applying to voluntary ban undertakings given by individuals in the study, including auditors, liquidators, directors, finance industry personnel and other persons. Table 24 focuses specifically on the bans given by directors and finance industry personnel.

---

<table>
<thead>
<tr>
<th>Year</th>
<th>No of EUs</th>
<th>Vol Ban</th>
<th>0-12 mths</th>
<th>1-2 years</th>
<th>2-5 years</th>
<th>5-10 years</th>
<th>10-15 years</th>
<th>Permanent</th>
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Table 23 reveals that the most common time period for a voluntary ban undertaking given by an individual was between 2 and 5 years, representing 31.8% of that sample. This was followed by voluntary banning periods of less than 12 months and 12 months to 2 years, both of which respectively represented 17.4% of the sample. Table 23 also highlights the incidence of permanent voluntary ban undertakings, pursuant to which the parties commit to never again be involved in or participate in a specified activity. Twenty percent of the voluntary bans (22 of 132 bans) in the sample were permanent in effect, with a further 6.4% (7 of 132 bans) between 10 and 15 years in length.
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Table 24 provides a breakdown of the data on voluntary bans given by directors and finance industry personnel, the two largest groups of individuals who gave enforceable undertakings in the data study. Table 24 includes data on the number of voluntary bans given by each group and the type of bans they gave. For directors, the bans were of three kinds: bans from being involved in the management of a corporation; bans from providing or working in financial services; and/or a combination of both bans. For finance industry personnel, the bans were of two kinds only: bans from providing or working in financial services; and a combined ban from providing financial services and being involved in the management of a corporation that provides financial services.

Table 24 offers a number of interesting insights. First, 97.4% of enforceable undertakings given by directors contained voluntary bans. In the case of finance industry personnel, it was 74.3%. Secondly, in relation to the types of voluntary bans given by directors, only half of the bans were concerned with being involved in the management of a corporation. The other half concerned providing financial services or a combination of being involved in management and providing financial services. Thirdly, in contrast with directors, the majority (92.7% or 51 out of 55) of voluntary bans given by finance industry personnel concerned providing financial services. The remaining 7.3% were combinations of bans from management and providing financial services. This data relates to a larger issue that affects ASIC’s banning powers in relation to financial services and credit industry personnel. Under current laws, ASIC has power to cancel an AFS or credit license and to ban a person from providing financial advice or credit services but it has no means of preventing a person from having an ongoing role in managing a financial services or credit business. Legislative amendments were recently recommended and agreed to by the Australian government to remove this impediment, but the data in Table 24 suggests that enforceable undertakings are one practical method by which ASIC is able to circumnavigate these restrictions and effectively remove financial or credit industry personnel from being involved in management.

8.4 Evidence of A Strategic Approach to Undertakings

At the time of the June 2015 publication of the ANAO report on the administration of enforceable undertakings, ASIC acknowledged that it did not systematically assess the effectiveness of enforceable undertakings in achieving desired regulatory outcomes. Yet, it is clear from the findings of the empirical study now presented
that ASIC values highly the use of legal compliance reviews as a technique for making business firms prioritise compliance from the ‘top down’. The broadest compliance review undertaking requires management to commit to compliance, induces the firm to learn how to comply and institutionalises compliance at the lower levels of the organisation.

When the data on compliance review undertakings is correlated with the activity data (Table 8) and misconduct data (Table 14), ASIC’s intentions becomes clearer. The bulk of legal compliance review undertakings have been given by financial planning or wealth management firms as a consequence of ASIC’s concerns that they failed to comply with the general obligations of Australian Financial Service Licensees under Corporations Act 912A. These obligations require licensees to establish systems for managing risks, supervising, monitoring and training representatives and ensuring compliance with financial service laws and licence conditions. Compliance review undertakings in this context allow ASIC to influence systemic and cultural change within financial planning firms and aspirationally, within the financial planning sector as a whole. ASIC has long been alert to the potential problems with the quality of advice being provided by the financial planning industry in Australia and has acknowledged the role that enforceable undertakings have played in addressing those concerns.

This strategy would appear to be part of a bifurcated approach, whereby enforceable undertakings are also accepted from individuals who are or were representatives of the financial planning firms giving legal compliance review undertakings. For authorised representatives found to be engaging in misconduct, undertakings typically involve a period of suspension from providing financial services, ranging from at least two years upwards towards permanent activity bans. What is surprising is that there are very few supervision undertakings that accompany these suspensions, either during the period of suspension, or immediately following on from it, when the representative recommences in the industry. Secondly, undertakings as to training or continuing professional development were not a consistent feature of these activity bans. Such an approach contrasts with the more consistent approach on this issue in enforceable undertakings given by auditors and liquidators.

9 Summary

The empirical study revealed that legal compliance review undertakings were the most common core undertaking found in 42.3% of all enforceable undertakings, the


248 Johnstone and Parker, above n 12, 2.

249 Corporations Act s 912A(1).

250 Performance of ASIC Report, above n 19, 9.4-9.7, 10.22-10.25.
majority of which were given by companies. Compliance systems reviews and reviews of compliance with specific legal obligations were the dominant types of legal review. The appointment of an independent expert was a requirement of 85% of all compliance reviews, typically for a review that took up to 12 months to complete.

Voluntary management and other activity bans, a form of cease and desist undertaking, were a feature of 36.5% of all undertakings, the majority of which were given by individuals. In 36% of cases, the bans were for a period of between 2 and 5 years. A further 20% of the undertaking bans were permanent. An examination of voluntary ban undertakings given by directors and finance industry personnel revealed that directors’ voluntary management bans are typically accompanied by a second ban from providing financial services in almost one quarter of enforceable undertakings. This is not the case for finance industry personnel. These findings suggest another strategic use of enforceable undertakings where the party giving the enforceable undertaking is both a director and a person working in the financial services industry.
VI. CONCLUSION

This working paper reported the results of an empirical study of ASIC’s use of formally negotiated settlements, in the form of enforceable undertakings, as a technique for responding to non-compliance of the laws it administers. ASIC’s enforceable undertakings regime has been in operation for 17.5 years and has produced the 414 enforceable undertakings examined in this study. The study analysed the purposes and context in which those enforceable undertakings have been deployed and the various types of obligations which they contain.

Findings on three issues were made: the characteristics of the regulated parties giving enforceable undertakings; the activities and misconduct that gave rise to the negotiation of enforceable undertakings; and the types of undertakings given.

**Characteristics of Regulated Individuals and Firms**

- ASIC accepted almost identical numbers of enforceable undertakings from companies (n=174) and individuals (n = 176). Enforceable undertakings by companies in combination with individuals were less common (n = 64) and the rate of their acceptance declined over the study period.
- The most common regulated entities from whom ASIC accepted enforceable undertakings were private companies (n = 156 or 50.2% of all companies giving EUs) and individuals in their position as directors (n =137 or 57.8% of all individuals giving EUs).
- Publicly listed companies were a small subset of parties giving enforceable undertakings (n = 30 or 9.6% of all companies giving EUs).

**Activities and Misconduct Regulated by Enforceable Undertakings**

- The most common activity that was the subject of enforceable undertakings was financial services (n = 190), representing 45.9% of the data set. The largest single activity involved in financial services was giving of financial or investment advice, comprising 40% of all financial services activity.
- The predominance of financial services activity supports ASIC’s own findings that financial services has become the dominant part of its regulatory remit, costing $108 million per year to regulate.
- Enforceable undertakings concerning financial services involved three common types of activity: the promotion, marketing, advertising and sale of financial services; the provision of specific financial advice or product recommendations; and the governance of financial services firms.
- There was an observable degree of overlap between enforceable undertakings dealing with giving financial advice and dealing in securities. Merging the two activities into one group only served to reinforce the dominance of giving financial advice as the critical financial service giving rise to compliance concerns and pre-empting the negotiation of enforceable undertakings.
ASIC has accepted 18 enforceable undertakings in relation to credit services since 1 July 2010, when it took over regulation of credit services and consumer contracts pursuant to the National Credit Act s 322.

The most common area of legal misconduct in enforceable undertakings accepted by ASIC was non-compliance with financial services laws. However, almost one third of enforceable undertakings in the study involved issues of non-compliance over a range of different areas of regulation. In particular, the study of enforceable undertakings with combined legal issues revealed the significant role that misleading and deceptive conduct plays in the negotiation of enforceable undertakings (n = 76 or 60.3% of enforceable undertakings with combinations of legal issues).

Financial services laws was a misconduct issue in 50% of all enforceable undertakings and misleading and deceptive conduct was a misconduct issue in 30.4% of all enforceable undertakings.

As noted in the following two points, a ‘maturation’ in the misconduct issues raised in relation to both managed investments and financial service laws was observable in the enforceable undertakings over the study period.

The managed investments laws in Chapter 5C commenced operation in 1998. The enforceable undertakings accepted in relation to those laws for the first six years of operation concerned the promotion of schemes that were not registered by responsible entities that did not have appropriate licenses. That changed from approximately 2004 onwards with the enforceable undertakings tending to focus on the management of the schemes.

The same trend was observable in relation to enforceable undertakings concerning financial services. The Chapter 7 reforms commenced in 2003 and for the first five years period, the enforceable undertakings predominantly concerned the provision of financial services without an appropriate licence or authority.

Types of Undertakings Given in Enforceable Undertakings

- The most common types of undertaking proffered by regulated parties were compliance review undertakings. They were present in 42.3% of enforceable undertakings.

- Compliance systems reviews and reviews of compliance with specific legal obligations were the dominant types of legal review. The appointment of an independent expert was a requirement of 85% of all compliance reviews, typically for a review that took up to 12 months to complete.

- Voluntary management and other activity bans, a form of cease and desist undertaking, were a feature of 36.5% of all undertakings, the majority of which were given by individuals. In 36% of cases, the bans were for a period of between 2 and 5 years. In 20% of the undertakings, the bans were permanent in effect.

- Directors’ voluntary management bans were typically accompanied by a second ban from providing financial services in one quarter of enforceable undertakings.
• Training or continuing professional education was a key feature of enforceable undertakings by auditors and liquidators, where they are subjected to a voluntary ban for a specific term or practice supervision by their peers. The professional education requirement was not as common in relation to other enforceable undertaking groups. Even where an education or training requirement was imposed, the undertaking was vague as to how that undertaking was to be carried out and certified when complete. This approach contrasts with approaches to the continuing education of auditors and liquidators who intend to keep practising after entering into an enforceable undertaking.

• A strategically directed, industry-wide approach to enforceable undertakings was evident in ASIC’s acceptance of enforceable undertakings relating to financial services, specifically financial planning or wealth management activities. Regulated firms typically committed to legal compliance systems review and individual representatives committed routinely to cease working in the sector.
Author/s: BIRD, H; Gilligan, G; Godwin, A; Hedges, J; Ramsay, I

Title: An Empirical Analysis of Enforceable Undertakings by the Australian Securities and Investments Commission between 1 July 1988 and 31 December 2015

Date: 2016

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