

# ENFORCEABLE UNDERTAKING: A RESTORATIVE SANCTION?

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*An enforceable undertaking is a promise enforceable in court. The alleged offender, known as the promisor, promises the regulator (for the purpose of this article, the Australian Securities and Investments Commission) to do or not to do certain actions. As an administrative sanction, an enforceable undertaking aims to protect the public, prevent similar breaches from occurring in the future and implement corrective action in the case where the alleged breach affected outsiders. Such aims are desirable, because an undertaking may not only impact the alleged offender but it also has a positive effect on the victim of the alleged breach and the community they live in. Accordingly, this article looks at the notion of restorative justice to assess whether an enforceable undertaking can be restorative in nature.*

## I INTRODUCTION

A court-enforceable undertaking is a sanction available to an increasing number of Australian regulators.<sup>1</sup> In 1993, following the introduction of s 87B into the *Trade Practices Act 1974* (Cth), the Australian Competition and Consumer Commission ('ACCC') became the first regulator to have and use such a sanction. Before that date, it was quite common for the ACCC to decide not to take tough enforcement action against possible regulatory breaches on the basis that it could achieve acceptable compliance from potential offenders through negotiation and settlement.<sup>2</sup> It was, however, doubtful whether such arrangements were legally enforceable. As a result, the Griffith and Cooney Committees recommended that the ACCC should be given statutory powers to accept undertakings which are legally enforceable.<sup>3</sup> Accordingly, the enforceable undertaking provisions were introduced into the system to legitimate and formalise the negotiated agreements entered into between the ACCC and an alleged offender.<sup>4</sup>

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

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

3 Commonwealth, *Mergers, Monopolies and Acquisitions — Adequacy of Existing Legislative Controls*, Parl Paper No 389 (1991) recommendation 19; Commonwealth, *Mergers, Takeovers and Monopolies: Profiting from Competition*, Parl Paper No 141 (1989) recommendation 9.

4 *Ibid.*

Due to the apparent success of the use of enforceable undertakings by the ACCC,<sup>5</sup> other regulators at both federal and state levels have lobbied successfully for the introduction of the sanction into their own regulatory systems.<sup>6</sup> For instance, similar provisions to s 87B of the *Trade Practices Act 1974* (Cth) were introduced into the *Australian Securities and Investments Commission Act 2001* (Cth) (the '*ASIC Act*'). Sections 93AA and 93A of the *ASIC Act* give the Australian Securities and Investments Commission ('ASIC') the power to accept enforceable undertakings. The provisions of s 87B of the *Trade Practices Act 1974* (Cth) and of ss 93AA and 93A of the *ASIC Act* are drafted in very similar terms. Accordingly, there are a number of similarities in the ACCC's and ASIC's principles, and policies, in relation to enforceable undertakings.<sup>7</sup>

An enforceable undertaking can be described as a promise enforceable in court.<sup>8</sup> It takes the form of a settlement in which the alleged offender (who may be called 'the promisor') and the regulator (for the purposes of this paper, ASIC) start their negotiation in relation to the alleged breach. Accordingly, an enforceable undertaking may be seen as a form of alternative dispute resolution.<sup>9</sup>

However, even though an enforceable undertaking only involves ASIC and the alleged offender, the conduct that leads to an enforceable undertaking may affect a number of parties. For example, conduct resulting in alleged breaches of the fundraising provisions may cause financial loss to investors. As a result, since the alleged contravention may impact people other than the promisor and the regulator, it is important to consider any negative or positive impact that a subsequent enforceable undertaking may have on the victims of the alleged breach and the community. This is especially important because ss 93AA and 93A of the *ASIC Act* do not impose a requirement for the regulator to take into consideration other people that may have been affected by the alleged breach.

Accordingly, Part II of this paper briefly looks at the aims and the most common promises that could be included in an enforceable undertaking. Part III discusses the concept of restorative justice and determines the elements that need to be there to determine whether a sanction is restorative in nature. Part IV of this article analyses whether an enforceable undertaking is restorative in nature.

5 The Australian and Consumer Commission ('ACCC') accepted over 900 enforceable undertakings from 1993 to 2008: ACCC, *Undertaking (Trade Practices Act s 87B)* (5 October 2010) <<http://www.accc.gov.au/content/index.phtml/itemId/6029>>.

6 Parker, above n 2; Nehme, above n 1, 68–87. Most of the occupational health and safety regulators today have the sanction of enforceable undertakings at their disposal.

7 These similarities have been recognised by the courts when dealing with enforceable undertakings accepted by the ACCC and Australian Securities and Investments Commission ('ASIC'). Accordingly, judgments in relation to ss 93AA and 93A of the *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*') and s 87B of the *Trade Practices Act 1974* (Cth) are regularly cross-referenced: Marina Nehme, 'Enforceable Undertakings and the Court System' (2008) 26 *Company and Securities Law Journal* 147, 147; *Australian Securities and Investments Commission v Edwards* (2004) 51 ACSR 320, 324 [16]; ACCC, 'Section 87B of the Trade Practices Act: Guidelines on the Use of Enforceable Undertakings' (Guidelines, 18 September 2009); ACCC, 'Corporate Trade Practices Compliance Programs' (Guidelines, 9 December 2005); ACCC, 'Merger Guidelines' (Guidelines, 30 June 1999); ASIC, 'Enforceable Undertakings' (Regulatory Guide No 100, March 2007).

8 *ASIC Act* ss 93AA, 93A.

9 Parker, above n 2, 213.

## II AIMS OF AND PROMISES GIVEN IN AN ENFORCEABLE UNDERTAKING

The process of entering into an enforceable undertaking may be initiated by a company, an individual or a responsible entity, or as a result of a discussion with ASIC. However, ASIC cannot compel a person to enter into an enforceable undertaking. Similarly, a person cannot oblige ASIC to accept an enforceable undertaking.<sup>10</sup>

Currently, ASIC accepts an enforceable undertaking if it believes that the undertaking would provide a better outcome than other sanctions.<sup>11</sup> For this reason, when entering into an enforceable undertaking, ASIC usually hopes to achieve the following aims:

- protection of the public;
- prevention of future breaches of the law; and
- corrective measures such as compensation or corrective advertisement.<sup>12</sup>

To achieve such goals, ASIC can include in an undertaking a variety of promises to deal with the alleged contravention of the law. Usually, the alleged offender promises to do or not to do certain actions. The most common undertakings are to:

- stop committing the alleged offence;
- put a compliance program in place;
- agree to a voluntary self-ban;
- fulfil certain educational requirements;
- compensate affected parties;
- be involved in community service; and
- disclose the undertaking to a certain category of people.<sup>13</sup>

Since the content of the undertaking depends on the gravity of the alleged offence, each undertaking differs from another. However, it is common for the abovementioned promises to interact when dealing with certain alleged offences. This ensures that the goals of the undertakings (protection of the public, prevention and corrective action) are achieved. For instance, a promise of a voluntary ban

10 ASIC, 'Enforceable Undertakings', above n 7, [1.5].

11 Ibid [1.4].

12 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 38. It is important to remember that an enforceable undertaking is an administrative sanction and its goals and aims are not to punish the promisors: Karen Yeung, *The Public Enforcement of Australian Competition Law* (ACCC, 2001) 120–1.

13 Marina Nehme, 'Enforceable Undertakings: A New Form of Settlement to Resolve Alleged Breaches of the Law' (2007) 11 *University of Western Sydney Law Review* 104, 117; ASIC, 'Enforceable Undertakings', above n 7, [2.3]. ASIC, *Enforceable Undertakings Register* (15 September 2010) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable+undertaking+register:+list?openDocument>>.

may be accompanied by education to prevent similar breaches from occurring in the future. For example, in 2003, ASIC was concerned that Mr Robert Marusco was breaching his directors' duties. Accordingly, the regulator entered into an undertaking with Mr Marusco who promised not to act as a director of a company or as key person of a responsible entity for a managed investment scheme. The duration of the voluntary ban was 12 months provided he fulfilled the education requirement. If he did not complete the Securities Institute of Australia Diploma of Financial Markets, Managed Investments stream or an equivalent of the course, his ban would be indefinite.<sup>14</sup>

Further, if certain parties have suffered a financial loss, an enforceable undertaking may contain a clause dealing with compensation of the victim of the alleged breach. One prominent example that illustrates the aims of an enforceable undertaking is the case of Multiplex Ltd. ASIC was concerned that Multiplex had breached the continuous disclosure rules. As a consequence of ASIC's inquiry into the matter, Multiplex entered into an enforceable undertaking with ASIC, in which it promised to compensate the investors for their loss and to engage an external consultant to reduce the possibility of a similar breach from occurring again.<sup>15</sup> In this example, the enforceable undertaking protected the public through a quick resolution of the problem. It also had a preventive effect by ensuring that Multiplex's compliance program improved, thus guarding against future breaches. Additionally, the enforceable undertaking dealt with the results of the alleged breach by forcing Multiplex to pay \$32 million to those people affected by the alleged breach.

Accordingly, victims of the suspected breach will benefit from the sanction imposed on the alleged offender and they will not be required to initiate any legal proceedings to be compensated for their losses.<sup>16</sup> This is a definite advantage of an enforceable undertaking over other sanctions since continuous disclosure actions are usually complex, lengthy and expensive. For instance, in January 2006, shareholders filed a class action against Telstra.<sup>17</sup> They alleged that Telstra did not comply with its continuous disclosure obligations. On 13 December 2007, the plaintiffs accepted a \$5 million settlement, of which \$1.25 million was paid to the plaintiffs' lawyers.<sup>18</sup> When comparing this scenario with the Multiplex case, the latter provides more benefits to misled investors.

In another example, ASIC was concerned that Mr Robert Hugh Iddon was promoting investment schemes that were not registered under the *Corporations Act 2001* (Cth) and that he did not hold a licence to deal in securities or to provide

14 ASIC, *Enforceable Undertaking: Robert Marusco*, Document No 008457094, 10 January 2003.

15 ASIC, *Enforceable Undertaking: Multiplex Limited*, Document No 017029205, 20 December 2006.

16 An enforceable undertaking does not affect the right of outsiders to sue the alleged offender. For instance, in the case of Multiplex, even though ASIC had entered into an enforceable undertaking with Multiplex that provided for a refund, a number of investors decided to initiate an action against Multiplex for its alleged failure to comply with the disclosure requirements and misleading conduct: *P Dawson Nominees Pty Ltd v Multiplex Ltd* (2007) 242 ALR 111.

17 *Taylor v Telstra Corporation Ltd* [2007] FCA 2008 (13 December 2007).

18 Angie Zandstra, Jason Harris and Anil Hargovan, 'Widening the Net: Accessorial Liability for Continuous Disclosure Contraventions' (2008) 22 *Australian Journal of Corporate Law* 51, 64.

investment advice. As a result of such alleged action, ASIC entered into an enforceable undertaking with Mr Iddon in which he undertook to stop his conduct, inform his clients about the content of the enforceable undertaking, and advise those clients of their rights to receive a refund. Additionally, Mr Iddon promised not to deal with investment advice until he had been issued a licence.<sup>19</sup> Thus, the enforceable undertaking protected the public by stopping the alleged breach from occurring. The undertaking also led to the rectification of the consequences of the alleged breaches through the disclosure of the undertaking to the affected clients and through the offering of a refund to those people. Such an undertaking may have resulted in the return of more than \$90 000 to investors.<sup>20</sup>

As it has been illustrated above, when the alleged breach has affected a number of people, ASIC has taken steps to correct the action of the alleged offender. As a consequence, an enforceable undertaking may be restorative in nature because it permits victims to be compensated for their losses without them needing to initiate private proceedings.<sup>21</sup>

### III RESTORATIVE JUSTICE AND ITS ELEMENTS

Until the beginning of the 1990s, the concept of restorative justice in criminal law was acknowledged by only a small group of academics.<sup>22</sup> Almost two decades later, this notion is part of the national and international criminal justice reform dialogue.<sup>23</sup> However, the concept of restorative justice does not have one universal definition. One of the most commonly accepted definitions is provided by Marshall. He describes restorative justice as a ‘process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’.<sup>24</sup>

This definition identifies three central elements of restorative justice:<sup>25</sup>

- It is a process that centres on notions of empowerment, dialogue, negotiation and agreement.<sup>26</sup>
- It involves stakeholders. Marshall’s definition does not refer to the parties whose interests are being restored. Braithwaite broadened the definition,

19 ASIC, *Enforceable Undertaking: Robert Hugh Iddon*, Document No 008547513, 27 April 2001.

20 Ibid.

21 ASIC, ‘Enforceable Undertakings’, above n 7, [2.3].

22 Gordon Bazemore and Lode Walgrave, ‘Introduction: Restorative Justice and the International Juvenile Justice Crisis’ in Gordon Bazemore and Lode Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press, 1999) 1, 1.

23 Heather Strang, ‘Restorative Justice Programs in Australia: A Report to the Criminology Research Council’ (Report, Research School of Social Sciences, Australian National University, March 2001).

24 Tony F Marshall, ‘Restorative Justice: An Overview’ (Report, Home Office Research Development and Statistics Directorate, 1999) 5.

25 Andrew Ashworth, ‘Responsibilities, Rights and Restorative Justice’ (2002) 42 *British Journal of Criminology* 578, 578.

26 Ibid.

arguing that the purpose of restorative justice is ‘to restore victims, restore offenders and restore communities’.<sup>27</sup>

- The outcomes of restorative justice may be very broad and are primarily decided based on the satisfaction of stakeholder needs; are the needs of the community, victims and offenders met?<sup>28</sup> Thus, the specific goals of restorative justice vary from case to case. Braithwaite noted that restorative justice may revolve around ‘restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and restoring social support’.<sup>29</sup>

This article adopts such a definition of restorative justice. Since crime violates people, and their relationships with each other, restorative justice aims to right the harm caused by the offender.<sup>30</sup> It is about restoring equilibrium in a relationship where one party has not fulfilled its obligations.<sup>31</sup> It requires all parties to be ‘empowered together to make innovative, flexible and expansive undertakings that go beyond what a court would order with the purpose of identifying [and]

- 27 John Braithwaite, ‘A Future Where Punishment is Marginalized: Realistic or Utopia?’ (1999) 46 *UCLA Law Review* 1727, 1743; John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 11; Paul Adams, ‘Restorative Justice, Responsive Regulation and Democratic Governance’ (2004) 31(1) *Journal of Sociology and Social Welfare* 3, 3–4; Paul Adams and Susan Chandler, ‘Responsive Regulation in Child Welfare: Systematic Challenges to Mainstreaming the Family Group Conference’ (2004) 31(1) *Journal of Sociology and Social Welfare* 93, 97. The concept can also be found in Mark Brown and Kenneth Polk, ‘Taking Fear of Crime Seriously: The Tasmanian Approach to Community Crime Prevention’ (1996) 42 *Crime and Delinquency* 398, 407. Dolinko notes that restorative justice ‘involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation and reassurance’: David Dolinko, ‘The Practice of Restorative Justice: Restorative Justice and the Justification of Punishment’ (2003) *Utah Law Review* 319, 319. See also Howard Zehr, *Changing Lenses: A New Focus For Crime and Justice* (Herald Press, 1<sup>st</sup> ed, 1990) 181.
- 28 Zehr, above n 27, 212; Paul McCold, ‘Restorative Justice and the Role of Community’ in Burt Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press, 1996) 85; Caroline G Nicholl, ‘Toolbox for Implementing Restorative Justice and Advancing Community Policy: A Guidebook Prepared for the Office of Community Oriented Policing Services’ (Guidebook, US Department of Justice, 1999) 42; John Braithwaite, ‘Setting Standards for Restorative Justice’ (2002) 42 *British Journal of Criminology* 563, 567.
- 29 John Braithwaite, ‘Restorative Justice: Assessing Optimistic and Pessimistic Accounts’ (1999) 25 *Crime and Justice* 1, 6; John Braithwaite, ‘Restorative Justice and a Better Future’ in Gerry Johnstone (ed), *A Restorative Justice Reader* (Willan Publishing, 2003) 83, 86; Mark S Umbreit, ‘Holding Juvenile Offenders Accountable: A Restorative Justice Perspective’ (1995) 46 *Juvenile and Family Court Journal* 31, 32, where he noted that ‘rather than defining the state as the victim, restorative justice theory views criminal and delinquent behaviour as first a conflict between individuals ... [B]oth victim and offender are placed in active problem solving roles’.
- 30 Zehr, above n 27, 211; Braithwaite, ‘A Future Where Punishment is Marginalized’, above n 27; Dolinko, above n 27; Kathleen Daly, ‘Revisiting the Relationship Between Retributive and Restorative Justice’ (Paper, Griffith University, 1999) 4 < <http://www98.griffith.edu.au/dspace/bitstream/10072/10511/kdpaper6.pdf>>.
- 31 Kieran McEvoy, Harry Mika and Barbara Hudson, ‘Introduction: Practice, Performance and Prospects for Restorative Justice’ (2002) 42 *British Journal of Criminology* 469, 469–70; Adam Crawford and Todd R Clear, ‘Community Justice: Transforming Communities through Restorative Justice’ in Eugene McLaughlin et al (eds), *Restorative Justice: Critical Issues* (Sage Publications, 2003) 215, 223; Stephen Savage, ‘Restoring Justice’ (2007) 4 *European Journal of Criminology* 195, 201.

correcting ... the original breach and its underlying causes'.<sup>32</sup> Accordingly, restorative justice empowers primary stakeholders.<sup>33</sup>

In today's criminal justice system, the main restorative justice practices are reconciliation and mediation programs,<sup>34</sup> family group conferencing<sup>35</sup> and sentencing circles.<sup>36</sup> Even though restorative justice has been criticised in the past,<sup>37</sup> the notion is not limited to the criminal justice system. It may be used in different areas,<sup>38</sup> for instance in the context of regulatory sanction. However, there is no consensus on the criteria for a sanction to be deemed restorative in nature. For the purpose of this article, the author measures the restorative nature of this sanction against Van Ness's three core principles.<sup>39</sup>

32 Parker, above n 2, 211; Braithwaite, *Restorative Justice and Responsive Regulation*, above n 27.

33 Charles K B Barton, *Restorative Justice: The Empowerment Model* (Federation Press, 2003) 15; McCold, above n 28; Ashworth, above n 25, 582.

34 See generally Declan Roche, 'Dimensions of Restorative Justice' (2006) 62 *Journal of Social Issues* 217, 218; Curt Taylor Griffiths and Ron Hamilton, 'Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities' in Burt Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press, 1996) 175; John Gehm, 'Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks' (1998) 1(1) *Western Criminology Review* <<http://wcr.sonoma.edu/v1n1/gehm.html>>.

35 See generally Allison Morris and Gabrielle Maxwell, 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study' (1998) 1 *Western Criminology Review* <<http://wcr.sonoma.edu/v1n1/morris.html>>; George Mousourakis, 'Restorative Justice: Some Reflections on Contemporary Theory and Practice' (2004) 29(1) *Journal for Juridical Science* 1, 14; Nathan Harris, 'Evaluating the Practice of Restorative Justice: The Case of Family Group Conferencing' in Lode Walgrave (ed), *Repositioning Restorative Justice* (Willan Publishing, 2003) 121, 123-8; Mark Umbreit and Howard Zehr, 'Restorative Family Group Conferences: Differing Models and Guidelines for Practice' in Eugene McLaughlin et al (eds), *Restorative Justice: Critical Issues* (Sage Publishing, 2003) 69, 70.

36 See generally Mararita Zernova, *Restorative Justice: Ideals and Realities* (Ashgate Publishing Ltd, 2007) 16; Julian Roberts and Carol LaPrairie, 'Sentencing Circles: Some Unanswered Questions' (1996-97) 39 *Criminal Law Quarterly* 69; John Braithwaite, 'Youth Development Circles' (2001) 27 *Oxford Review of Education* 239; Julian V Roberts and Kent Roach, 'Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles' in Andrew Von Hirsch et al (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing, 2003) 237.

37 See, eg, Braithwaite, 'Assessing Optimistic and Pessimistic Accounts', above n 29, 79-104; Mara Schiff, 'Models, Challenges and the Promise of Restorative Conferencing Strategies' in Andrew Von Hirsch et al (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing, 2003) 315, 325-31; Sharon Levrant et al, 'Reconsidering Restorative Justice: The Corruption of Benevolence Revisited' (1999) 45 *Crime and Delinquency* 3; Allison Morris, 'Critiquing the Critics: A Brief Response to Critics of Restorative Justice' (2002) 42 *British Journal of Criminology* 596; Allison Morris and Warren Young, 'Reforming Criminal Justice: The Potential of Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (2000) 11, 21; Carolyn Boyes-Watson, 'The Value of Citizen Participation in Restorative/Community Justice: Lessons From Vermont' (2004) 3 *Criminology and Public Policy* 687, 689; Harry Blagg, 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia' (1997) 37 *British Journal of Criminology* 481; Paul Takagi and Gregory Shank, 'Critique of Restorative Justice' (2004) 31(3) *Social Justice* 147, 156; Declan Roche, 'Restorative Justice and the Regulatory State in South African Townships' (2002) 42 *British Journal of Criminology* 514, 517, 519, 524, 525, 527; Chris Cunneen, 'Thinking Critically About Restorative Justice' in Eugene McLaughlin et al (eds), *Restorative Justice: Critical Issues* (Sage Publishing, 2003) 182, 189.

38 Martin Wright, 'Is it Time to Question the Concept of Punishment?' in Lode Walgrave (ed), *Repositioning Restorative Justice* (Willan Publishing, 2003) 3, 19.

39 Daniel Van Ness, 'Perspectives on Achieving Satisfying Justice: Values and Principles of Restorative Justice' (1997) 8(1) *ICCA Journal on Community Corrections* 7.

Van Ness proposed that the basis of restorative justice might be found in three core principles that are based on the belief that ‘[c]rime is far more than lawbreaking; it also causes injuries to victims, communities and even to offenders’.<sup>40</sup> The three core principles are:

- reparation of harm;
- stakeholder involvement—the role that the victims, offenders and community play in the justice process; and
- community and government cooperation.<sup>41</sup>

These principles are discussed in the next paragraphs.

### **A Reparation of Harm**

In relation to the first principle, justice requires the healing of victims, offenders and communities that have suffered from the breach. Such repairs and amendments address the imbalance created when the breach occurred. They can be viewed as the ultimate aims of restorative justice.<sup>42</sup> However, the words ‘healing’ and ‘reparation’ go beyond restitution. The goal of restorative justice is also to ‘restore’ emotional injuries.<sup>43</sup> There are four main modes of reparation that are relevant in this context and they constitute the four values of the first principle. For the purpose of this article, they are:<sup>44</sup>

- changed behaviour — the offender agrees not to breach the law again. Further, he/she takes steps to ensure that the breach will not occur in the future;
- restitution — this is the most common method of reparation. It involves compensating the victim and the community for the loss they have suffered;
- repentance — a genuine apology, for example, may demonstrate the repentance of the offender. Such repentance plays an important role in making amends for it is an acknowledgement of the wrongdoing; and

40 Ibid 8.

41 Ibid.

42 Gordon Bazemore and Sandra O’Brien, ‘The Quest for a Restorative Model of Rehabilitation: Theory-for-Practice-for-Theory’ in Lode Walgrave (ed), *Restorative Justice and the Law* (Willan Publishing, 2002) 31, 42–3.

43 Gordon Bazemore and Lode Walgrave, ‘Restorative Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform’ in Gordon Bazemore and Lode Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Criminal Justice Press, 1999) 45, 55.

44 Daniel W Van Ness, ‘The Shape of Things to Come: A Framework for Thinking About a Restorative Justice System’ in Elmar Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing, 2002) 1, 4.

- generosity — the offender agrees to go one step beyond restitution. This may be characterised, for instance, by the willingness of the offender to do free work for an agency selected by the victim.<sup>45</sup>

These four values help the reintegration of the victim and the offender into the community.<sup>46</sup> While the first principle addresses the final outcome of restorative justice, the second principle encompasses the procedure that must be followed to reach the final outcome.

## **B Role of the Victims, Offenders and Community (‘Stakeholder Involvement’)**

The second principle, which deals with ‘stakeholder involvement’, gives the victims, offenders and communities the opportunity to be actively involved in the justice process at an early stage. It is believed that since the harm caused by the offender ‘cannot be assessed in a vacuum, restitution cannot be achieved in the absence of those most affected by the crime’.<sup>47</sup> But this does not mean that the affected parties have to participate in person in the restorative justice process. The willingness of these people to be involved actively in the process may vary depending on the circumstances of each case. This variation ultimately affects the degree of healing that will take place because ideally all stakeholders should participate in the process to achieve fully the goals of the first principle.<sup>48</sup>

Usually, the traditional stakeholders are the government and the offender. Restorative justice adds two categories to the equation: the victims and the community. Including the offender, government, victim and community provides these different stakeholders with the opportunity to be involved in the justice process. Van Ness noted that three key values must be assessed when determining if such inclusion exists:<sup>49</sup>

- acceptance of alternative approaches — the willingness to accept new approaches to deal with the consequences of an offence demonstrates that the invitation to participate was genuine;
- acknowledgement of interests — the interests of the victim, offender and community are taken into consideration when dealing with the breach; and
- invitation — the person responsible for the restorative justice process invites the affected parties to participate in the process. This may result in a meeting

45 Roche noted that the reason why certain people are able to be generous is because these people are aware of the ordinary legal limits on remedies that may be imposed on them and they choose to deviate from these remedies in the interests of restorative justice: Declan Roche, *Accountability in Restorative Justice* (Oxford University Press, 2003) 219.

46 Van Ness, above n 44, 4.

47 Bazemore and O’Brien, above n 42, 43.

48 Bazemore and Walgrave, ‘Restorative Juvenile Justice’, above n 43, 55.

49 Van Ness, ‘The Shape of Things to Come’, above n 44, 5–6.

between the parties and an agreement that is specifically tailored to their situation.<sup>50</sup>

Excluding all the stakeholders — except to the extent needed to determine the guilt of the offender — prevents the restorative process from taking place.<sup>51</sup>

### **C Community and Government Cooperation**

As noted in the previous paragraph, restorative justice involves an ongoing discussion with the community. Accordingly, the community plays an extensive role in restorative justice.<sup>52</sup> However, what is meant by the ‘community’? How can this term be defined? The term community is vaguely defined and can have different meanings and interpretations because the concept is subjective.<sup>53</sup> Walgrave, for example, noted that this notion is ‘a mirage of what we are craving for in the desert of fragmentation and individualism, but which we cannot really make concrete’.<sup>54</sup>

Community, for instance, can describe localities such as the place where the offender grew up. The term community can also be viewed as a ‘place in which people know and care for one another’.<sup>55</sup> However, it has been noted that this notion is not just a place.<sup>56</sup>

The definition can be broadened and be considered as a ‘web of affect-laden relationships among a group of individuals ... and ... a measure of commitment to a set of shared values’.<sup>57</sup> Further, Braithwaite has described this term as set of ‘dense

50 Daniel W Van Ness, ‘Creating Restorative Systems’ in Lode Walgrave (ed), *Restorative Justice and the Law* (Willan Publishing, 2002) 130, 135–6.

51 Ibid 132–3.

52 Adam Crawford, ‘The State, Community and Restorative Justice: Heresy, Nostalgia and Butterfly Collecting’ in Lode Walgrave (ed), *Restorative Justice and the Law* (Willan Publishing, 2002) 101, 115–8.

53 Ibid 138; Lode Walgrave, ‘Community Services as a Cornerstone of a Systematic Restorative Response to (Juvenile) Crime’ in Gordon Bazemore and Lode Walgrave (eds), *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (1999) 129, 134; Mara Schiff, ‘Satisfying the Needs and Interests of Stakeholders’ in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing, 2007) 228, 235.

54 Lode Walgrave, ‘From Community to Dominion: In Search of Social Values for Restorative Justice’ in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing, 2002) 71, 75.

55 Amitai Etzioni, *The Spirit of the Community: Rights, Responsibilities and the Communitarian Agenda* (Fontana Press, 1995) 31.

56 Paul McCold and Benjamin Wachtel, ‘Community is Not a Place: A New Look at Community Justice Initiatives’ (Paper Presented at the International Conference on Justice Without Violence: Views from Peacemaking Criminology and Restorative Justice, Albany, New York, 5–7 June 1997); Tony F Marshall, ‘Grassroots Initiatives Toward Restorative Justice: The New Paradigm?’ in Anthony Duff et al (eds), *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester University Press, 1994) 245, 248.

57 Amitai Etzioni, *The New Golden Rule: Community and Morality in a Democratic Society* (Basic Books, 1997) 127.

networks of individual interdependencies with strong cultural commitments to mutuality of obligation'.<sup>58</sup>

Community can also be viewed as 'a feeling, a perception of connectedness' and 'a sense of community'.<sup>59</sup> In certain situations, community is described as an extension of both the offender and the victim. For example, in group conferencing, both the offender and the victims are supported by a community of care.<sup>60</sup> Community can also be considered as a tool for it can provide the 'adequate social context needed for good restorative practice through "reintegrative shaming"'.<sup>61</sup>

Further, community can be viewed as a third party that has a stake in the process. Beside the victims that have been directly affected by the breach, the community can be a secondary victim.<sup>62</sup> Finally, community may be perceived as 'the non-governmental actors who respond to crime, to victims and to offenders'.<sup>63</sup> This latest interpretation will be definition adopted in this paragraph.

The third principle, community and government cooperation, really deals with the tension that exists between the community and government.<sup>64</sup> According to Van Ness, while the government is responsible for preserving a 'just order', the community is responsible for establishing a 'just peace'.<sup>65</sup> The community is expected to play a critical role in the government's response to crime due to the existing limitation on the role of the government in its response to contraventions of the law.<sup>66</sup>

The third principle defines the structural configuration that is needed to achieve this result. It requires the presence of two values:<sup>67</sup>

- The role of agencies must change. Regulatory agencies' policies should take into account the community's involvement. To achieve such a value, 'community–government cooperation must be fluid and dynamic in keeping with the nature of society itself'.<sup>68</sup> This may be achieved through greater communication between regulators and the community. Such communication can take the form of conferences or direct involvement of community through the creation of panels that are consulted, for example, when the regulatory agency imposes an administrative sanction. Basically, the judicial system or

58 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 85.

59 McCold and Wachtel, above n 57.

60 John Braithwaite and Kathleen Daly, 'Masculinities, Violence and Communitarian Control' in Tim Newburn and Elizabeth A Stanko (eds), *Just Boys Doing Business?* (Routledge, 1994) 189, 195–6.

61 Walgrave, 'From Community to Dominion', above n 54, 75.

62 Paul McCold, 'Toward a Holistic Vision of Restorative Justice: A Reply to the Maximalist Model' (2000) 3 *Contemporary Justice Review* 357, 365, 367.

63 Van Ness, 'Creating Restorative Systems', above n 50, 138.

64 Bazemore and Walgrave, 'Restorative Juvenile Justice', above n 43, 55.

65 Daniel Van Ness, 'Pursuing a Restorative Vision of Justice' in Paul Arthur (ed), *Justice: The Restorative Vision, New Perspective on Crime and Justice* (1989) 17, 20.

66 Bazemore and O'Brien, above n 42, 43.

67 *Ibid*; Van Ness, 'Creating Restorative Systems', above n 50, 138–43.

68 Daniel W Van Ness, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4 *Criminal Law Forum* 251, 273.

sanction has to be orientated toward supporting the community’s ownership of restorative justice processes.

- The capacity of the community to respond to contravention of the law has to be enhanced. Such an aim may be achieved by educating the community about the laws that may affect them. This will allow the community to be protected and equipped with the necessary tools to deal with breaches of the law.

Accordingly, a change in government policy to take into consideration the community is necessary to fulfil this principle. Such a restorative orientation creates an opportunity for the regulator to contribute to the main aim of the republican justice theory to protect and to promote the dominion of all citizens.<sup>69</sup>

#### IV THE RESTORATIVENESS OF AN ENFORCEABLE UNDERTAKING

Each of the three core principles discussed in Part III of this paper deals with restorative justice at a different level. Some take into account the offender while others consider the involvement of the victims and the community. Table 1 summarises the values that are the basis of each principle.

**Table 1: The Values and Principles of Restorative Justice**

First Principle	Second Principle	Third Principle	Values
<ul style="list-style-type: none"> <li>• Changed behaviour</li> <li>• Restitution</li> <li>• Repentance</li> <li>• Generosity</li> </ul>	<ul style="list-style-type: none"> <li>• Acceptance of alternative approaches</li> <li>• Acknowledgement of interest</li> <li>• Invitation</li> </ul>	<ul style="list-style-type: none"> <li>• The role of agencies must change</li> <li>• Increasing the ability of the community to deal with the harm</li> </ul>	

For the purpose of this article, it is accepted that these principles and their values are the main components of restorative justice. Their presence would imply that an enforceable undertaking is considered as a fully restorative remedy. If none of these principles is present, the sanction will not be deemed restorative. However, there are degrees of restorative justice. If some of the principles and their values are present, enforceable undertakings will be moderately or minimally restorative, depending on the number of values that are present.

A difficult question arises when determining the weighting of each principle and value. This article considers that all the mentioned values and principles

69 Walgrave, ‘Community Services as a Cornerstone’, above n 53, 145.

of restorative justice are equally important. Accordingly, when assessing if an enforceable undertaking is a restorative sanction, the article considers each principle separately to determine if they form part of an undertaking. After assessing each principle, a conclusion will be reached on whether an enforceable undertaking can be considered as a restorative sanction or not.

## **A   *Reparation of Harm and Enforceable Undertakings***

Section 93AA(1) of the *ASIC Act* states that ‘ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under this Act’.<sup>70</sup> There is no statutory requirement obliging ASIC to consider the interests of the victims and the community they live in. However, as illustrated in the *Multiplex*<sup>71</sup> and the *Iddon*<sup>72</sup> undertakings, ASIC has taken stakeholders’ interests into account before. In fact, the corporate regulator has adopted a policy that aims to maximise the benefit that may arise in an undertaking. It intends for an enforceable undertaking to achieve ‘an effective outcome for those who have been adversely affected by the conduct or compliance failure’.<sup>73</sup> Accordingly, ASIC considers the effect that its enforceable undertakings may have on the promisors, the victims and the community they live in before accepting the terms of an undertaking.<sup>74</sup> The following sections consider the extent to which the first principle of restorative justice (reparation of harm) is reflected in enforceable undertakings.

### **1   *Change of Behaviour***

One of the aims of an enforceable undertaking is to prevent the promisor (who may be a company or an individual) from committing similar breaches in the future. An enforceable undertaking can contain one of two promises that may achieve this goal. These promises are:

- the implementation of a compliance program;<sup>75</sup> and
- education.

The implementation of a compliance program in an organisation allows employees<sup>76</sup> to understand what is required of them. It raises their awareness and

70 Section 93A(1) of the *ASIC Act* is similar in content. For example, an enforceable undertaking may have such a healing impact because one of its goals is corrective action.

71 ASIC, *Enforceable Undertaking: Multiplex Limited*, Document No 017029205, 20 December 2006.

72 ASIC, *Enforceable Undertaking: Robert Hugh Iddon*, Document No 008547513, 27 April 2001.

73 ASIC, ‘Enforceable Undertakings’, above n 7, [2.10].

74 This is emphasised by the goals of an enforceable undertaking.

75 ASIC, ‘Enforceable Undertakings’, above n 7. Such a promise is present in 38.3 per cent of ASIC’s enforceable undertakings given to companies between 1998 and 2008 (this percentage includes undertakings entered into with a company and their officers).

76 This term includes the senior management of the company.

limits the likelihood of them engaging in prohibited conduct. Some of the aims that are usually achieved by a compliance program are:<sup>77</sup>

- enabling employees to detect behaviour which may result, or has already resulted, in contravention of the law, before the regulator takes any action;
- avoiding the possibility of having to spend significant costs in defending a prosecution or private action;
- avoiding any unfavourable publicity and disruption to business that may be caused by a prosecution or private action;
- reducing the risk of incurring penalties and liability to pay damages for breach of the law;
- assisting in a plea of mitigation where a penalty is to be imposed following conviction for a breach of the law; and
- creating an awareness of the content of the law among the company's employees.

Corporate compliance systems can also be seen as management systems that:

aim to prevent, and where necessary, identify and respond to, breaches of laws, regulations, codes or organizational standards occurring in the organisation; promote a culture of compliance within the organisation; and assist the organisation in remaining or becoming a good corporate citizen.<sup>78</sup>

Accordingly, compliance programs can play a major role in changing behaviours because implementing such a promise may lead the organisation to acknowledge that some corporate beliefs and practices conflict with desired beliefs and practices. They appeal to 'the business unit, top management, regulators and broader democratic communities to [find a solution for the] conflict in each circumstance'.<sup>79</sup> This is possible because such compliance programs involve a combination of the following elements:<sup>80</sup>

- The promisor will appoint an independent party.
- The independent party will review the compliance program.
- The independent party will report to the promisor and to ASIC on its recommendations.

77 Christopher Andrew, 'Trade Practices Compliance Programs: Why You Should Have One' (1993) 3(2) *Australian Corporate Lawyer* 29. These goals can be seen as self-serving. Braithwaite has observed that the business community will not follow the law unless it gets something in exchange. For example, companies may wish to implement a compliance program because such program might balance against unfavourable publicity: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 36.

78 Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) 17.

79 *Ibid* 42–3.

80 ASIC, *Enforceable Undertakings Templates: Schedule 2: Sample Terms for Compliance Program Assessment* (2 August 2010) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable+undertakin+templates?openDocument>>.

- The company will implement the recommendation of the independent party. Usually the company will include training in its compliance program to ensure the education of its staff.
- The independent party will audit the compliance program when put in place and will report to ASIC.

An education component has been included in a number of enforceable undertakings accepted with individuals who have allegedly breached their director's duties or their financial service licence requirements.<sup>81</sup> In 46.8 per cent of the enforceable undertakings (accepted with individuals between 1998 and 2008)<sup>82</sup> requiring an alleged offender to promise not to manage a company or deal with securities, financial services and/or investment advice, ASIC required the promisor to complete a course during or at the end of the period of voluntary ban. It is only when the promisors have fulfilled the education requirement that they can manage a company or deal with securities and/or investment advice.<sup>83</sup>

Education ensures that the promisor becomes aware of their duties and obligations. It is a preventive measure. It also protects the public and helps reintegrate the promisor into the community. Through education, a change of behaviour is likely to occur and the chances of the individual repeating the alleged offence are reduced. Additionally, the promisor will become more equipped to deal with similar situations in the future.

Accordingly, an enforceable undertaking contains, when appropriate, promises that can change the behaviour of the alleged offender. This implies that the value of 'changed behaviour' is achieved by this remedy.

## 2 Restitution

As for restitution, consumers or clients of alleged offenders are also protected when an enforceable undertaking is entered into, since an undertaking may require compensation to be paid to the people affected by the alleged breach. Of the 286 enforceable undertakings accepted by ASIC (from 1998 to 2008), 85 required the promisor to refund money to a certain category of people. Compensation<sup>84</sup> is required when third parties have suffered a financial loss due to the alleged actions of the promisor. The areas where this requirement arises are listed in Table 2.<sup>85</sup>

81 See, eg, ASIC, *Enforceable Undertaking: Robert Marusco*, Document No 018457094, 10 January 2003.

82 ASIC, 'Enforceable Undertakings', above n 7.

83 Ibid. See, eg, ASIC, *Enforceable Undertaking: Marc Anthony Bissett*, Document No 017029044, 26 June 2002.

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

85 ASIC, *Enforceable Undertakings Register*, above n 13.

**Table 2: Undertakings that Contain a Refund, Indemnification or Compensation Requirement (in relation to enforceable undertakings accepted from 1998 to 2008)<sup>86</sup>**

Type of matter	Total number of enforceable undertakings using compensation	Percentage of enforceable undertakings using compensation (%)
Dealing with securities or financial services without licence	5	5.9
Fundraising/investment offer in breach of the law/breach of disclosure provisions	24	28.2
Misleading advertisement/information/advice/conduct	31	36.5
Breaches of duties	6	7.1
Dealing with unregistered managed investment schemes	6	7.1
Miscellaneous	13	15.2
<b>Total</b>	<b>85</b>	<b>100%</b>

Table 2 illustrates that 64.7 per cent of the undertakings that contain a compensation promise relate to two alleged offences: (1) misleading advertisement; and (2) breaches of the law in relation to fundraising and disclosure provisions.

For example, in 2007, ASIC accepted an enforceable undertaking from PCI Equity Pty Ltd because the regulator was concerned that this company was breaching its Australian Financial Services Licence ('AFSL') conditions and failing to comply with its duties as a licensee. Its conduct affected 47 retail clients who were issued units in a trust in contravention of the AFSL conditions. The undertaking contained a promise to disclose the conduct to the victims of the alleged breach. The company also provided refunds to these retail clients to compensate for any loss.<sup>87</sup>

In other cases, ASIC has accepted enforceable undertakings as a supplement to court orders. In 2005, the regulator was concerned that First Capital Financial Planning Pty Ltd provided defective advice to 177 clients by directing them to move their superannuation investments from First State Super Superannuation Scheme to Wealthtrac Personal Super Plan, Matrix Super Master Trust, Navigator Personal Retirement Plan or FC One Retirement Builder. ASIC initiated proceedings in the Supreme Court of New South Wales. The defendant agreed to resolve the proceedings by consenting to declarations and injunctions made by the Supreme Court. Further, First Capital Financial Planning Pty Ltd entered

<sup>86</sup> Ibid.

<sup>87</sup> ASIC, *Enforceable Undertaking: PCI Equity Pty Ltd*, Document No 017029212, 22 June 2007.

into an enforceable undertaking with ASIC. In it, the promisor undertook to indemnify the clients for any losses they suffered due to the transfer of funds.<sup>88</sup>

A right of compensation in an enforceable undertaking gives the aggrieved party a quick way to recover their losses without going to court and paying court expenses.<sup>89</sup> It redresses the harm caused by the alleged conduct of the promisor.<sup>90</sup>

Further, when more than one party is affected by the alleged conduct, the enforceable undertaking usually includes a promise to disclose the alleged conduct and the enforceable undertaking to the affected parties. However, the disclosure requirement is used carefully by regulators in the case of an enforceable undertaking because the effect of corrective advertisement must not be punitive.<sup>91</sup>

Such a disclosure requirement targets usually the same category of people that was allegedly targeted by the promisor. Accordingly, such corrective action will reach the same target audience as the original campaign, to avoid any punitive consequences that such a disclosure may have.<sup>92</sup> For instance, in the undertaking entered into with Freehold International Pty Ltd and Optioneer System Pty Ltd, the clients of these companies had been affected by the alleged conduct. The promisors agreed to inform their clients of the content of the undertaking. The letter they sent to their clients clearly stated that the clients could rescind the agreements they had made with Freehold, and that they would need to contact a lawyer for more information on their rights.<sup>93</sup> Of the enforceable undertakings accepted by ASIC between 1998 and 2008, 34.9 per cent contained this type of disclosure requirement.<sup>94</sup> Such publicity is corrective in nature and redresses the harm that allegedly took place. In *ACCC v On Clinic Aust Pty Ltd*,<sup>95</sup> Tamberlin J stated:

The purpose of corrective advertising is to protect the public interest.<sup>96</sup> ...  
Corrective advertising is intended to dispel incorrect or false impressions

88 ASIC, *Enforceable Undertaking: First Capital Financial Planning Pty Ltd*, Document No 017029207, 11 May 2007.

89 ASIC, *06-443 ASIC Accepts an Enforceable Undertaking from the Multiplex Group* (2 August 2010) <<http://www.asic.gov.au/asic/asic.nsf/byheadline/06-443+ASIC+accepts+an+enforceable+undertaking+from+the+Multiplex+Group?openDocument>>.

90 Ashworth, above n 25, 584.

91 It is possible for such disclosure to become punitive. Such a possibility is not a desirable one since an enforceable undertaking is an administrative sanction. Accordingly, any punitive impact of an enforceable undertaking may lead the court to consider that such undertakings are unacceptable. For instance, in *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* (2003) ATPR 41-908, 46541-2 [45]-[46], it was pointed out that the advertisement requirement present in the undertaking was inappropriate. The court also confirmed that the purpose of such disclosure is to protect the public interest, not to punish the promisor: at 46542 [46].

92 If an undertaking targets everyone (both those people affected by the breach and those unaffected by the breach), the enforceable undertaking may have a punitive purpose, and using the sanction in such a way would be inappropriate.

93 ASIC, *Enforceable Undertaking: Freehold International Pty Ltd and Optioneer Systems Pty Ltd*, Document No 017029027, 14 February 2002. The exact figure is unknown as the undertaking did not set up a lump sum of compensation.

94 ASIC, 'Enforceable Undertakings', above n 7.

95 (1996) 35 IPR 635.

96 Ibid 636.

which may have been created as a result of deceptive or misleading conduct. It is not intended to be punitive.<sup>97</sup>

Similarly, A & A Gillon Pty Ltd provided financial product advice without a licence via the Shapiro website. The company entered into an undertaking with ASIC in which it promised not to offer financial product advice and to refund its customers. It also undertook to disclose the content and terms of the undertakings on the Shapiro website.<sup>98</sup> In this way, the publicity targeted those parties that may have seen the original advertisement.

Another type of disclosure can involve major newspapers. General disclosure of this kind may be needed if the promisors targeted the general public through major newspapers in their original campaign.<sup>99</sup> This again represents a corrective measure that aims to fix the problem caused by the original breach.

All this will ultimately heal the victims of the alleged breach and render the promisor accountable for his/her actions. As a consequence, the value of restitution is present.

### 3 Repentance

An apology may be viewed as merely a symbolic gesture. In fact, it plays an important role in the process of reparation. Even if a victim has been fully indemnified for their loss, he/she may remain emotionally dissatisfied and not fully restored, particularly if the offender continues to be hostile.<sup>100</sup> The fact that the offender shows repentance and expresses a willingness to respect the rules can restore victims and communities.<sup>101</sup>

Since an enforceable undertaking requires ASIC and the alleged offender to come together to reach a settlement, this sanction cannot be imposed in instances where the promisor is not willing to rectify his/her conduct. Further, ASIC is unlikely to enter into an enforceable undertaking if the alleged offender does not cooperate or denies liability.<sup>102</sup>

However, the fact that an enforceable undertaking requires the consent of both parties is not by itself enough to consider that this remedy fulfils the value of repentance because coercion and lack of apology may limit the restorative nature of this sanction. For instance, the process of entering into an enforceable

97 Ibid 640.

98 ASIC, *Enforceable Undertaking: A&A Gillon Pty Ltd*, Document No 017029066, 14 January 2003; ASIC, *Enforceable Undertaking: Allen Ray Gillon*, Document No 017029067, 14 January 2003; ASIC, *Enforceable Undertaking: Ann Gillon*, Document No 017029068, 14 January 2003.

99 ASIC, *Enforceable Undertaking: National Investment Institute Pty Ltd*, Document No 017029093, 30 July 2003; ASIC, *Enforceable Undertaking: Henry Kaye*, Document No 017029094, 30 July 2003; ASIC, *Enforceable Undertaking: Novasource Consulting Pty Ltd*, Document No 017029095, 30 July 2003; ASIC, *Enforceable Undertaking: Alan Meagher*, Document No 017029096, 30 July 2003.

100 Sharon Levrant et al., 'Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?' (1999) 45 *Crime & Delinquency* 3, 11.

101 Walgrave, 'Community Services as a Cornerstone', above n 53, 139.

102 ASIC, above n 7, [2.10], [3.3].

undertaking has been subject to criticism in the past. Yeung noted that the private nature of the negotiation in an enforceable undertaking may lead to ‘arm-twisting’ by the more powerful party.<sup>103</sup>

Such coerciveness may limit the restorative effect of an enforceable undertaking. On the one hand, McCold noted that any form of coerciveness would cause restorative justice to go ‘back to being a theory of retributivism’.<sup>104</sup> On the other hand, Walgrave notes that restorative justice includes voluntary processes as well as coercive ones:

Even if offenders do not originally freely accept a restorative action, they may in the longer term understand the sanctions in a constructive way. That will increase their chances of being reaccepted by the community more than a retributive action would. This seems even to be true also in comparison with rehabilitative measures.<sup>105</sup>

He observes that the voluntary process will have a higher restorative value since it is voluntary and reflects the willingness of the offender to heal the victims of the alleged breach.<sup>106</sup>

The ACCC has responded to the concerns identified in research conducted by Parker<sup>107</sup> in relation to its enforcement work by taking preventive measures in relation to a number of issues raised in the study.<sup>108</sup> Additionally, both the ACCC and ASIC are willing to consider varying an enforceable undertaking when needed.<sup>109</sup> This lessens any possible abuse of the system and demonstrates the regulators’ flexibility when dealing with the regulated entities. Further, when enforcing an undertaking, the court can take into account the process that led to the settlement.<sup>110</sup> All this limits the likelihood of coercion and helps ensure that an enforceable undertaking is entered into voluntarily.

103 Yeung, above n 12, 113. For example, the ACCC was criticised for using enforceable undertakings to bully or arm-twist businesses into complying with its directives and to extract unjustified and expansive promises from the alleged offenders. Similar criticism may also apply to ASIC. See, eg. Christine Parker, ‘Arm-Twisting, Auditing and Accountability: What Regulators and Compliance Professionals Should Know about the Use of Enforceable Undertakings to Promote Compliance’ (Paper presented to the Australian Compliance Institute, Melbourne, 28 May 2002) 15 <[http://cccpc.anu.edu.au/Parker\\_ACI\\_2805031.pdf](http://cccpc.anu.edu.au/Parker_ACI_2805031.pdf)>.

104 Jolien Willemsens, ‘Restorative Justice: A Discussion of Punishment’ in Lode Walgrave (ed), *Repositioning Restorative Justice* (Willan Publishing, 2003) 24, 29.

105 Lode Walgrave, ‘On Restoration and Punishment: Favourable Similarities and Fortunate Differences’ in Gabrielle Maxwell and Allison Morris (eds), *Restorative Justice for Juveniles: Conferencing Mediation & Circles* (Hart Publishing, 2001) 17, 23.

106 Ibid.

107 The ACCC commissioned Christine Parker’s research (in 2000–02) through the Regulatory Institutions Network in order to ascertain whether its approach had been / is appropriate, to point out actual and potential problems, and to make overall recommendations to improve its regulatory practice.

108 Louise Sylvan, Deputy Chair ACCC, ‘Future Proofing — Working with the ACCC’ (Speech delivered at the Australian Compliance Institute, Melbourne, 1 September 2005) <<http://www.accc.gov.au/content/item.phtml?itemId=706591&nodeId=a5b95d899226cb9db64fcb45b4674b0f&fm=20050901%20ACI.pdf>>.

109 ACCC, ‘Section 87B of the Trade Practices Act’, above n 7, 10; ASIC, ‘Enforceable Undertakings’, above n 7, 15–16.

110 Nehme, ‘Court System’, above n 7, 160–2.

However, while an alleged offender may publicly acknowledge ASIC's concerns in relation to the alleged conduct, the regulator does not require the promisor to admit that a breach of the law has actually occurred. For example, one undertaking states:

Wilson acknowledges ASIC's concerns set out in this Undertaking, but does not concede the contraventions of the Corporations Law, or the ASX Business rules ... Wilson does not concede that, in the circumstances, ASIC would be entitled to exercise the powers referred to in Paragraphs 1.9 and 1.10.<sup>111</sup>

Such clauses are quite common in the enforceable undertakings accepted by ASIC.<sup>112</sup> The promisor's implied rejection of liability may have a negative impact on the restorative nature of an enforceable undertaking.

#### 4 Generosity

The terms of an enforceable undertaking may go beyond restitution. The flexibility of this sanction allows the promises included in the undertaking to be more comprehensive than that of the court which is subject to certain restraints.<sup>113</sup> As noted earlier in this article, an enforceable undertaking also impacts promisors by improving their behaviour and changing their compliance culture. Additionally, promisors may even become involved in community service as a result of an enforceable undertaking.

Undertakings can, for example, contain promises to promote community awareness of the law and consumer rights. For instance, an undertaking was given by Combine Insurance Company of America. The company had sold policies that allegedly were not appropriate for the needs and circumstances of the indigenous people who were targeted. Combine was required by the undertaking to donate \$40 000 to assist in the preparation of educational material for Aboriginal consumers of financial services. As a consequence, the community that was deceived by the conduct of the promisor received education and benefited from the undertaking.<sup>114</sup>

However, the flexibility of the promises that may be included in an undertaking is dampened because such promises have to be connected to the alleged conduct of the promisor to be acceptable. If they are not related to the alleged breach, the validity of the undertaking can be challenged. This is due to the inherent nature of an enforceable undertaking as an administrative sanction — it cannot have a punitive nature. Accordingly, if certain promises, such as the implementation of a compliance program or the initiation of community services, go beyond the

111 ASIC, *Enforceable Undertaking: Anthony Lasey Wilson*, Document No 008547508, 21 March 2001.

112 Marina Nehme, 'Enforceable Undertakings and its Impact on Private Lawsuit' (2008) 22 *Australian Journal of Corporate Law* 275, 282.

113 *Australian Competition and Consumer Commission v Woolworth (SA) Pty Ltd* (2003) 198 ALR 417, 433 [54]–[55].

114 ASIC, *Enforceable Undertaking: Combined Insurance Company of America*, Document No 008547484, 13 November 2000.

alleged conduct, they may be perceived as punitive in nature.<sup>115</sup> Further, if the terms of an undertaking are not related to the alleged offence, the court is unlikely to enforce them.<sup>116</sup> Accordingly, due to the fact that an undertaking cannot go beyond the alleged breach, the scope of application of this value is limited.

## **5 Presence of the First Principle?**

An enforceable undertaking attempts to repair the harm that was caused by the alleged conduct. It provides an opportunity for the alleged offender to modify his/her behaviour. Further, in instances where parties have suffered a financial loss due to the alleged conduct of the promisor, the undertaking will contain promises such as disclosure and compensation to remedy the injustice that has been taken place.

The negotiations that result in an undertaking manifest the willingness of the promisor to face the consequences of the alleged breach.<sup>117</sup> However, repentance of the promisor is limited since an enforceable undertaking does not require an apology. It is unlikely that an apology would be included in an undertaking, because the acceptance of an undertaking does not imply that the promisor did in fact breach the law. It simply means that ASIC has concerns that the law is not being complied with. As a result, a victim affected by the breach of an undertaking or a member of the general public cannot use the undertaking as proof that the promisor has breached the law. Admission of guilt and an apology may put the promisor in a vulnerable situation,<sup>118</sup> and thus is unlikely to ever be included as a standard term in an enforceable undertaking accepted by ASIC.

The last value, generosity, is present to a certain extent through promises such as those relating to community services. But such generosity is limited to actions that can be linked to the original conduct. Such a limitation may not be lifted; attempting to do so may invalidate an enforceable undertaking. Accordingly, the limitation that exists around the values of repentance and generosity are unlikely to be remedied in the context of an enforceable undertaking.

In summary, the presence of the values of changed behaviour and restitution and the limited presence of repentance and generosity means that an enforceable undertaking is moderately restorative in relation to the first core principle of restorative justice. The second core principle is considered in the next section.

115 It is also unlikely that Parliament intended that the enforceable undertakings provisions would be used for a punitive purpose: Yeung, above n 12, 123.

116 Nehme, 'Court System', above n 7, 163.

117 However, it is possible that the promisor would have entered into an undertaking to escape more drastic actions. An enforceable undertaking would be the lesser of two evils.

118 In case of an apology, the promisor will be in a vulnerable situation because the enforceable undertaking may be used by the victims of the alleged breach in private lawsuit: Nehme, 'Impact on Private Lawsuit', above n 113, 275.

## **B Stakeholder Involvement and Enforceable Undertakings**

As mentioned earlier, stakeholder involvement is a core principle of restorative justice. In the context of an enforceable undertaking, such involvement requires the participation of the alleged offender, the victims, the community and ASIC in the process that leads to entering into an enforceable undertaking. This section considers whether the three values related to this second core principle are present.

### **1 Acceptance of Alternative Approaches**

ASIC considers entering into an enforceable undertaking in matters where an enforceable undertaking offers ‘a more effective regulatory outcome’ than other sanctions or legal actions.<sup>119</sup> Such a better outcome is possible due to the fact that the provisions related to an enforceable undertaking in the *ASIC Act* are very broad. For instance, s 93AA(1) of the *ASIC Act* observes that ASIC can enter into any undertaking that is ‘in connection with a matter in relation to which ASIC has a function or power under this Act’. In *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd*,<sup>120</sup> Mansfield J observed that the words ‘in connection with’, in relation to s 87B of the *Trade Practices Act 1974* (Cth), have a wide import.<sup>121</sup> Similarly, in *Australian Securities and Investments Commission v Edwards*,<sup>122</sup> the Court once more pointed out the wide import of the words ‘in connection with’ that are present in s 93AA of the *ASIC Act*.<sup>123</sup> Accordingly, such power to accept enforceable undertakings can be more comprehensive than that of the court, which is subject to certain restrictions.<sup>124</sup> Accordingly, with its flexibility, an enforceable undertaking fulfils the value of ‘acceptance of alternative approaches’.

### **2 Acknowledgement of Interest of Other People**

When accepting an undertaking, ASIC considers the ‘position of consumers and investors whose interests have been or may be harmed by the suspected conduct’.<sup>125</sup> Unlike criminal sanctions, which aim to punish the offender, an enforceable undertaking attempts to modify the culture of the alleged offender with the hope of preventing the alleged breach from reoccurring in the future.<sup>126</sup> Further, as

119 ASIC, ‘Enforceable Undertakings’, above n 7, [1.4].

120 (2003) 198 ALR 417.

121 Ibid 433 [55].

122 (2004) 51 ACSR 320

123 Ibid 324 [16].

124 *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* (2003) 198 ALR 417, 433 [55].

125 ASIC, ‘Enforceable Undertakings’, above n 7, [2.8].

126 Interview with Jan Redfern, former Executive Director of Enforcement (Face to Face Meeting, 20 June 2008).

noted in the previous paragraphs, an enforceable undertaking compensates the victims for any losses they have suffered.

As a consequence, the fact that the promises given in an enforceable undertaking take into account the interests of the promisor and the interests of parties who may have been affected by the alleged conduct means that the value of ‘acknowledgement of interest of other people’ is present.

### 3 Invitation

The value of ‘invitation’ in relation to enforceable undertakings has two aspects. On the one hand, an enforceable undertaking is the result of communications between the alleged offender and the regulator. In all instances, the enforceable undertaking is the result of cooperation between the promisor and ASIC.<sup>127</sup> Further, the terms of the enforceable undertaking are agreed after a series of negotiations between these two parties.<sup>128</sup> As a result, at one level, there is an invitation issued by ASIC to the alleged offender to decide the manner in which the matter is going to be dealt with.<sup>129</sup> Such participation allows the promisor to understand why certain promises have to be made. Further, the promisor has to agree that the promises are acceptable. This provides some accountability to the process.<sup>130</sup>

On the other hand, the *ASIC Act*<sup>131</sup> does not guarantee that the rights of third parties will be heard.<sup>132</sup> ASIC is not required to consult with third parties in relation to the terms of an enforceable undertaking. However, damage caused by an alleged breach cannot be calculated in a vacuum. For this reason, before entering into an enforceable undertaking, ASIC will consider the effect that its enforceable undertakings may have on the victims of the promisor and the community.<sup>133</sup> This may take the form of consultation with the victims and result in an outcome that protects their rights. A senior officer in ASIC noted that the regulator:

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

127 ASIC, ‘Enforceable Undertakings’, above n 7, [2.10].

128 *ASIC Act* ss 93A, 93AA.

129 Bazemore and O’Brien, above n 42, 32.

130 Roy Sainsbury, ‘Administrative Justice: Discretion and Procedure in Social Securities Decision Making’ Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 1992) 305.

131 *ASIC Act* ss 93AA, 93A.

132 *Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission* (2005) ATPR 42-082, 43290 [87].

133 ASIC, ‘Enforceable Undertakings’, above n 7, [2.8].

have practical knowledge and experience on what is of concern to the public and affected parties generally.<sup>134</sup>

Since ASIC's restructure in the second half of 2008, the regulator no longer has a consumer protection directorate and a compliance directorate. However, ASIC still consults internally with those stakeholder teams that have interfaced with the affected parties.<sup>135</sup> Such consultations are very useful in helping to formulate the terms of the enforceable undertakings and in maximising the likelihood that the promises given will take into account the position of the victims and the community in which the alleged breach occurred. They help, for example, in calculating the amount of compensation that should be paid to indemnify the victims. Accordingly, even though ASIC may not contact every consumer that may have suffered a loss due to the alleged conduct, broader communication with the community usually takes place. This means that there is a moderate level of communication between ASIC and the affected parties.

#### **4 Presence of the Second Principle?**

An enforceable undertaking is a form of settlement between ASIC and an alleged offender. It is one in a range of modes that can be used by the corporate regulator to address an alleged breach of the law. It is a tool that provides immense flexibility in handling an alleged offence because it allows the regulator to adapt the promises that are incorporated into the enforceable undertaking to different scenarios. Accordingly, ASIC is embracing alternative approaches to deal with certain breaches of the law.

Further, the terms of an enforceable undertaking acknowledge the interests of the promisors and the affected parties. Before accepting an undertaking, ASIC consults with different groups to assess the impact of the alleged breach. However, ASIC does not necessarily meet the victims and communities that have been affected by the alleged conduct. Since the negotiations that result in an enforceable undertaking are private, the victims may not be aware of the discussion taking place between the alleged offender and ASIC until the undertaking is entered into. This aspect limits the restorative nature of an enforceable undertaking.

One way to allow more communication between victims of an alleged breach involves incorporating certain features of a sanction available in the United States: the consent decree. This remedy is similar to an enforceable undertaking in some regards. Like an enforceable undertaking, a consent decree may be defined as an agreement between involved parties. But the similarity stops there, because a consent decree must be submitted in writing to a court for approval. It is only when the consent decree receives the approval of a judge that it becomes legally binding.<sup>136</sup> However, the consent decree encourages greater communication with

134 Interview with Jan Redfern, former Executive Director of Enforcement (Face to Face Meeting, 20 June 2008).

135 Update by ASIC to the information provided in Interview with Jan Redfern, former Executive Director of Enforcement (Face to Face Meeting, February 2009).

136 *Commerce and Trade*, 15 USC § 16 (2004).

the victims and the community affected by the breach. The *Antitrust Procedures and Penalties Act*<sup>137</sup> requires the government to solicit public comment before finalising consent decrees relating to antitrust settlements. The settlement document must be published in the Federal Register at least 60 days before the effective acceptance of the decree. Summaries of the proposed decree and other relevant documents are published in certain general circulation newspapers.<sup>138</sup> Such disclosure ensures that the public is aware of the proposed decree and is given an opportunity to comment on its content. This facilitates a certain type of restorative justice since all affected parties are made aware of the proposed consent decree, and can add to it, if the court believes their comments are reasonable.

Arguably, such communication should have a place in the Australian regulatory system to guarantee that the rights of those affected are taken into account in enforceable undertakings. The regulator can also obtain more information about the alleged offender when the public is involved in the process of regulation.

For instance, in the proceedings between the United States regulator and Microsoft there was a deluge of public comment in relation to the proposed decree. The judge who was considering the consent decree asked Microsoft and the Justice Department if they were planning any changes to the settlement proposal in response to the public comments.<sup>139</sup> However, adopting such a system in Australia may be difficult, and should be implemented with care.

Further, allowing communication between the alleged offender and the victims of the alleged breach can lead to a change in the attitude and behaviour of the promisor. This was noted by Braithwaite, where he referred to an investigation conducted by the Trade Practices Commission in relation to the mis-selling of insurance products to remote indigenous communities. The matter was resolved by settlement and the process was restorative. One of the things that the process involved was for the top management of the insurance company to visit the affected communities and meet the victims of the alleged breach. Some of these executives returned back to the city ashamed of their company's conduct. This settlement not only led to the payment of compensation to the victims but also resulted in reforming the organisation's practices.<sup>140</sup>

Irrespective of whether such disclosure exists, the presence of the values of 'acknowledgement of interests' and 'acceptance of alternative approaches' and the moderate presence of the value of 'invitation' mean that, in the context of the second principle, an enforceable undertaking is moderately restorative. The third principle is discussed in the following section.

137 Ibid.

138 Ibid § 16(e).

139 *United States v Microsoft*, 56 F 3d 1448, 1462 (DC Cir, 1995).

140 Braithwaite, *Restorative Justice and Responsive Regulation*, above n 27, 22–4.

### **C Cooperation of Community/Government and Enforceable Undertakings**

The third core principle of restorative justice, ‘cooperation of community and government’, is unlikely to have a strong presence in the context of enforceable undertakings accepted by ASIC. As noted before, the goals of an enforceable undertaking are the prevention of future breaches, the protection of the public and corrective action. The goals do not include the transformation of the relationship that exists between the community and the government.

In relation to the first value, the changing role of regulatory agencies, there is no evidence that an enforceable undertaking supports the community’s ownership of the restorative justice process. When the sanction was first introduced in 1993, the Parliament and regulators did not describe it as a method of restoring justice.<sup>141</sup> As mentioned before, ss 93A and 93AA of the *ASIC Act* do not require the regulator to involve the community in the process of negotiating an enforceable undertaking.

However, other regulators that have this sanction at their disposal have deemed that the involvement of the community in the process of an enforceable undertaking is required. For example, when accepting an undertaking, the Victorian Environmental Protection Authority requires referral of the matter to an Independent Advisory Panel. This panel is constituted by persons independent to the Environmental Protection authority and who have ‘skills such as social and community understanding, as well as legal, investigative and environmental skills’.<sup>142</sup>

As for the second value, which requires increasing the community’s awareness and ability to address the harm caused by an offender, enforceable undertakings may achieve this by including certain promises. For example, an undertaking may contain a promise by the alleged offender to implement community service programs. Such programs are educational in nature and promote the community’s awareness of the law.

In one example, ASIC believed that Michael Anthony Casey allegedly failed to act efficiently in the performance of his duties as a holder of a dealer’s licence.<sup>143</sup> In 1999, he entered into an undertaking with ASIC in which he agreed to refrain from acting as a representative of a dealer or investment advisor for two months and to fulfil some education requirements. He also promised to cooperate with ASIC and the ASX in the preparation and presentation of seminars in Sydney and Melbourne that would be open to all designated trading representatives. The presentations and seminars considered issues of law, practice and procedure relevant to acting as a designed trading representative.<sup>144</sup>

141 Parker, ‘Restorative Justice in the Business Regulation?’, above n 2, 211–12.

142 Environmental Protection Authority (Vic), ‘Enforceable Undertakings: Draft Guidelines’ (Publication No 1224, August 2008) 2.

143 ASIC, *Enforceable Undertaking: Michael Anthony Casey*, Document No 008547357, 9 July 1999.

144 Ibid.

Similarly, in 2003, it was alleged that Automotive Financial Services Pty Ltd did not comply with legislation in relation to insurance contracts. The company promoted a product that should have been considered an insurance contract. In its undertaking, Automotive Financial Services promised to contribute \$20 000 to be used by ASIC for researching, educating and promoting consumer awareness about consumer rights, including any risk in purchasing financial products offered by or through car dealers.<sup>145</sup> Hence, ASIC does incorporate community services in its undertakings in rare instances.

Accordingly, the enforceable undertakings may, in a very small way, empower the community through education to deal with certain breaches of the law. The more aware the public is, the better it is able to distinguish true from false information, and the easier it is to establish ‘just peace’. The fact that certain promises in an enforceable undertaking are ‘carried out within the community itself [provides] benefits [to the] community through, for [instance], [education and] the destruction of [stereotypes]’.<sup>146</sup> Accordingly, the presence of the third core principle is really minimal.

#### IV CONCLUSION

Nowadays, restorative justice is part of the national and international criminal justice reform dialogue. However, the application of restorative justice is not limited to the criminal justice system. This author is of a view that an enforceable undertaking accepted by ASIC is to a certain extent restorative in nature.

Since an enforceable undertaking is a form of settlement that aims, among other things, to correct the action of the promisor, this remedy enhances the position of the people affected by the breach. It increases the efficiency of justice by taking into account different parties. This allows ASIC to tailor the terms of the undertakings to the breach that has allegedly occurred.

Accordingly, the enforceable undertaking is a very important sanction because it introduces into the corporate regulatory system a certain level of restorative justice. Figure 1 summarises the application of the three core principles of restorative justice to enforceable undertakings, to help determine the level of the restoration that may be achieved by an undertaking.

From Figure 1, it can be concluded that the sanction of enforceable undertaking is moderately restorative. This sanction can be viewed as a middle ground for the application of restorative justice, and has the potential to apply the theory of restorative justice in most of its aspects.

As noted in this paper, further consultation with third parties is required to ensure that the fairness of the system persists. These consultations would enable

145 ASIC, *Enforceable Undertaking: Automotive Financial Services Pty Ltd*, Document No 017029111, 25 September 2003.

146 Willemsens, above n 105, 30.

the regulator to be more aware of the consequences of an alleged breach by allowing victims to be part of the solution. This in turn would help an enforceable undertaking to better protect the rights of alleged victims. It would also ensure that the regulator used the sanction in a fair and just manner. This might facilitate a change in policy regarding the role of the community in an enforceable undertaking — allowing the community to provide an input in the use of the sanction.

**Figure 1: Summary of the Application of the Three Principles of Restorative Justice to Enforceable Undertakings**

