A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation

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This article examines the use of enforceable undertakings in Australian occupational health and safety (OHS) regulation. Enforceable undertakings are promises by persons alleged to have breached their regulatory obligations to do something, which if not done, is enforceable in court. Enforceable undertakings potentially have an important responsive and restorative role to play in a regulatory enforcement strategy to ensure compliance with OHS statutes, and have been used in other areas of business regulation, including trade practices, financial, prudential, consumer, civil aviation, environmental and communications and media regulation. The article then reports on a study of the operation of enforceable undertakings in Queensland to enforce compliance with OHS obligations. We conclude that this early experience of enforceable undertakings in Queensland provides useful guidance as to how the enforceable undertaking provisions might best be implemented elsewhere, and preliminary evidence of the complexities of their likely effectiveness in OHS regulation.

Introduction

Since the late 1970s, Australian occupational health and safety (OHS) regulators have developed a broad range of administrative sanctions to supplement formal enforcement of OHS statutes through criminal prosecution. Early measures included improvement and prohibition notices, and then, from the late 1980s, infringement notices (on-the-spot fines). The most recent innovation has been the enforceable undertaking, essentially:

a contract involving a commitment by a person (obligation holder) who is alleged to have breached their obligations under the [OHS legislation] to do something, which if not done, is enforceable in court.1

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At their most basic level, enforceable undertakings are promises enforceable in court. They are ‘offered’ by an OHS duty holder, and operate as an agreement between the duty holder and an OHS regulator, in which the duty holder undertakes to do or refrain from doing certain activities. The agreement effectively serves as a substitution for, or augmentation of, other regulatory enforcement methods such as civil, administrative or even criminal action. If contravened, the undertaking is enforceable in court, and the relevant OHS statutes generally provide for additional penalties for such contraventions of the undertaking. Some statutes also enable the regulator to conduct a prosecution for the original contravention.

Enforceable undertakings are designed to secure quick and effective remedies for contraventions of regulatory provisions without the need for court proceedings, and provide non-adversarial and constructive solutions to regulatory compliance issues.

Enforceable undertakings are an Australian invention, and originated in 1993 in the Trade Practice Act 1974 (Cth), as an enforcement method available to the Australian Competition and Consumer Commission (ACCC). Before 1993, the ACCC had commonly accepted ‘administrative resolutions,’ or deeds of settlement, from parties in lieu of or in addition to prosecution. Section 87B of the Trade Practices Act formalised these agreements as ‘enforceable undertakings,’ and clarified issues of their enforceability.

Since their introduction in 1993, enforceable undertakings have been adopted by other federal and state agencies, including the Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA), the Civil Aviation Safety Authority (CASA), the Australian Communications and Media Authority (ACMA), the Therapeutic Goods Administration, the Australian Transaction Reports and

3 ALRC Report 95, above n 2, p 2.
5 Although note that the US Department of Justice has since the 1930s accepted ‘consent decrees’ in the context of anti-trust regulation. Consent decrees are a court-reviewable arrangement between the regulatory agency and the defendant ‘whereby the defendant accepts specific limitations on its conduct in return for the termination of the government action’: ALRC, Report 95, above n 2, p 2 n 154. Since 2003 the Department of Justice has permitted federal prosecutors to enter into deferred prosecution agreements with corporations. Deferred prosecution agreements are a form of pre-trial diversion, giving corporations a period of probation to carry out corporate reform and restitution.
6 See s 87B of the Trade Practices Act 1974 (Cth).
Analysis Centre (AUSTRAC), the Private Health Insurance Administration Council (PHIAC), Victorian Consumer Affairs, the Office of Fair Trading both in (New South Wales and Queensland), and the Environmental Protection Authority (Victoria). Enforceable undertakings are also now to be found in the majority of OHS statutes — in particular the OHS statutes of the Australian Capital Territory, the Commonwealth, Queensland, Tasmania and Victoria. Progress in implementing the enforceable undertaking provisions in these statutes has not been rapid, with Queensland the only jurisdiction in which enforceable undertakings have been regularly used since their introduction in 2002. The other OHS regulatory agencies are now beginning to implement enforceable undertakings, but it is Queensland that provides the best evidence of the complexities of conceptualising and implementing enforceable undertakings, and their likely effectiveness, within an OHS context.

In this article, we examine the conceptual development of enforceable undertakings, and the way in which they might contribute to a regulatory enforcement strategy to ensure compliance with OHS statutes. We then report on a study of the operation of enforceable undertakings in Queensland to enforce compliance with OHS obligations. We conclude that this early experience of enforceable undertakings in Queensland provides useful guidance as to how the enforceable undertaking provisions might best be implemented and preliminary evidence of the complexities of their likely effectiveness in OHS regulation.

**Theoretical Contexts**

Compliance with OHS regulatory requirements is a continual and ongoing process. An organisation can take measures to comply with the provisions of the OHS statute, but without sustained effort to ensure ongoing compliance, will soon be in contravention of OHS obligations. If the aim of all enforcement is to obtain compliance with regulatory standards, the fundamental purpose of enforceable undertakings is to encourage and enhance a robust approach to compliance and to ensure compliance.

Parker, drawing on recent empirical work on compliance within organisations, suggests that organisations need to progress through at least three stages to comply with their obligations. First, management needs to be committed to comply, and to become actively engaged in setting compliance goals and reviewing performance. Second, firms have to learn how to comply, which involves acquiring the knowledge and skills for self-regulation and developing appropriate management policies, procedures and institutions.

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8 For a discussion of these regulatory developments and the state of play in 2005, see Nehme, above n 7.
9 See Nehme, above n 7, and Parker, above n 4.
10 These provisions are discussed in detail later in this article.
Third, compliance, or self-regulation, needs to be *institutionalised* in everyday operating procedures, performance appraisals and in the culture of the organisation. Enforceable undertakings arguably address all three stages of compliance.\(^{13}\) For example, enforceable undertakings attempt to promote and encourage *management commitment to comply* by attracting the attention of management, and engaging senior management in face-to-face meetings to develop, negotiate and approve provisions of the undertaking. Undertakings might also spur organisational commitment to regulatory goals: the undertaking is offered and negotiated by management; undertakings involve often lengthy and expensive commitments; the measures undertaken are usually more extensive than merely meeting regulatory standards; and targets and deadlines are set with the approval and oversight of the regulator. Management commitment will also most likely be spurred by the threats of prosecution underpinning an enforceable undertaking.

Enforceable undertakings usually also enable, and indeed require, organisations to *learn how to comply*. Commonly, enforceable undertakings involve the implementation of systematic approaches to OHS management which are often put into place by expert third parties in collaboration with the organisation involved. The appointment of a specialist expert or the creation of a management position within a firm is also common after an undertaking is accepted. Often undertakings contain specific time lines and deadlines for the development of compliance expertise and methods.

Finally, enforceable undertakings usually seek to *institutionalise ongoing compliance*, so that the organisation incorporates these changes, and the systems and management of the issue become ‘second nature’ and are built into standard operating procedures and processes. Enforceable undertakings can require:

a. Implementation of a compliance management system.

b. Provisions for monitoring timelines and audits on:
   i. compliance with the undertaking itself; and
   ii. compliance with the requirements of the appropriate system for managing compliance (this can include accreditation to a particular standard, such as Australian Standard (AS) 4801 in the case of OHS).

c. Provision for ongoing internal monitoring, through committees, incident reporting, and internal audits.

The research into compliance shows that organisational culture is at the heart of sustained compliance with regulatory requirements, and encouraging, promoting and facilitating organisational change to increase sustained and ongoing compliance is a central concern of all regulators.\(^{14}\) Researchers and regulators increasingly understand that a central regulatory goal is to ensure that organisations respond to regulatory requirements by *self-regulating*, with the regulator essentially playing a monitoring role. Regulators must therefore become quite sophisticated in their efforts to target, effect and change

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\(^{13}\) See Parker, above n 11, pp 43–61.

\(^{14}\) Ibid.
organisational responses to regulatory systems.

At their most ambitious, enforceable undertakings aim at sparking management commitment and inculcating long term change within the organisational culture itself: for example, ASIC states that:

we see enforceable undertakings as an important component in our array of enforcement remedies to influence behaviour and encourage a culture of compliance for the benefit of all participants in the market we regulate.\textsuperscript{15}

Enforcement is conducted within particular regulatory environments and frameworks. In recent times, debates about regulatory enforcement have been influenced by the principles of responsive regulation and restorative justice,\textsuperscript{16} which offer approaches which transcend the long standing debate between deterrence-based and persuasion-based models of enforcement.

Indeed, the theory of responsive regulation was developed because of the limitations of both the ‘advise and persuade’ approach and the deterrence approach. It ‘covers the weakness of one with the strengths’ of the other.\textsuperscript{17} Responsive enforcement gives regulators a framework to react appropriately and effectively, with a mix of ‘persuasive’, reforming and ‘deterrent’ sanctions to the ‘motivational diversity’\textsuperscript{18} demonstrated by firms faced with regulatory requirements. There should be sanctions to deter the worst offenders, but other measures to encourage and assist organisations to comply voluntarily. In OHS enforcement, for example, the regulator begins by presuming that the organisation will comply voluntarily, but where it appears that an organisation needs mild enforcement action to encourage compliance, the regulator can provide advice on the measures required, and if need be, resort to an administrative sanction, like an improvement notice, infringement notice or, if a persons is subjected to an ‘immediate risk’ by the hazard, a prohibition notice. But if these measures do not induce cooperative compliance, the regulator can resort to deterrent measures, such as prosecution.\textsuperscript{19} Essential to the success of responsive regulation is that the regulator negotiate compliance with regulated organisations within the shadow of very large sanctions — such as very high fines or imprisonment.\textsuperscript{20}

Restorative justice emphasises a collaborative approach where those with a ‘stake’ in the offence come together to resolve collectively a negotiated response.\textsuperscript{21} Restorative justice seeks to address harms done (restoration),

\textsuperscript{16} For discussions of responsive regulation and restorative justice, see J Braithwaite, \textit{Restorative Justice and Responsive Regulation}, Oxford University Press, Oxford, 2002; and I Ayres and J Braithwaite, \textit{Responsive Regulation: Transcending the Deregulation Debate}, Oxford University Press, New York, 1992. See also Parker, above n 4, with regard to enforceable undertakings in particular.
\textsuperscript{17} Braithwaite, above n 16, p 32.
\textsuperscript{18} Ayres and Braithwaite, above n 16, Ch 2, particularly pp 20–35.
\textsuperscript{20} Ibid, Ch 7.
\textsuperscript{21} Braithwaite, above n 16.
repair relationships, and reduce recidivism.\(^{22}\) Restorative justice involves three possible stages:\(^{23}\)

1. Restitution, or putting the wrong right: for example, compensating and providing rehabilitation for the injured worker, or cleaning up waste;
2. Prevention: for example, modifying plant or work processes and practices to remove hazards; introducing systematic safeguards to prevent future occurrences; or ensuring relevant parties within the organisation are held responsible for the contravention;
3. Social justice and democracy: which can include wider consultation and community input and access; and broader issues of justice and making amends.

In attaining these goals, it is crucial that an enforcement option captures and motivates all appropriate individuals within an organisation, particularly senior management.

Enforceable undertakings draw on the lessons from the scholarship on responsive regulation and restorative justice. Within the escalating enforcement methods typically found in enforcement regimes influenced by responsive regulation, enforceable undertakings fall at the intersection between ‘punitive’ sanctions and ‘persuasive’ approaches, and most appropriately would lie between administrative sanctions and prosecution. They are a flexible alternative to prosecution, and civil remedies, where these are part of a regulatory enforcement regime. As Macrory notes in his extensive review of the United Kingdom’s system of regulatory sanctions, enforceable undertakings:

represent a powerful alternative to traditional coercive, regulatory enforcement action, and have the potential of imposing fit-for-purpose sanctions which are more satisfying for both offender and the victims of non-compliance.\(^{24}\)

Part of the responsive nature of enforceable undertakings lies in their potential for dynamic deterrence, because enforceable undertakings internalise the costs of contraventions at two stages: the costs of the measures undertaken by the firm, and the cost of the sanctions that will be imposed upon the firm if the undertaking itself is broken. As we show in Tables 9 and 10 below, the total amount spent in an enforceable undertaking (the first stage) in relation to OHS in Queensland is on average six to eight times the cost of the fine that may be expected if the offence proceeded to prosecution.

In a sense, enforceable undertakings have done much to advance the argument that Australian OHS policy makers should improve prosecution sanctions by including non-monetary penalties.\(^{25}\) As the ALRC notes,\(^{26}\) the advantages of non-monetary penalties include the:

- potential to tailor the penalty to suit the particular offender and what that particular offender needs to do to comply with the law in future;

\(^{22}\) Ibid.
\(^{23}\) See Parker, above n 11, pp 43–61 and 253 ff.
\(^{24}\) Macrory, above n 1, at [4.18].
\(^{25}\) See, eg, the types of sanctions advocated in Gunningham and Johnstone, above n 19, Ch 7.
\(^{26}\) ALRC, Report 95, above n 2, at [27.4].
• potential to direct a penalty towards internal reorganisation of a corporation — to facilitate the behavioural change necessary for compliance; and
• ability to better align the penalty with the purpose.

Non-monetary sanctions have the potential to be highly responsive, and to promote restorative justice goals. Since 2000 non-monetary penalties have been included in four of the Australian OHS statutes; namely, adverse publicity court orders (New South Wales, Victoria, South Australia, the Australian Capital Territory and Northern Territory OHS statutes); orders to participate in an OHS-related project (New South Wales, Victoria and South Australia); an order requiring the defendant to take remedial measures (Commonwealth, New South Wales, the Australian Capital Territory and the Northern Territory) or to undertake training (South Australia and the Northern Territory); and forms of corporate probation (Victoria and Western Australia — which we discuss later in this article). But to date these sanctions have not been widely used by the courts, whereas, as we show later in this article, many Queensland enforceable undertakings include OHS related projects, the kinds of provisions that would feature in corporate probation, and, to some degree, adverse publicity.

Enforceable undertakings have the potential to achieve deterrent, rehabilitative and restorative outcomes more cheaply, and faster, than prosecution. While our research suggests that the administration of enforceable undertakings is quite labour intensive for the OHS regulator, the process is nowhere near as costly or as time consuming as the prosecution process. OHS prosecutions are expensive (both in the resources, time and effort devoted to the preparation and conduct of the case by the prosecution team and the defence team, and in court administration costs), and prone to delay. Their adversarial nature precludes the kind of ‘cooperative’ negotiation that best achieves the desired organisational cultural change required, and which is a feature of enforceable undertakings.

Enforceable undertakings are responsive at two levels. Not only do they provide regulators with an enforcement method in a responsive hierarchy of sanctions, tailored to address the level of non-compliance by the offending organisation, but they also represent a responsive stage within a hierarchy of sanctions allowing regulators to tailor enforcement methods to the organisation allegedly in breach.

Enforceable undertakings go far beyond the requirements of administrative sanctions such as improvement, prohibition or infringement notices to remedy a particular issue or circumstance, because, as we will show later in this article, they can take a more widespread and systematic approach to

compliance by the organisation, providing a specific response particularised to the circumstances of the organisation, as well as the alleged contravention. As they are initiated by the duty holder, and negotiated with the regulator, they are built around, and from the outset tailored to, the circumstances of the organisation.

In addition to their responsive nature, and their role in dynamic deterrence, enforceable undertakings also contribute to the goals of rehabilitation and restorative justice:

restorative justice requires that all parties (the regulator, regulated entity and those affected by the breach) should be empowered together to make innovative, flexible and expansive undertakings that go beyond what a court would order with the purpose of identifying, correcting and preventing the original breach and its underlying causes.

Parker has argued, for example, that the use of enforceable undertakings by the ACCC (discussed further in the next section of this article):

- demonstrates at least a partial realisation of restorative justice, and at their best ACCC enforceable undertakings have demonstrated restorative justice very well indeed...

Enforceable undertakings can harness management commitment to the goal of sustained organisational change and seek to produce and institutionalise restorative justice. For example, undertakings can include commitments to compensate and rehabilitate workers, improve worker involvement in OHS management, introduce technological measures to remove hazards, or introduce measures to promote justice within, or at least confer benefits on, the broader community. And because enforceable undertakings can draw all stakeholders into the negotiations which shape the undertaking, undertakings can achieve restorative justice aims where a court imposed sanction cannot — even if such sanctions were flexible and could be tailored to the organisation’s circumstances. The UK Macrory Review of Regulatory Penalties observed that enforceable undertakings are a:

- flexible sanction that enables regulators to tailor their enforcement response to individual circumstances taking industry considerations and resources, such as management capacity and willingness to restore harm, into account.

In summary, an enforceable undertaking is more than a simple punishment, or a quick remedy for a specific contravention. To further the aims of responsive regulation and restorative justice it should be tailored to the nature of the contravention; and to the organisation involved (and its compliance and enforcement history), address extensive organisational change, and should require more than a simple remedy of the regulatory contravention. All

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28 This is not to say that enforceable undertakings are always used to address systematic issues, but rather that they are a good vehicle to induce organisations to take a systematic approach to compliance.

29 Parker, above n 4, at 211.

30 Ibid, at 220.

31 See again the discussion of possible flexible court sanctions above and in Gunningham and Johnstone, above n 19, Ch 7.

32 Macrory, above n 1, at [4.19].
stakeholders should be involved in the negotiation of undertakings. Undertakings should be designed to address contraventions and prevent their future occurrence and to shape future behaviour by focusing on systematic reform and change of corporate systems through promoting management commitment, enabling organisations to learn how to comply; and incorporating ongoing measures for assessing and improving compliance within a firm. They should also seek to achieve wider social and community justice, by addressing broader community benefits. In an ideal form, they represent a regulator-controlled model of how to ‘build’ a compliant organisation.

**Enforceable Undertakings in Other Areas of Regulation**

Because of these potential benefits, enforceable undertakings have increasingly been mooted in many areas of regulation, from anti-discrimination to environmental regulation, in Australia, the United Kingdom and New Zealand.

As noted earlier in this article, the ACCC was the first regulatory agency to introduce enforceable undertakings, and the history of undertakings within the ACCC offers an informative picture of their practical operation. For the ACCC, undertakings form the substantive alternative to civil proceedings within its enforcement framework. Between 1997 and 2002, enforceable undertakings accounted for 37 per cent of matters in which the ACCC took enforcement action, but, as Parker notes, their use has fluctuated since their introduction in 1993. The ACCC’s use of undertakings reached a peak in 2000 with 80 undertakings accepted, but then acceptance of undertakings fell to a low of 30 undertakings in 2003. Since 2004, the ACCC has shown renewed interest in enforceable undertakings, and the rates of undertakings accepted has risen and remained steady at over 50 per year since 2004, and

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35 This includes matters where other enforcement action was also undertaken in addition to the acceptance of an enforceable undertaking: Parker, above n 4, at 215.
36 Ibid.
rose to reach at least 99 in 2007.\textsuperscript{39}
## Table 1: ACCC’s Use of Enforceable Undertakings by Year

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<thead>
<tr>
<th>Year</th>
<th>Enforceable Undertakings</th>
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<tr>
<td>2007</td>
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<td>1993</td>
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<td>Total</td>
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The ACCC’s explanation for its renewed interest in enforceable undertakings reflects many of the issues discussed in the previous section of this article:

First, in the interests of public efficiency and accountability, the ACCC will accept enforceable undertakings when the outcome is broadly the same as could be achieved through a court-based resolution. Second is the issue of timeliness — the court process can lead to significant delays in, and a dilution of, the remedies for unlawful conduct. However, if the conduct is particularly serious and/or blatant a court-based resolution will be sought. Third, following the case of *Cassidy v Medibank Private*, the ACCC cannot obtain refunds through a civil court-based outcome unless it takes a representative action, whereas it can obtain refunds through an undertaking. Other more innovative outcomes are also achievable through undertakings such as compliance training programs for directors, employees, businesses and corporations. Of the 50 s 87B undertakings accepted during 2005–06 in consumer protection matters 13 involved outcomes — primarily refunds — that would not have been achieved through court orders.

Parity, economy and flexibility arguably reflect the restorative justice aims of enforceable undertakings as a responsive enforcement option.

In other federal fields, ASIC adopted enforceable undertakings into its framework in July 1998, and by the end of 2006 had accepted over 260 undertakings. Analysis of the pattern of undertakings within ASIC shows a steady decline since the 62 undertakings accepted in 2000. The ASIC

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40 This review is compiled from the *ACCC Undertakings Register (s 87B)*, above n 37 and Parker, above n 4, p 215. This is an approximate count only — some undertakings are not included on the ACCC register.


Enforceable Undertaking Register shows just 14 undertakings accepted in 2006, and only 10 undertakings accepted in 2007. There is no account for this decline in the publicly available ASIC literature.

Between 2001 and the end of 2005, APRA had accepted a total of 60 undertakings. In 2006, by contrast, it accepted 165 enforceable undertakings, 164 of these in relation to superannuation. Policy changes in enforcement practices have therefore significantly raised the profile of enforceable undertakings within this agency.

A review of enforceable undertakings in the financial sector (including at the ACCC, ASIC and APRA) recently found that:

Enforceable undertakings on the Australian model have demonstrated their effectiveness in a number of high profile cases. In particular they focus the attention of senior management in corporations that have agreed to such an undertaking on the need to ensure ongoing compliance and have provided an effective basis for obtaining compensation for clients.

A number of other federal regulatory bodies have also adopted enforceable undertakings into their frameworks, including:

- The Civil Aviation Safety Authority (CASA): there are two Enforceable Voluntary Undertakings listed at the CASA register;
- The Australian Communications and Media Authority (ACMA): since its formation in 2006, the ACMA has accepted a small number (five or less) of undertakings under its various empowering regulations. These are not provided in an accessible public register;
- The Therapeutic Goods Administration (TGA), no undertakings are recorded online by the TGA, or appear in annual reports;
- The Australian Transaction Reports and Analysis Centre (AUSTRAC), which has reported on undertakings in relation to money laundering and other offences in its annual report, but does not specify numbers or content of these undertakings.


45 Adams et al, above n 7, p 19.


49 ACMA has jurisdiction in relation to the Telecommunications Act 1997 (Cth), Spam Act 2003 (Cth) and the Broadcasting Services Act 1992 (Cth).

50 Therapeutic Goods Act 1989 (Cth) s 42YL.

51 For a discussion of these regulatory developments and the state of play in 2005, see Nehme, above n 7.

The Private Health Insurance Administration Council (PHIAC) has most recently included undertakings in its enforcement options in early 2007. They are not yet in operation.

A small number of state regulators have used enforceable undertakings in their enforcement strategies:

- The NSW Department of Fair Trading has accepted one undertaking in relation to product safety in the 2005/06 reporting period;\(^53\)
- Victorian Consumer Affairs has accepted a total of 93 accepted undertakings from their introduction in 2004 to mid-2007;
- The Queensland Office of Fair Trading accepted 190 enforceable undertakings in the 2004/05 reporting period in relation to independent contractors in the real estate industry. The 2005/06 departmental annual report also states that enforceable undertakings were used, but does not provide details or numbers.\(^54\) Undertakings are kept on a register, but this is only available in hard copy, not online:\(^55\)
- The Environmental Protection Authority Victoria is still in the process of developing guidelines for the use of enforceable undertakings.

This brief survey suggests that the actual operation of enforceable undertakings varies considerably.\(^56\) The first obvious difference is whether or not the regulator has developed the capacity to actually utilise enforceable undertakings. Enforceable undertakings require extensive policy development and consultation before they can be used effectively. Producing effective and individually tailored undertakings is a time-intensive process. Undertakings must also be monitored effectively in order to retain their power as an enforcement option. Each of these requirements means that enforceable undertakings can take time to get off the books and into practice. Many jurisdictions with the power to accept undertakings are not currently using this power in practice.\(^57\)

The second key issue of difference is in how the undertakings are created and utilised.

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\(^56\) There is some literature on the operation of enforceable undertakings within the ACCC and ASIC. See particularly: Adams et al, above n 7; Nehme, above n 7; Yeung, above n 7; N Andrews, ‘If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct Under the Corporations Act and the Australian Securities and Investments Act’ (2003) 15 *Aust Jnl Corp Law* 137; D Watt, ‘Evaluation of the use of s 87B Undertakings’ (1998) 13 *ACCC Jnl* 7. Most of this work considers legal issues and does not examine undertakings in practice, nor assess their effectiveness. Parker’s work on the use of enforceable undertakings by the ACCC is the only empirical work conducted on undertakings thus far: see Parker, above n 4.

operationalised by the regulator. To what kinds of alleged regulatory contraventions are the undertakings applied? How do the undertakings actually work in practice? Answering these questions in detail is beyond the scope of the current article, but some common features of enforceable undertakings in operation can be identified:

- Enforceable undertakings are voluntary: the regulator cannot compel a duty holder to enter into one, and a duty holder cannot compel a regulator to accept an undertaking from them. 58
- Undertakings tend to be used as an alternative to civil proceedings, or as an adjunct to civil and administrative proceedings. Their use as an alternative to criminal proceedings is more controversial, but is not ruled out by the majority of legislative provisions. 59
- Enforceable undertakings generally require a statement of regret or acknowledgement of concern in relation to the contravention. This statement is generally not required to be an admission in relation to the alleged breach. Undertakings cannot include a denial of liability, or a specific statement that the undertaking is not an admission. Undertakings often require the applicant to make a statement of positive commitment to cease the offending activity.
- The undertaking document itself will outline in detail the actions required of the applicant/s, generally including redress to injured parties, actions taken in response to the immediate incident, and other corrective action.
- Most undertakings require a systematic component, such as a compliance program, implementation of a compliance system, upgrading of a system to a particular standard, and so on.
- Most undertakings make provision for monitoring, including third party and regulator audits, reports, and other methods of assuring compliance as appropriate.
- Many undertaking programs include wider community actions, such as donations, funding, industry-wide actions such as formulation of national standards, presentations, publications, and so on.

While it is difficult to draw any definitive conclusions from this preliminary review, it does suggest that enforceable undertakings fall in and out of favour, and require expertise within the agency, considerable work to implement effectively, and effective policies and guidelines. Some regulators, notably those consistently using undertakings such as ACCC, ASIC and APRA, have developed sophisticated guidelines. Finally, there is no consistent practice to

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58 However, note recent decisions on this issue where the ASIC was effectively ‘forced’ to accept undertakings by the Administrative Appeals Tribunal, decisions upheld by the Full Federal Court in ASIC v Donald (2003) 136 FCR 7; 203 ALR 566. See also Daws v ASIC (2006) 91 ALD 138; [2006] AATA 246 in which the AAT directed that ASIC and the applicant agree to the terms of an undertaking, and if terms could not be agreed, that the AAT would set the terms: ‘Review of Decisions of ASIC Under the Administrative Appeals Tribunal Act’, Australian Corporation Law Principles and Practice, LexisNexis Online, 2008, at [15.4.0025]ff. These cases are discussed and explored in M Nehme, ‘Expansion of the Powers of the Administrative Appeals Tribunal in Relation to Enforceable Undertakings’ (2007) 25 C&SLJ 116.

ensure transparency and accountability. As we discuss later in this article, accountability and transparency in decision-making and in monitoring performance are central to the successful operation of enforceable undertakings, and in maintaining public confidence in the use of undertakings. While regulators like the ACCC and ASIC have public registers with all undertakings included, other regulators simply summarise briefly the undertakings that have been accepted and/or provide overall statistics on accepted undertakings in their annual reports, and yet others provided little, if any, information on accepted undertakings.

The inconsistencies between regulators could be addressed by encouraging conformity with national guidelines. For example, in its inquiry into Federal Civil and Administrative Penalties in Australia in 2002, the ALRC considered enforceable undertakings at some length, principally in the context of the ASIC and ACCC schemes which were then functioning. The ALRC Review generally endorsed the use of enforceable undertakings, but identified a number of issues with these enforceable undertaking schemes, principally issues of legislative clarity, legal issues surrounding the status and requirements for admissions of liability within enforceable undertakings, and guidelines for content and publication of enforceable undertakings. The ALRC made two substantive recommendations in regard to enforceable undertakings. The first (recommendation 16-2) recommended that the terms of an enforceable undertaking must:

1. bear a clear or direct relationship with the alleged breach;
2. be proportionate to the breach;
3. not require the payment of money to the regulator other than in recompense to those affected by the alleged breach or in payment of the regulator’s costs (if these are otherwise recoverable at law); and
4. stipulate a time period within which compliance with undertakings is required and not be otherwise open-ended.

This Recommendation is not intended to prevent an enforceable undertaking requiring a regulated party to perform work or undertake prescribed activities at its expense.

The second (recommendation 16-3) recommended that agencies publish guidelines outlining:

1. the circumstances in which the regulator will accept enforceable undertakings, including
   a. whether they will be used as an alternative to criminal proceedings; and
   b. the stage of an investigation or civil enforcement proceedings or proceedings to impose a quasi-penalty that the regulator will accept enforceable undertakings;
2. examples of acceptable and unacceptable terms in enforceable undertakings;
3. what will happen if an enforceable undertaking is not complied with;
4. the circumstances in which a regulator will consider a request to vary or withdraw an enforceable undertaking; and

60 Ibid, Section 16, ‘Fairness in Dealings with Regulators’.
61 There is a third key recommendation in relation to issues surrounding publicity in relation to the exercise of enforcement options: see recommendation 16-4.
5. when and how third party interests will be taken into consideration, having regard to such factors as the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator.

Finally, in the international context, since 2003 New Zealand has adopted enforceable undertakings into the powers available to its Securities Commission.62 The commission maintains a public register of undertakings, which has 25 entries.63 There were 12 undertakings accepted in 2004.

In the United Kingdom, as a key part of the Better Regulation initiative, the Macrory review of regulatory sanctions64 called specifically for enforceable undertakings to be widely introduced. The report also suggested the use of ‘Undertakings Plus’ which would include a fine to provide a more punitive option for regulators.65 These recommendations have yet to come into operation in the United Kingdom, but indicate the importance of enforceable undertakings in the future of responsive regulatory systems.66

**Enforceable Undertakings in OHS Regulation**

Enforceable undertakings are available as an enforcement option in a majority of Australian OHS statutes (including the Commonwealth, Victorian, Queensland, Tasmanian, Western Australian and Australian Capital Territory statutes).

For example, Pt 5 of the Workplace Health and Safety Act 1995 (Qld) (WHSA)69 provides for enforceable undertakings, and s 42D defines a ‘workplace health and safety undertaking’ as a written undertaking made by a person that recognises that the regulator alleges that the person has contravened the Act; identifies facts and circumstances of the alleged contravention and includes an assurance from the person about the person’s future behaviour. While on the face of the Act, a duty holder can propose an undertaking at any time, reg 229A of Workplace Health and Safety Regulation 1997 (Qld) (see also WHSA s 42D(2)) provides that an undertaking must be received by the Director-General of the Department of Employment and Industrial Relations ‘within 90 days after the identified person for the undertaking is served with a summons in relation to the alleged contravention’. This means that the use of enforceable undertakings has been

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62 Securities Act 1978 (New Zealand) s 69J.
64 Macrory, above n 1.
65 Ibid, p 68.
66 In the United Kingdom, the Competition Commission has recently been given powers to accept undertakings in regard to very specific merger circumstances in the financial sector. It is not clear whether the commission has chosen to operate these powers.
67 See also Pt 3 of the Electrical Safety Act 2002 (Qld).
68 While Western Australia offers ‘enforceable undertakings’ in the Occupational Safety and Health Act 1984 (WA), in force as of 1 January 2005, these are not enforceable undertakings in the more common sense: they are a sentencing alternative post-conviction, and are thus not comparable to the operation of enforceable undertakings discussed in the rest of this article.
69 See also Electrical Safety Act 2002 (Qld) Pt 3.
confined to being an alternative to a prosecution for a contravention of the Act. The Director-General may, by written notice, accept the undertaking (s 42E(1)), and may publish the undertaking (s 42E(3)). Upon such acceptance, the undertaking starts operating, becomes enforceable against the person making it (s 42E(2), and the person must not contravene the undertaking (s 42G). Once accepted, an undertaking can only be withdrawn or varied by the person making it with the consent of the Director-General (s 42H). If prosecution proceedings have already commenced for the alleged contravention which prompted the undertaking, when the undertaking is accepted the Director-General must take the necessary action to bring the proceeding to an end; and if a proceeding for the alleged contravention has not yet commenced, it must not commence (s 42F). If the Director-General considers that the person making the undertaking has contravened its terms, the Director-General may apply to an industrial magistrate for one or more orders directing the person to:

(a) comply with the undertaking, or a stated aspect of the undertaking, or to comply with the undertaking, or a stated aspect of the undertaking, in a stated way;
(b) pay to the state an amount that is not more than the direct or indirect financial benefit obtained by the person from, and reasonably attributable to, the breach;
(c) give a security bond to the state for a stated period; and/or
(d) make another order the magistrate considers appropriate in the circumstances (s 42I(1)–(3)). The Director-General can both seek an order under s 42I(1)–(3) and bring a prosecution for a contravention of the enforceable undertaking (s 42I(4) and (5)).

Table 2 provides an overview of the relevant provisions in the other Australian jurisdictions.
### Table 2: Summary of Australian OHS Enforceable Undertakings Provisions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Statutory Provisions</th>
<th>Implementation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth</td>
<td>Occupational Health and Safety Act 1991 (Cth) Sch 2 cl 16: Comcare may accept a written undertaking from a person in relation to the person’s fulfilment of an obligation under the Act. The person may not vary or withdraw the undertaking without Comcare’s consent. An undertaking is available as an alternative to civil proceedings or criminal prosecution under the Act. If civil proceedings have commenced and Comcare accepts an undertaking, Comcare may ask the Court to adjourn the proceedings. If the person breaches the terms of an undertaking, or withdraws or varies it without Comcare’s consent, Comcare will attempt to resolve the matter by consultation. If this is not successful, Comcare can seek a court order that the person complies with the undertaking, and any consequential orders. Comcare can also pursue any civil proceedings or criminal prosecution that it had previously elected not to pursue; or can apply to the court to revive any proceedings that were adjourned because of the undertaking.</td>
<td>The Comcare Guidelines for Applicants are substantially similar to those used in the Queensland and discussed below. The Comcare website reports on two enforceable undertakings accepted by Comcare.</td>
</tr>
</tbody>
</table>
Victoria Occupational Health and Safety Act 2004 [Vic] ss 16 and 17: WorkSafe Victoria\(^{(ii)}\) (the authority) may accept a written undertaking given by a person in connection with a matter relating to a contravention or alleged contravention of the Act or regulations. The person may withdraw or vary the undertaking at any time, but only with the authority’s written consent. Proceedings for an offence against the Act or the regulations constituted by the contravention or alleged contravention to which the undertaking relates may not be brought. If the authority considers that a person has contravened an undertaking accepted by the authority, the authority may apply to the Magistrates’ Court for the enforcement of the undertaking. If the Magistrates’ Court is satisfied that the person has contravened the undertaking, it may make an order that the person must comply with the undertaking or take specified action to comply with the undertaking; or any other order that it considers appropriate. See also Dangerous Goods Act 1985 ss 60A–60B and Equipment Public Safety Act 1994 ss 34A–34B.

Tasmania The Work Health Act 1995 (Tas) s 55A empowers ‘the Secretary’ of Workplace Standards Authority to ‘accept a written undertaking given by a person . . . in connection with a matter in respect of which the Secretary has a power or function’ under the Act. The person may withdraw or vary the undertaking, but only with the consent of the Secretary. If the Secretary considers that the person who gave the undertaking has contravened any of its items, the Secretary may apply to the Magistrates’ Court. If the court is satisfied that the person has contravened the undertaking, the court may make appropriate orders, including directing the person to comply with the undertaking and/or to compensate persons suffering injury or loss as a result of the contravention, and/or make payment of an amount not exceeding any benefit that the person may have obtained from the contravention.

WorkSafe’s Supplementary Enforcement and Prosecution policy (November 2005) outlines WorkSafe’s approach to undertakings. The WorkSafe website reports that six undertakings have been accepted by mid-October 2008.\(^{(iii)}\)

It is unclear whether this regulator has exercised this enforcement option to date.
The Occupational Health and Safety Act 1989 (ACT) Div 7.6 (ss 168–174) enables the OHS Commissioner to accept a written safety undertaking from a person the Commissioner alleges has contravened a provision of the Act, in which the person acknowledges that the Commissioner alleges that s/he has contravened the Act, identifies the facts and circumstances of the alleged contravention, and promises to rectify the contravention. On the Commissioner’s acceptance of the safety undertaking the safety undertaking becomes an enforceable safety undertaking. The person may only withdraw from, or amend, the accepted undertaking with the Commissioner’s written consent. The Commissioner, upon his or her own initiative or on the application of the person, may end an enforceable undertaking by written notice if satisfied that the undertaking is no longer necessary or desirable. Giving the safety undertaking is not an express or implied admission of fault or liability by the person in relation to the alleged contravention. If an undertaking is breached, the Commissioner may seek an order from the Magistrates’ Court to pay the value of any benefits derived from the breach; an order compensating someone who has suffered loss or damage from the breach; and/or any other order the court considers appropriate. It is an offence if a person fails to take all reasonable steps to comply with an order from the Magistrates’ Court to honour an enforceable undertaking.

ACT WorkCover has produced guidelines governing enforceable undertakings, which substantially reproduce the Queensland guidelines discussed below. Since their introduction in the 2004/05 reporting period, ACT WorkCover accepted 10 enforceable undertakings. These undertakings are not currently available online in a Register.

Table 2 Key:


For completeness, we note that the Occupational Safety and Health Act 1984 (WA) ss 55H–55R enables a court to offer the option of an enforceable undertaking once a person has been found guilty of an offence under the Act and a penalty has been imposed by the court. It is open to either the prosecutor or the offender to ask the court to adjourn proceedings to allow the parties to consider whether an undertaking is appropriate. An election to enter into an undertaking must be lodged within 28 days from when the order was made. The undertaking is offered to, and entered into with, the WorkSafe WA Commissioner, and is an alternative to the payment of fines. Undertakings can only be entered into for minor offences and where there has been no physical harm to a person, and both the offender and WorkSafe must agree that it is appropriate to enter into an undertaking. The cost to the offender of complying with the undertaking must be substantially equivalent to or greater than the amount of the fine imposed. This use of undertakings is quite different from the use of undertakings in the other Australian jurisdictions, and is more akin to the non-monetary criminal sanction of corporate probation.70

While enforceable undertakings are available to five jurisdictions as an enforcement option,71 only the Queensland OHS regulator has significant experience in using enforceable undertakings, although it appears that WorkSafe ACT, and recently WorkSafe Victoria, are regularly accepting enforceable undertakings. The remainder of this article reports on a recent exploratory study of the use of enforceable undertakings in OHS regulation in Queensland, in which we were able to gather significant data about the operation of enforceable undertakings under the Workplace Health and Safety Act 1995 (Qld).

The project was conducted with the support of the Queensland Department of Employment and Industrial Relations (DEIR) in late 2006 to mid 2007. The project had three key aims: to assess the conceptual development of enforceable undertakings in the DEIR context; to examine the implementation of enforceable undertakings within the department as an enforcement option (including an assessment of administrative procedures, decision-making processes and compliance monitoring); and, finally, to begin to assess the effectiveness of enforceable undertakings as an enforcement option (including exploration of the regulator’s goals for effectiveness, internal measures of performance and a preliminary exploration of possible effectiveness indicators). The research methodology included documentary analysis, participant observation and interviews with over 40 stakeholders in the enforceable undertaking process within Workplace Health and Safety Queensland, including key departmental officers and management, key

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70 See, eg, Gunningham and Johnstone, above n 19, pp 266–72.
71 Western Australia has been excluded here due to the different nature and purposes of their ‘enforceable undertakings’.
decision-makers, applicants and successful applicants for enforceable undertakings, external third-party auditors, and other stakeholder representatives. In reporting on the project, first we outline the regulatory framework for the use of enforceable undertakings under the Workplace Health and Safety Act 1995 (Qld) (WHSA); then we analyse the use of enforceable undertakings, and draw preliminary conclusions about their likely effectiveness.

**Enforceable undertakings in OHS Regulation in Queensland: The Decision-Making Process**

The core policy document which governs the Queensland Department of Employment and Industrial Relations' implementation of enforceable undertakings is *Enforceable Undertakings under the Workplace Health and Safety Act 1995 and the Electrical Safety Act 2002: Information for Applicants* (which will be referred to in the remainder of this article as ‘the Guidelines’). These Guidelines outline the objectives of enforceable undertakings, the way in which enforceable undertakings are intended to operate under both the WHSA and the Electrical Safety Act 2002 (ESA); the decision-making process and the relevant principles governing that process; requirements for the content of the undertaking; and administrative processes. The Guidelines provide detailed information to applicants, particularly in relation to required content and the factors considered in accepting or rejecting an application. There is also a draft template of an undertaking within the Guidelines. Some examples of appropriate terms are also included.

Of particular interest are the six principles which apply to the consideration of applications for enforceable undertakings. These principles specify that:

1. Undertakings will deliver tangible benefits to workers, industry and or the community;
2. Undertakings will deliver benefits beyond compliance;
3. Undertakings will not be accepted in cases involving workplace or electrical fatalities or very serious breaches of the WHSA or ESA (except in exceptional circumstances);
4. Enforceable Undertakings may be publicised;
5. Enforceable Undertakings must be monitored; and
6. All departmental costs are recoverable.

These principles are considered in detail and applied by the department (in the guise of a four person Evaluation Team) in considering applications, and by the Director-General in the exercise of his discretion to accept or reject an application.

The Guidelines specify that a proposed undertaking will be considered by the Director-General on a ‘case by case basis’, and will be accepted if ‘it offers the most appropriate enforcement action in the circumstances of the case’. In addition to the six general principles outlined above, the Director-General will

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73 Referred to in the Guidelines as the Chief Executive.
consider the following factors in the exercise of his or her discretion to accept or reject the undertaking:

- the impact of the enforcement action, especially its impact on encouragement and deterrence;
- the compliance history of the obligation holder;
- the extent of the risk;
- the seriousness of the perceived contravention and the actual or potential consequences;
- whether a target issue, a target hazard or specific strategic priority is involved;
- whether the incident or nature of the non-compliance is of considerable public concern;
- the need to highlight a common hazard or risk in order to deter other workplaces from continuing particular practices;
- the views or opinions, expressed in writing, of any person injured as a result of the incident; and
- information relating to any rehabilitation activity or program or other support or assistance that was provided to injured persons.74

The relevant DEIR Regional Manager and the DEIR’s Legal and Prosecution Services are required to make a determination as to the ‘objective gravity’ of the alleged offence. The Guidelines specify that:

The objective gravity of the alleged offence that is the subject of the Enforceable Undertaking application will be assessed by looking at:

- compliance by the obligation holder to the principles of risk management embodied in the relevant Act;
- the actual and potential risks;
- culpability;
- aggravating or mitigating factors;
- cooperation with the department throughout the investigation;
- previous sanctions and prior prosecutions;
- remorse, and
- previous compliance history.75

The application process76 is often a lengthy one. As we have noted earlier, enforceable undertakings are voluntary, and can only proceed within 90 days of an OHS prosecution being initiated, by the obligation holder (the alleged offender), not by the regulator. The application process is administered by Enforceable Undertakings Coordinators within DEIR. Once an application has been received, an initial meeting is usually held between the applicant (a management representative, usually accompanied by their legal representative) and a coordinator, in which the coordinator explains the requirements that need to be met in applications and answers any questions. In the majority of cases (and notably in those applications that are successful),

74 Ibid.
75 Ibid.
76 This overview is informed by the Guidelines, the legislative review discussed earlier in this article; interviews undertaken during the course of the project; participant observation (including at a number of Evaluation Team meetings); and review and analysis of enforceable undertakings and Evaluation Matrices.
there continues to be extensive contact and consultation between the coordinators and the applicant throughout the application stage.

Based on the final application submitted by an applicant, a lengthy Enforceable Undertaking Matrix (Matrix) is prepared by the coordinators, and this is considered by the Evaluation Team. The Matrix contains:

- Details of each aspect of the proposed enforceable undertaking and an assessment of whether or not the applicant has met the DEIR criteria outlined above;
- A submission by the Director, Legal and Prosecutions Services in relation to the alleged contravention, including an assessment of the objective gravity of the contravention; the prior enforcement history of the applicant; the current status of the matter; current legal costs; and related issues;
- A submission from the relevant Regional Manager regarding the compliance history of the enforceable undertaking applicant; an assessment of the applicant’s cooperation with the investigation and with any notices issued in relation to the matter; an assessment of any other actions the applicant undertook after the alleged incident to address the core problem; and a general comment on the application and the terms of the undertaking proposed.
- A WorkCover report detailing any current claims, including those relevant to the current contravention; any issues arising in relation to the current matter; and a worker’s compensation contribution premium rate assessment comparing the applicant to industry norms;
- The complaint and summons, and a ‘statement of facts’ as prepared for Legal and Prosecutions Services by the original investigator of the alleged contravention; and
- The information gathered from contacting the injured worker involved and that worker’s support or opposition to the proposed undertaking.

The Evaluation Team is constituted by two external advisors, and either the General Manager of Workplace Health and Safety, or of the Electrical Safety Office, depending upon whether the application is made under the WHSA or the ESA. The team makes a recommendation to the Director-General as to whether or not the application complies with the intentions of the enforceable undertaking program and, finally, the opinion of the team as to whether or not the application should be accepted or rejected by the Director-General.

The full Matrix (which includes space for comment by the Evaluation Team throughout), the recommendation and a briefing note covering this material go to the Director-General for consideration. The Director-General either accepts or rejects the application. If the enforceable undertaking is accepted, it is

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77 Two advisors are chosen from a group of four advisors. These advisors are external to the DEIR, and have considerable workplace health and safety interest and experience. Two of the external advisors have backgrounds representing worker interests, and two have backgrounds representing industry interests. This ensures a significant degree of ‘deliberative accountability’ in decision-making, because it ensures that the wider interests of stakeholders are taken into account: see Parker, above n 4, at 243–5.
signed by the Director-General and begins operation as at that date. The Director-General provides a written decision which is usually several pages in length and which specifies the considerations, principles and legislative requirements of enforceable undertakings as applied to the undertaking at issue.

How, then, has the Director-General exercised his discretion in regard to the acceptance and rejection of enforceable undertakings to date? Enforceable undertakings became available under the WHSA and ESA on 1 July 2003. Table 3 provides a breakdown of matters as at the end of 2007. At that date, 35 undertakings have been accepted, and 22 rejected, with a total of 52 formally considered by the Director-General. An additional 13 matters have been formally withdrawn.

**Table 3: Enforceable Undertakings: Applications as at the end of 2007**

<table>
<thead>
<tr>
<th>EU Status</th>
<th>Number</th>
<th>Percent</th>
<th>Subtotal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accepted</td>
<td>35</td>
<td>50</td>
<td>35</td>
</tr>
<tr>
<td>Rejected</td>
<td>22</td>
<td>31.5</td>
<td>57</td>
</tr>
<tr>
<td>Withdrawn</td>
<td>13</td>
<td>19.5</td>
<td>70</td>
</tr>
<tr>
<td><strong>Total of Finalised Matters</strong></td>
<td><strong>70</strong></td>
<td><strong>100</strong></td>
<td><strong>70</strong></td>
</tr>
</tbody>
</table>

Why did firms propose undertakings? Firms indicated to us in interviews that their motives for applying for an undertaking were to avoid conviction, coupled with an aspiration or identified need to improve OHS processes and systems within the business. This thinking was neatly summarised in the words of one firm:

Essentially . . . we had a management view that there were certain areas that did need a lift in their safety approach, and an enforceable undertaking would be a good vehicle for giving that impetus. There was the other view that a prosecution would involve a penalty which essentially is money that is foregone with no real benefit. Whereas the money spent during the enforceable undertaking, while considerably more than the penalty, was money that was essentially invested back into the business in the process of making the business safer, and some of those safety measures actually made aspects of the business more efficient.

In this project we analysed enforceable undertakings up to February 2007.\(^7\)\(^8\) As at February 2007, 65 applications had been formally completed, which included 31 accepted applications, 21 rejected undertakings, and 13 withdrawn from consideration. Table 4 shows that 59% of all applications formally considered by the Director-General were accepted.

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\(^7\)\(^8\) This is due to the extensive document and hard-copy file review undertaken. Continuing to assess files as they work in operation after the end of February was not a viable research option.
Undertakings routinely take a considerable time to assess — from initial inquiry to finalisation by acceptance, rejection or withdrawal. At the time of the study the performance goal of the Enforceable Undertakings Unit was to process applications within six months of their receipt. The average time for assessing the 65 finalised matters was 7.5 months, with a range of one to 18 months, and a median of six months and a mode of seven months. Eight applications (12%) have taken 12 months or longer (six of these were accepted and two rejected).

As Table 5 shows, there has been a fairly consistent rate of assessing applications (resulting in acceptance or rejection by the Director-General, or withdrawal by the duty holder), with the peak number of undertakings processed in the 2004–2005 financial year. Rejections have fallen from an initial high of 13 (2004/05) to a current low of one (2006/07).

The most significant reason for the rejection of each application is presented in Table 6.
Table 6: Main Factor of Significance in Rejection of an Application

<table>
<thead>
<tr>
<th>Factors of Significance in Rejection</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>The injury was a fatality</td>
<td>5</td>
</tr>
<tr>
<td>Issues surrounding the benefits proposed (benefits insufficient or 'minimal'; little or no industry benefits; little or no community benefits)</td>
<td>5</td>
</tr>
<tr>
<td>Failure to notify Workplace Health and Safety of the incident in a timely fashion (or at all, in three cases the incident was brought to the attention of the Division by the injured worker themselves)</td>
<td>4</td>
</tr>
<tr>
<td>Quantum value of undertaking insufficient</td>
<td>3</td>
</tr>
<tr>
<td>Failure to meet essential criteria</td>
<td>2</td>
</tr>
<tr>
<td>Prior history of compliance considered problematic</td>
<td>2</td>
</tr>
</tbody>
</table>

Total Rejected Undertakings: 21

In two cases, the Director-General’s decision to reject an application has been reviewed. In one case, an applicant requested the Director-General to reconsider the application, on the grounds that there were exceptional circumstances warranting the acceptance of the undertaking even though the contravention had resulted in a fatality. The applicant was allowed to submit a second application in order to put forth this argument. However, this second application was also rejected after a second formal review by the Director-General, in which it was held that exceptional circumstances had not been made out.

In the second case of review, the decision of the Director-General was submitted for judicial review under the Judicial Review Act 1991 (Qld). In BBC Hardware Ltd v Henneken,80 BBC Hardware’s key arguments for review rested on the basis that the application had been rejected even though an application made by another party in relation to the same incidents had been accepted by the Director-General. BBC’s application was rejected. The court held that there had been no error in law or improper exercise of the discretionary power in the Director-General’s decision to reject BBC’s application for an enforceable undertaking. In reaching its decision, the court analysed the procedures, principles and guidelines at length, including the processes in place for assessing and recommending an application for an undertaking.81 In a comment on the decision, Richardson notes that:

Each proposed workplace health and safety undertaking needs to be considered on the merits of the proposal. Ultimately, this may mean that one party’s proposal may be accepted, while the other party’s proposal may not.82

79 The Director-General produces a written document detailing reasons for rejection. The data in Table 6 is a summary of these written reasons.
80 [2006] QSC 149; BC200604554.
82 Ibid, at 256.
This is a result of the two parties’ “different roles in the events that resulted in the incident or if the size, nature and resources of the operation of the respective parties are significantly different.”

Our study suggests that, as the decision-making process becomes fine-tuned, and potential applicants develop a better understanding of the process (particularly DEIR policy and the outcomes of decisions), applications are far more likely to succeed, and fewer applications are withdrawn. A serious and committed applicant will take advantage of the opportunity to prepare a sound application that addresses the wider goals of OHS in their workplace, in accordance with the guidelines and requirements of DEIR. In our view, these are the kinds of applicants for which enforceable undertakings are most suitable.

**Enforceable Undertakings in OHS Regulation in Queensland: The Content of Accepted Enforceable Undertakings**

As discussed earlier in this article, the guidelines require enforceable undertakings to provide substantial benefits to workers and the workplace, industry and the community — benefits which should “go beyond mere compliance”. Terms found in undertakings that were accepted include:

- An Occupational Health and Safety management system implemented and audited to an acceptable standard (usually that outlined in AS/NZ 4801: 2001);
- Other benefits to the company’s workplace and workers;
- Benefits to industry;
- Benefits to the community, and having some sort of nexus with the contravention;
- Auditing of both the OHS management system and the undertaking itself; and
- Detailed costing of the above.

Further, all enforceable undertakings contain:

- A description of the incident;
- An acknowledgement of the allegation (not an admission of liability);
- A description of the allegation;
- A statement of regret about the incident;
- An assurance about future behaviour;
- A requirement to provide third-party audit reports on compliance to the terms of the undertaking to WHSQ;
- Provision that Investigation and Monitoring costs incurred by the WHSQ be paid by the applicant within 30 days of acceptance of the undertaking; and
- A statement of the total value of the undertaking.

At the core of the undertaking are the terms and benefits proposed. Generally, these benefits centre on the company itself and improvements to its

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83 Ibid.
safety internally. As noted above, all undertakings include a requirement to upgrade and/or audit the company’s OHS management system, and specify this audit to the standards outlined in AS/NZ 4801 in the majority of cases. Other key benefits are listed in Table 7. These are presented in summary form only, and we note that in many cases multiple benefits of the same type are included in an undertaking (for example, training packages in a variety of areas, or training for management as well as for workers, etc).

**Table 7: Central Benefits to Workers and the Workplace**

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Number of Undertakings Containing Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upgrade or implement an OHS system</td>
<td>31</td>
</tr>
<tr>
<td>Conduct audits on OHS system to AS/NZ 4801</td>
<td>30</td>
</tr>
<tr>
<td>Training</td>
<td>22</td>
</tr>
<tr>
<td>Change operational practice in relation to task and/or equipment</td>
<td>12</td>
</tr>
<tr>
<td>Appointment of staff in OHS, or OHS management</td>
<td>6</td>
</tr>
<tr>
<td>Establish a workplace health and safety committee</td>
<td>3</td>
</tr>
<tr>
<td>Obtain a best-practice industry accreditation</td>
<td>1</td>
</tr>
</tbody>
</table>

The ease with which these provisions in relation to systematic OHS management are included in enforceable undertakings begs the question as to why the OHS statutes do not currently vest courts with the power to make corporate probation orders (particularly organisational reform orders) to similar effect.\(^\text{84}\)

There are a range of benefits proposed for industry within enforceable undertakings, as Table 8 demonstrates. Core benefits involve the communication of lessons from the incident and the company’s responses to it, usually by a presentation to industry at a conference or by publication in an industry journal or newsletter. Some undertakings included extensive training packages for use in industry, advice and assistance to smaller businesses, or developed a code of practice in relation to a core issue for the industry.

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\(^{84}\) See Gunningham and Johnstone, above n 19, pp 266–72.
Table 8: Central Benefits to Industry

<table>
<thead>
<tr>
<th>Benefit</th>
<th>Number of Undertakings Containing Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Present paper to industry</td>
<td>23</td>
</tr>
<tr>
<td>Advise industry on the core issue and responses</td>
<td>10</td>
</tr>
<tr>
<td>Develop training for industry</td>
<td>5</td>
</tr>
<tr>
<td>Provide advice and assistance to smaller businesses within the industry in relation to the incident, responses, or general OHS</td>
<td>4</td>
</tr>
<tr>
<td>Develop industry code of practice in relation to a particular matter</td>
<td>4</td>
</tr>
</tbody>
</table>

Wider community benefits range widely and include:
- Donations to specific hospitals and services;
- Funding of training programs in Indigenous communities in relation to employment;
- Organising and funding a town ‘safety day’;
- Development and airing of television advertisements about marine safety;
- Funding of research into the development of a radio frequency ignition device for jet-skis;
- Funding, hosting and organising of a ‘youth roundtable’ to address OHS issues facing young workers in rural areas; and
- The provision of specified voluntary assistance to a rural fire brigade.

These industry and community benefits provide important lessons for OHS policy makers considering the usefulness of non-monetary sanctions which might be included in the array of prosecution sanctions in an OHS statute. They illustrate the kinds of OHS projects that might well be the subject of a court order to carry out an OHS-related project.

Enforceable Undertakings in OHS Regulation in Queensland: Effectiveness

The examples provided earlier in this article show how enforceable undertakings offer tangible benefits to the workplace, industry and community. The simplest measure of ‘benefits’ offered by enforceable undertakings is in dollar value. The total dollar value of all accepted undertakings to February 2007 is presented in Table 9, which was prepared by the Enforceable Undertakings Unit. The table shows very clearly that the monetary value of undertakings made by duty holders is worth more than six times the dollar value of the maximum possible penalty for the alleged breach if the matter had been successfully prosecuted. According to the accepted undertakings, over $6 million has been (or will be) spent on OHS measures within workplaces, industry and the community, as a result of the enforceable undertaking program in Queensland.
Table 9: Financial Value of Accepted Enforceable Undertakings Compared to Minimum and Maximum Penalty

<table>
<thead>
<tr>
<th>Accepted EUs</th>
<th>Minimum Penalty</th>
<th>Maximum Penalty</th>
<th>EU Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>31</td>
<td>$691,000.00</td>
<td>$915,000.00</td>
<td>$6,216,643.75</td>
</tr>
</tbody>
</table>

Table 10 below demonstrates the profound difference in dollar outcomes between court matters in fines and by accepted undertakings. The average value of the measures in the 31 accepted undertakings is $200,536.87 per undertaking, with a total value of $6,216,643.75. In contrast, the average fine given to rejected applicants in subsequent prosecutions is $25,100. The total value of enforceable undertakings is over eight times the total of fines paid in both rejected and withdrawn matters combined. If the average value of fines for rejected applicants is used, accepted applications would have been fined a total of $809,100 if prosecuted, only 13% of the value of the undertakings agreed to.

Table 10: Comparative Dollar Outcomes for Accepted, Rejected and Withdrawn Applicants

<table>
<thead>
<tr>
<th>EU Result</th>
<th>Number</th>
<th>Total dollar amount</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Withdrawn</td>
<td>10</td>
<td>$261,000.00</td>
<td>$26,100.00</td>
</tr>
<tr>
<td>Rejected</td>
<td>20</td>
<td>$502,000.00</td>
<td>$25,100.00</td>
</tr>
<tr>
<td><strong>subtotal Withdrawn and Rejected</strong></td>
<td>30</td>
<td>$763,000.00</td>
<td>$25,433.00</td>
</tr>
<tr>
<td>Accepted</td>
<td>31</td>
<td>$6,216,643.75</td>
<td>$200,536.87</td>
</tr>
</tbody>
</table>

Of course, it is the application of the money involved in undertakings to substantive OHS issues that is key to the social value and effectiveness of enforceable undertakings. Fines are paid into Queensland’s Consolidated Revenue. Money spent through undertakings is intended to be applied to the health and safety of workplaces, industry and the wider community.

Another way of evaluating the effectiveness of enforceable undertakings is to examine the impact of undertakings on the firms concerned. The 10 holders of enforceable undertakings interviewed for this project were consistently positive about the effect of enforceable undertakings on their business and on OHS within their workplaces. Echoing firms’ comments on why they proposed undertakings (discussed above), these perceptions were centred on tangible benefits to the company itself, especially as compared to the perceived outcome of prosecution. Typical comments from duty holders included:

85 This table is compiled from internal data gathered from the Department of Employment and Industrial Relations in relation to each of the 31 enforceable undertakings accepted by the department. The calculations are the sum total of maximum and predicted minimum penalties for each case, and the values of each enforceable undertaking.
It’s far better for organisation to channel their improvements into getting better safety outcomes, rather than going through a prosecution process.

I’ve got no doubt about that ... what was actually done in the enforceable undertaking was very effective for workplace health and safety, and certainly had a lot more benefit than a prosecution ever would have had.

I think it assisted us in a cultural change towards better risk management and taking risk a lot more seriously, all kinds of different risks.

Table 7 above showed the central benefits offered in the enforceable undertakings accepted by the Director-General. All include significant improvements in the systematic management of OHS, and all bar one include extensive requirements to audit these systems.

The effects of the enforceable undertaking process, as reported in interviews by duty holders, auditors and their legal representatives, can be summarised as:

- A more systematic approach to managing OHS, primarily through the implementation of an OHS management system and/or auditing of such a system to AS/NZ 4801;
- increased resources allocated to OHS, including:
  - staffing levels, such as the appointment of dedicated risk management or OHS staff (including workplace health and safety officers, and where such officers are mandatory, increasing the required numbers of such officers, etc);
  - workforce training in OHS; and
  - OHS improvements to plant and safety equipment to best practice standards;
- cultural changes within the organisation in regard to attitudes to OHS; including:
  - changes in management perceptions and operational commitment to OHS;
  - increased knowledge of and commitment to OHS throughout the company at both management and worker levels; and
  - increased worker participation (such as toolbox meetings, increased reporting of incidents and problems, and increased input into safety management, including greater management commitment to working with health and safety representatives);
- recognition of direct cost savings in terms of:
  - reduction in the payment of worker and/or public liability compensation payments and premiums (one company reported a drop to a mere 10% of its pre-Enforceable Undertaking level of claims payout);

86 We acknowledge that these benefits are self-reported by duty holders, but interviews with other stakeholders confirmed these observations.
– efficiencies and savings due to improvements in work (and plant) processes and production; and
– a reduction in workplace incidents and associated costs (including time lost to injury).

**Formal and Deliberative Accountability: Transparency, Monitoring and Auditing**

To be effective enforcement mechanisms, there needs to be public confidence in the process of accepting or rejecting applications for undertakings, and enforceable undertakings need to be monitored and enforced. Accountability is central to the successful operation of enforceable undertakings and operates at two key stages: 87 in decision-making; and in performance (monitoring).

*Formal accountability* 88 is of particular concern at two stages. The first is the decision stage where an undertaking is accepted or rejected. These decisions should be transparent and consistent. These decisions should be subject to judicial review, as is the case for enforceable undertakings in OHS in Australian jurisdictions. Earlier in this article we discussed an instance of judicial review of a decision to reject an undertaking in Queensland. There should also be informal and deliberative accountability, in the sense that all affected parties must be identified and involved in the decision-making process: for example, representatives of employer associations, trade unions and the regulator should be involved in the decision to accept or reject an undertaking, and any workers affected by the contravention which led to the undertaking, should be consulted. There should be public scrutiny of regulatory discretion: for example, accepted undertakings should be available for scrutiny:

where a regulator has accepted an [Enforceable Undertaking], the Undertaking should be made available publicly. This is important to secure public confidence in the regulatory enforcement system, but businesses who have agreed undertakings will also benefit since it will demonstrate that it is taking responsible action in relation to a breach. 89

A public register is essential for the public accountability of enforceable undertakings:

making enforceable undertakings publicly available allows lawyers and industry and consumer groups to assess critically regulators’ performance in accepting enforceable undertakings and gives regulators the chance to explain and justify their policies and practices. It also gives participants in enforceable undertaking negotiations information about the different types of terms that have been negotiated previously, and hence empowers them to bargain more effectively. 90

The second stage is the performance (or compliance) stage. Here it is crucial that the regulator should be able to enforce compliance with the undertaking, as is the case in all of the OHS statutes with undertakings.

87 Parker, above n 4, at 241–3.
88 Ibid.
89 Macrory, above n 1, p 68.
90 Parker, above n 4, at 244.
Accountability at the compliance stage is more than the legal capacity to enforce an undertaking: undertakings must be monitored and, where compliance with the terms of the undertaking is inadequate, the undertaking must be enforced.

In his recommendation that the UK government introduce enforceable undertakings as an enforcement option, Macrory pointed to a number of practical issues involved in their introduction, including increased monitoring responsibilities:

Enforceable Undertakings would require an increased monitoring role for the regulator, as it will be involved in following up EUs to ensure that the conditions are carried through.\(^{91}\)

Monitoring compliance with enforceable undertakings is central to the credibility of undertakings as an enforcement option.

Parker specifies that regulators require both capacity and commitment to rigorous monitoring standards in order for enforceable undertakings to operate successfully and credibly. Her key recommendations\(^{92}\) for effective monitoring of enforceable undertakings include:

1. That monitoring is conducted centrally within the regulator, rather than by the officer who investigated the original contravention that led to the enforceable undertaking.

2. That the regulator should publish clear policy and guidance on:
   a) the required qualifications of auditors;
   b) issues of conflict of interest, such as whether the auditor can have had previous involvement with a company; and the requirement that there be different auditors monitoring compliance with specific requirements (for example that a specific type of OHS management system be implemented), and periodic monitoring of compliance with the terms of the undertaking generally;
   c) requirements of a compliance program audit, how compliance with an enforceable undertaking is to be assessed, requirements for the frequency and content of compliance audit reports; and how the regulator is to monitor the reports of third party auditors;

3. That effective monitoring of each enforceable undertaking requires the regulator having continuing and responsive engagement with both the auditor(s) and with the firm that has entered into the undertaking.

4. That, in addition to relying on third party audits, the regulator undertake a final audit of compliance with the terms of the undertaking at the completion of each undertaking.

The little empirical work that has been carried out on enforceable

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\(^{91}\) Macrory, above n 1, p 68.

undertakings, including our Queensland OHS study, suggests that the weakest point in processes for implementing enforceable undertakings is auditing and monitoring firms’ compliance with the terms of the undertaking they have entered into. In the case of Queensland, third party auditing was the principal auditing method used. DEIR had a spreadsheet to monitor progress with enforceable undertakings, but minimal resources to track actual progress. During 2008 significant improvements have been made, including the appointment of additional staff to conduct monitoring functions. To date, no obligation holder has been prosecuted for non-compliance with an enforceable undertaking under an OHS statute, and under-enforcement is a characteristic of other regulatory regimes.93

Conclusion

This research suggests that enforceable undertakings can have a significant impact upon the organisational culture of firms, on their compliance with OHS law, on their acquisition and implementation of skills in relation to systematic OHS management and in the delivery of tangible benefits to workers, industry and community. Revisiting the three stages of compliance outlined earlier in this article, our research suggests that enforceable undertakings can, indeed, significantly improve compliance with OHS statutory standards.

For example, enforceable undertakings increased management commitment to comply, as the following comments by a firm indicates:

You’re duty bound and all the activities that surround that gain special status in the organisation and that’s important particularly for someone who like myself who has to be the champion of dealing with it, you’ve got to sort of drive it through the organisation and it involves participation by the whole organisation, and you’ve got to draw everyone in . . . and if it’s just your personal vent on trying to make the business a little less risky, well that’s one thing, but if you’ve got the weight of an enforceable undertaking behind you you’re able to get busy quicker and get more commitment from the rest of the organisation.

Other parties also identified management commitment as an outcome of enforceable undertakings. One auditor observed that:

I have seen a great improvement in the safety management systems and in management awareness.

Our data also demonstrated that enforceable undertakings prompted firms to learn how to comply. Most enforceable undertakings involve the implementation of OHS management systems which are put into place by expert third parties in collaboration with the firm involved. The appointment of a specialist expert or management position within a firm is also common after an undertaking is agreed to. Further, as one firm noted:

Realistically, if you’ve got someone who’s coordinating and managing the process, [. . .] if you’ve committed to timeframes, that should be pretty straightforward to ensure compliance. It’s not rocket science really.

93 Note that Parker identifies only three cases in which the ACCC had enforced compliance with an undertaking as at 2003 in her comprehensive review of monitoring requirements for enforceable undertakings in the two papers cited at n 92.
Third, enforceable undertakings can play a major role in *institutionalising compliance*. Enforceable undertakings specifically deal with:

a. Implementation of a compliance management system;

b. Provisions for set monitoring timelines and audits on:

   i. Compliance with the undertaking itself; and

   ii. Compliance with the requirements of the appropriate system for managing compliance (this can include accreditation to a particular standard, such as AS4801 in the case of OHS; and

c. Provision for ongoing internal monitoring, such as committees, incident reporting, internal audits, and so on.

As one firm observed:

Look we’re very keen on them. We’re hoping that we’re not going to have to ever have to do another one but certainly for our organisation it’s been very positive in terms of precipitating a change of culture internally because the fact that it is the very nature of an enforceable undertaking is you have to do it. It’s not something that you do if you feel like once you agree to it.

This preliminary and exploratory study suggests that enforceable undertakings are important enforcement mechanisms in the OHS enforcement framework, because they are flexible; they can motivate and promote systematic approaches to OHS management; and the costs they impose can both act as a deterrent, but at the same time redirect resources within the firm to developing systematic approaches to managing OHS. But for enforceable undertakings to be credible, OHS regulators need to ensure that they are properly monitored and that the contents of undertakings are open to public scrutiny.