

Enforceable Undertakings: Are they Procedurally Fair?

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Abstract

An enforceable undertaking is an administrative sanction available to the Australian Securities and Investments Commission ('ASIC'). It is a form of settlement between ASIC and an alleged offender. However, enforceable undertakings provisions have been criticised in the past because they do not specify the procedure that needs to be followed by the corporate regulator when accepting an undertaking. This article considers the procedural fairness of an enforceable undertaking from an administrative law perspective and from the perspective of an alleged offender: will an alleged offender perceive the process of entering into an enforceable undertaking to be fair or not? In this context, the article also analyses whether an enforceable undertaking should be subject to any type of review.

I Introduction

An enforceable undertaking is an administrative sanction available to various Australian regulators at both the federal and state level. It is used in a number of instances to deal with alleged breaches of the law. While such an administrative sanction was considered in 2002 to be unique to Australia,¹ today, similar sanctions exist overseas.² For example, in the United Kingdom, as a result of the *Macrory Review* report and consultation paper,³ a number of new sanctions were introduced in 2008 such as enforcement undertakings that are the equivalent of the Australian enforceable undertakings.⁴ Further, in the United States, settlements are commonly used by the Securities Exchange Commission to deal with certain breaches of securities law.⁵ The use of administrative sanctions such as enforceable undertakings and settlements is on the rise and a study of the manner in which these sanctions are being used is essential to ensure the fairness of the regulatory system.

In Australia, the first regulator that had this sanction at its disposal was the Australian Competition and Consumer Commission ('ACCC') in 1993 with the introduction of s 87B

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¹ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (December 2002) 98 [2.159].

² Marina Nehme, 'Enforceable Undertakings in Australia and Beyond' (2005) 18 *Australian Journal of Corporate Law* 1.

³ Professor Richard Macrory, 'Regulatory Justice: Sanctioning in a Post-Hampton World' (Consultation Document, May 2006) 4.

⁴ *Regulatory Enforcement and Sanctions Act 2008* (UK) c 13, s 50.

⁵ Sarah Johnson, 'SEC Settlements Rise 16% in Q1', *CFO* (online), 16 April 2009 <<http://www.cfo.com/article.cfm/13518063>>.

to the *Trade Practices Act 1974* (Cth).⁶ Due to the apparent success of this remedy,⁷ the sanction became available to the Australian Securities and Investments Commission ('ASIC') — among other regulators — in 1998.⁸ It is the use of enforceable undertakings by this regulator that forms the centrepiece of this article.

An enforceable undertaking is a form of settlement that may be enforced in court by the corporate regulator if the party who agreed to the terms of the undertaking does not comply with them.⁹ The enforceable undertaking is the result of a compromise between ASIC and an alleged offender (the promisor) that is reached to deal with an alleged breach of the law. ASIC may accept an enforceable undertaking instead of seeking a civil order from a court, taking administrative action, or referring the matter to another administrative body.¹⁰ However, this sanction cannot be used as a replacement for criminal sanctions.¹¹ ASIC can also accept an enforceable undertaking when such an undertaking may change the compliance culture of an organisation.¹² To achieve this, the promisor usually promises to stop the alleged contravention, implement a compliance program to prevent the future occurrence of similar breaches, and/or rectify any negative impact the conduct may have had on the general public. Accordingly, an enforceable undertaking aims to:¹³

- protect the public;
- prevent similar future breaches from occurring;
- change the compliance culture of an organisation; and
- correct the effect of the contravention.

Section 93AA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') provides 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.' A similar provision in s 93A(1) of the ASIC Act relates to enforceable undertakings accepted due to alleged contraventions of registered managed investment schemes provisions.¹⁴ The content of ss 93AA and 93A of the ASIC Act illustrates the fact that an

⁶ *Trade Practices Act 1974* (Cth) s 87B(1): 'The Commission may accept a written undertaking given by a person for the purposes of this section in connection with a matter in relation to which the Commission has a power or function under this Act'.

⁷ The ACCC accepted over 1000 enforceable undertakings from 1993 to 2009.

⁸ Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *Modern Law Review* 209, 210; Nehme, 'Enforceable Undertakings in Australia and Beyond', above n 2.

⁹ *Australian Securities and Investment Commission Act 2001* (Cth) ss 93AA–93A ('ASIC Act').

¹⁰ Australian Securities and Investments Commission, 'Enforceable Undertakings' (Regulatory Guide No 100, Australian Securities and Investments Commission, March 2007) 7 [2.1] ('*Regulatory Guide 100*'). ASIC will not consider an enforceable undertaking unless there is reason to believe that there has been a contravention of relevant legislation and ASIC has commenced an investigation into the conduct believed to give rise to the alleged breach.

¹¹ *Ibid* 8 [2.5(a)].

¹² *Ibid* 7 [2.3(b)].

¹³ *Ibid*; Karen Yeung, *The Public Enforcement of Australian Competition Law* (Australian Competition and Consumer Commission, 2001) 120–1; 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, 118.

¹⁴ The similarity in the terms of ss 93AA and 93A of the ASIC Act and s 87B of the *Trade Practices Act 1974* (Cth) has been recognised in a number of judgments. The judgments in relation to these provisions are regularly cross-referenced. See, eg, Marina Nehme, 'Enforceable Undertakings and the Court System' (2008) 26 *Company and Securities Law Journal* 147.

enforceable undertaking is only possible when a meeting of minds takes place. As a result, ASIC cannot force an alleged offender to enter into an undertaking.¹⁵

The negotiation leading to an enforceable undertaking bears a striking resemblance to mediation even though a mediator is not involved in the process. The similarity centres on the fact that an enforceable undertaking has to be agreed to by both parties. Accordingly, there is a consensual element to mediation and enforceable undertakings which may allow an enforceable undertaking to become a restorative sanction.¹⁶ Additionally, as with mediation, there may be a disparity in power between the parties involved in the undertaking (ASIC and the promisor). Such inequality in bargaining power and the lack of involvement of independent third parties has led to criticism of the use of undertakings.¹⁷ This was further accentuated by the fact that the provisions dealing with this sanction do not specify a procedure that needs to be followed when an enforceable undertaking is being considered.¹⁸ Some commentators have noted that this lack of required procedure may lead to arm-twisting and bullying by the parties involved in the negotiation.¹⁹ This raises questions about the procedural fairness of ASIC's undertakings from both an administrative law perspective and a psychology theory perspective.²⁰

The second part of this article highlights the importance of having a fair procedure to enter into an undertaking. The third part outlines the elements that need to be present to achieve such fairness. Based on these elements, the fourth part of the article assesses whether an enforceable undertaking is procedurally fair from an administrative law perspective and psychology theory perspective. This assessment will, in part, use psychological concepts and research to determine whether the promisor is likely to perceive as fair the procedure leading to an enforceable undertaking. Ultimately, this article determines that, despite the criticisms ASIC has faced in the past regarding the procedural fairness of undertakings, this sanction is procedurally fair from both an administrative law perspective and a psychology theory perspective. However, the article also finds that the procedure that may result in the acceptance of an undertaking could be improved through the introduction of certain protections that can maximise the procedural fairness of an undertaking.

II The Notion of Procedural Fairness and its Importance

In administrative law, the terms 'procedural fairness' and 'natural justice' are often used interchangeably. For instance, in *Forbes v New South Wales Trotting Club Ltd*,²¹ Murphy J stated that '[n]atural justice and fairness are different ways of expressing the concept or

¹⁵ Australian Securities and Investments Commission, above n 10, 5 [1.9]; ASIC Act ss 93AA–93A.

¹⁶ Parker, above n 8; Richard Johnstone and Michelle King, 'A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *Australian Journal of Labour Law* 280.

¹⁷ Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002) 590–3.

¹⁸ Frank Zumbo, 'Section 87B Undertakings: There's No Accounting for Such Conduct!' (1997) 5 *Trade Practices Law Journal* 121, 123.

¹⁹ Yeung, above n 13, 117; 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 at the Australian Compliance Institute, Melbourne, 28 May 2002) 15; *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 417, 429–30 [43].

²⁰ 'Procedural fairness' is concerned with the procedures followed by a decision-maker. It does not deal with the actual outcome reached by a decision-maker but requires a fair and proper procedure to be used by the decision-maker when deciding on a particular matter. Procedural fairness is discussed in more detail later in this article.

²¹ (1979) 143 CLR 242.

facets of the concept of due process.²² However, procedural fairness may be deemed to be both broader and narrower than natural justice.²³ Procedural fairness may be broader than the concept of natural justice because the notion of natural justice has traditionally related to ‘adjudication’ procedures.²⁴ Fuller defined adjudication as a ‘form of social ordering’, which is adversarial in nature and is distinct from mediation, contracting, managerial direction and legislation.²⁵ Procedural fairness extends beyond this scope and covers a wider range of decision-makers.²⁶

Procedural fairness may also be narrower in scope than natural justice because procedural fairness does not have the same impact, reach and protections as natural justice. Its standards may be lower than the standards of natural justice. In certain circumstances, it may be easier to apply the standards of procedural fairness, which may vary from one situation to another.²⁷ For example, in situations where administrative bodies determine issues that affect people’s legal rights, natural justice requirements do not automatically apply and may be replaced by what some may deem to be watered-down benchmarks.²⁸ Such a distinction is important today since regulators are relying more and more on different administrative sanctions such as enforceable undertakings to deal with possible breaches of the law.²⁹

However, this article will use the terms procedural fairness and natural justice interchangeably.³⁰ From an administrative law perspective, the procedural fairness of an undertaking is vital especially in instances where the terms of an undertaking have not been complied with. If the procedure that led to an undertaking is deemed unfair by a court, that

²² Ibid 276. See also *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 112; *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, 418; *Furnell v Whangarei High Schools Board* [1973] AC 660, 679; *Kioa v West* (1985) 159 CLR 550, 601; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 53; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 414–15.

²³ Michael Head, *Administrative Law: Context and Critique* (Federation Press, 2nd ed, 2008), 173–4.

²⁴ Ibid; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 4th ed, 2009), 407.

²⁵ Lon Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353, 357, 364; John Allison, ‘Fuller’s Analysis of Polycentric Disputes and the Limits of Adjudication’ (1994) 53 *Cambridge Law Journal* 376; Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 84–5.

²⁶ Aronson, Dyer and Groves, above n 24, 407; Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate, 2002), 211.

²⁷ *Kioa v West* (1985) 159 CLR 550, 585; Martin Loughlin, ‘Procedural Fairness: A Study of the Crisis in Administrative Law Theory’ (1978) 28 *University of Toronto Law Journal* 215, 222.

²⁸ Loughlin, above n 27, 219; John Swaigen, *Administrative Law: Principles and Advocacy* (Emond Montgomery, 2005), 47; De Smith, *Judicial Review of Administrative Action* (Stevens & Sons, 3rd ed, 1973), 208–9. For more on the discussion about the distinction between procedural fairness and natural justice see David Mullan, ‘Natural Justice and Fairness — Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making?’ (1982) 27 *McGill Law Journal* 250; Muthucumaraswamy Sornarajah, ‘Natural Justice, Fairness and Administrative Functions’ (1977) 5 *University of Tasmania Law Review* 268; David Bernie, Ross Dalglish and Peter Punch, ‘Natural Justice and the Duty to Act Fairly’ (1977) 2 *University of New South Wales Law Journal* 27; Graham Taylor, ‘Natural Justice — The Modern Synthesis’ (1975) 1 *Monash University Law Review* 258; Graham Taylor, ‘Fairness and Natural Justice — Distinct Concepts or Mere Semantics?’ (1977) 3 *Monash University Law Review* 191; Roderick Macdonald, ‘Judicial Review and Procedural Fairness in Administrative Law: I’ (1980) 25 *McGill Law Journal* 520; Roderick Macdonald, ‘Judicial Review and Procedural Fairness in Administrative Law: II’ (1981) 26 *McGill Law Journal* 1; David Mullan, ‘Fairness: The New Natural Justice?’ (1975) 1 *University of Toronto Law Journal* 281.

²⁹ Australian Law Reform Commission, above n 1, 91–101.

³⁰ The term ‘procedural fairness’ may, however, be preferable when dealing with administrative regulatory agencies because the term ‘natural justice’ is associated more with court procedures: Ombudsman Western Australia, ‘Procedural Fairness (Natural Justice)’ (Guidelines, Ombudsman Western Australia, February 2008) <<http://www.ombudsman.wa.gov.au/documents/guidelines/Procedural-fairness-Guidelines-30409.pdf>>.

court is unlikely to enforce the terms of the undertaking.³¹ This will mean that a breach of an undertaking will not have any consequences.³²

Procedural fairness is also crucial from the point of view of the promisor. From a psychological perspective, it is of the utmost importance for ASIC's enforceable undertakings to be perceived as fair and for a determinable procedure to have been followed in preparing the undertaking. This is especially the case in instances where the cost of complying with an enforceable undertaking runs into the millions.³³ Any perceived lack of fairness may lead the promisor to resent the conduct of the regulator. This may in turn affect the manner in which an alleged offender will comply with the terms of the undertaking.³⁴ In fact, any resentment may stop an undertaking from achieving one of its main aims, which is to change the compliance culture of an organisation. Such a change is only possible in instances where the promisor is willing to alter its behaviour.³⁵

Further, the use of an enforceable undertaking heavily relies on trust and compliance between ASIC and the alleged offender.³⁶ Cooperation is a key element in the successful implementation of the terms of an undertaking. If such cooperation is not present, ASIC is unlikely to enter into an undertaking.³⁷ For cooperation to continue after the acceptance of the undertaking, the promisor should believe that the regulator is treating him or her in a fair and just manner.³⁸ Accordingly, a perceived lack of procedural fairness may lead to minimal compliance by the promisor and this would mean that an enforceable undertaking would not achieve its goals as characterised in Diagram 1.

³¹ Nehme, above n 14, 160–2.

³² It is important to acknowledge that in such situations, it is possible for ASIC to decide to initiate proceedings relating to the original breach. However, this will not change the fact that an enforceable undertaking will lose some of its effectiveness. *Australian Competition and Consumer Commission v Woolworths (South Australia) Pty Ltd* (2003) 198 ALR 417, 429–30 [43]; *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* (2003) 52 ATR 1, 13 [38]; Nehme, above n 14, 160–1.

³³ Randal Dennings and Peter Whyntie, 'Managing an Enforceable Undertaking: How to Turn a Potential Adversarial Situation Into a Positive Change and Management Opportunity' (Paper presented at Australian Compliance Institute 12th Annual Conference: Sustaining Compliance Beyond Regulatory Intervention, Melbourne, 24 October 2008); Queensland Department of Justice and Attorney-General, *Enforceable Undertakings Process*, 28 July 2010, Workplace Health and Safety Queensland <<http://www.deir.qld.gov.au/workplace/law/enforceable-undertakings/process/index.htm>>.

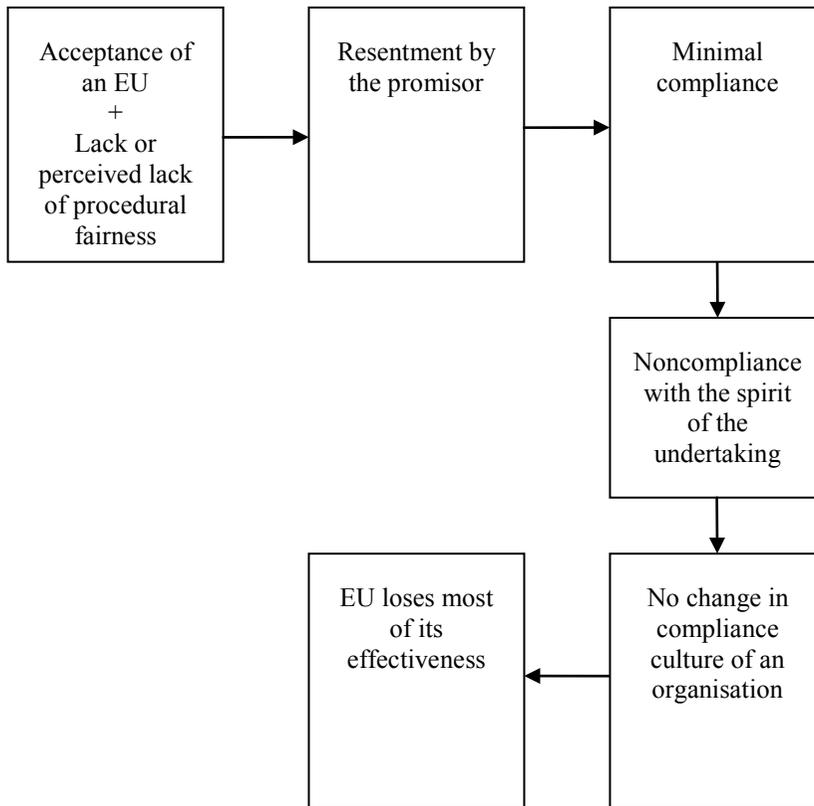
³⁴ Allan Lind and Tom Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988) 7; Jonathan Casper, Tom Tyler and Bonnie Fisher, 'Procedural Justice in Felony Cases' (1988) 22 *Law and Society Review* 483, 483.

³⁵ Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982), ix, 6, 92–3, 105.

³⁶ Australian Securities and Investments Commission, above n 10, 7–8 [2.4], 9–10 [2.10].

³⁷ *Ibid* 9–10 [2.10].

³⁸ Bardach and Kagan, above n 35, 105.



*Diagram 1: Outcome of an enforceable undertaking in the case of a lack of, or perceived lack of, procedural fairness.*³⁹

As can be seen, an apparent lack of procedural fairness may result in breaches of an undertaking, or compliance with merely the letter and not the spirit of the law.⁴⁰ The latter scenario should be of particular concern to the regulator. For example, an alleged offender may agree in its undertaking to implement a compliance program.⁴¹ The aim of such a program is to change the compliance culture of an organisation.⁴² If the promisor believes that the undertaking is not procedurally fair, it may introduce a compliance program without taking it seriously.

In such an instance, the enforceable undertaking is not necessarily breached, since the promise to implement a compliance program has been fulfilled. However, unlike the implementation of promises such as corrective advertisement or refund, a change in the behaviour of an organisation — which is supposed to be the result of the implementation of a new compliance program — is not readily observable and cannot easily be measured.

³⁹ For the purpose of this Diagram, 'enforceable undertaking' is abbreviated to 'EU'.

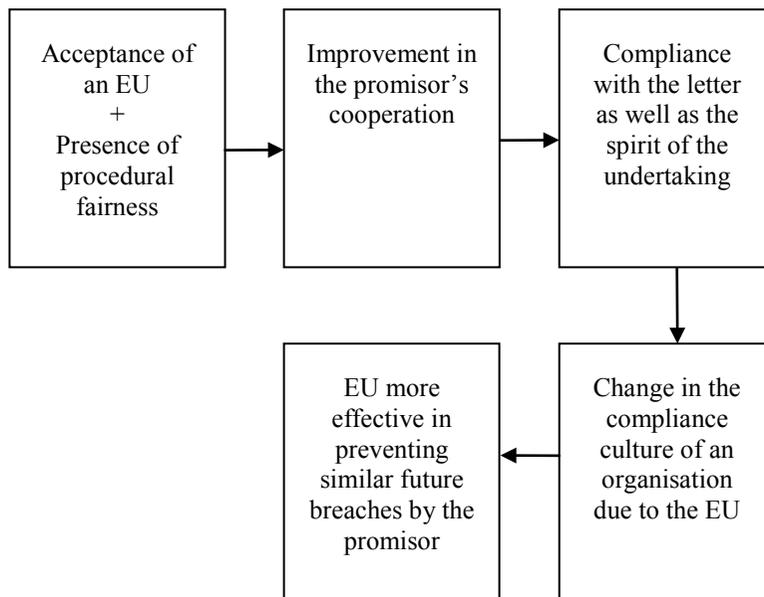
⁴⁰ Kent Menzel, 'Judging the Fairness of Mediation: A Critical Framework' (1991) 9 *Mediation Quarterly* 3, 7; Doreen McBarnet and Christopher Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *Modern Law Review* 848, 855.

⁴¹ Australian Securities and Investments Commission, above n 10, 7 [2.3].

⁴² Ibid; Doreen McBarnet, *Crime, Compliance and Control* (Ashgate, 2004) 192–3, 284.

Accordingly, ASIC may not be able to react to the noncompliance with the spirit of the undertaking even though one of the aims of the undertaking — the change in the compliance culture of the company — has not been reached.⁴³

As a consequence, the enforceable undertaking's effectiveness is reduced because one of its main aims is not realised. The situation may be different if procedural fairness was perceived to have been achieved as illustrated in Diagram 2.



*Diagram 2: Outcome of an enforceable undertaking in case of procedural fairness.*⁴⁴

The alleged offender's perception that procedural fairness was afforded in an undertaking may lead to a different outcome than the one described in Diagram 1. Such a perception improves the cooperation between the regulated entity and the regulator.⁴⁵ The promisor may be more satisfied with the terms of the undertaking and this in turn may result in greater compliance.⁴⁶ Accordingly, a change in the compliance culture of an organisation is more likely to be achieved.

⁴³ However, a promisor may comply with the terms of the undertaking, even if the promisor perceives the undertaking as unfair, because of the danger that ASIC will enforce the undertaking in court or impose more serious sanctions if the promisor does not comply. An example of this can be found in the GE undertaking: Australian Securities and Investments Commission and AVCO Access Pty Ltd (Enforceable undertaking No 017029220, 22 May 2008) <[http://www.fido.gov.au/asic/pdflib.nsf/LookupByFileName/017029220.pdf/\\$file/017029220.pdf](http://www.fido.gov.au/asic/pdflib.nsf/LookupByFileName/017029220.pdf/$file/017029220.pdf)>.

⁴⁴ For the purpose of this Diagram, 'enforceable undertaking' is abbreviated to 'EU'.

⁴⁵ Procedural fairness reduces the anger that a regulated entity may feel from coming into contact with the regulator. Further, it influences the assessment of the legitimacy of the regulatory agency: Alex Piquero, Zenta Gomez-Smith and Lynn Langton, 'Discerning Unfairness Where Others May Not: Low Self-Control and Unfair Sanction Perceptions' (2004) 42 *Criminology* 699, 704.

⁴⁶ Bardach and Kagan, above n 35, 105; Menzel, above n 40, 8. However, it is important to acknowledge that people are motivated by self-interest and may not comply with an undertaking even if they consented to it: Craig McEwen and Richard Maiman, 'Mediation in Small Claims Court: Achieving Compliance Through Consent' (1984) 18 *Law and Society Review* 11, 44; Tom Tyler, 'Procedural Fairness and Compliance with the Law' (1997) 133 *Swiss Journal of Economics and Statistics* 219, 222–3.

III Elements of Procedural Fairness

Different methods may be used to evaluate the extent of procedural fairness in enforceable undertakings from an administrative law perspective and a psychology theory perspective. Such evaluation might be based on data collected using one or more of the following techniques:

- studying whether the law itself and official policies dealing with the acceptance of enforceable undertakings require ASIC to observe procedural fairness when accepting an undertaking and, if so, whether they provide any guidance in relation to this matter;
- examining the general practices of the corporate regulator when accepting an undertaking to assess whether the procedure leading to the acceptance of an undertaking is fair;
- conducting empirical research to determine whether promisors perceive that the procedure that leads to an enforceable undertaking is fair.

Each technique contributes something to the data picture built up. However, it is beyond the scope of this paper to empirically assess actual practice to discover the psychological perspectives of ASIC and promisors towards procedural fairness of enforceable undertakings. This article bases its evaluation of the procedural fairness of enforceable undertakings mainly on legal and official ASIC policy documents and statements.

Mindful of the limitations of this article, the remainder of this part looks at the elements of procedural fairness from an administrative law perspective and from a psychology theory perspective and considers any overlap that may exist between the elements of these two perspectives.

A *Criteria for Procedural Fairness from an Administrative Law Perspective*

The concepts of natural law and natural justice form an important part of the English common law.⁴⁷ For instance, in *Calvin's Case*,⁴⁸ Lord Coke noted:

[T]he law of nature is part of the law of England ... [T]he law of nature is immutable.
The law of nature is that which God at the time of creation of the nature of man infused

⁴⁷ The high point of natural law and natural justice in the common law system was the fact that common law could trump statute law when the statute was against the right of natural justice: *Dr Bonham's Case* (1610) 77 ER 638, 652; *Day v Savadge* (1614) 80 ER 235, 237; *Forbes v Cochrane* (1824) 107 ER 450, 458–9. However, it is important to note that these concepts can be traced to ancient times. Aristotle, *Nicomachean Ethics* (WD Ross trans, 2004), 76. See also Stephen Buckle, 'Natural Law' in Peter Singer (ed), *A Companion to Ethics* (Blackwell Reference, 1991) 161; John Salmond, 'Law of Nature' (1895) 11 *Law Quarterly Review* 121, 127; KD Irani, 'The Idea of Social Justice in the Ancient World' in KD Irani and Morris Silver (eds), *Social Justice in the Ancient World* (Greenwood, 1995) 3, 6; Charles Brice, 'Roman Aequitas and English Equity' (1913) 2(1) *Georgetown Law Journal* 16, 18–19; Michael Zuckert, "'Bringing Philosophy Down from the Heavens": Natural Right in the Roman Law' (1989) 51 *The Review of Politics* 70; AJ McGregor, 'The Law of Nature — Jus Naturale' (1942) 59 *South African Law Journal* 343; Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 51; Henry Maine, *Ancient Law* (1972), 27; Thomas Riha, 'The idea of natural law and the moral content of economics' (1998) 25 *International Journal of Social Economics* 1520.

⁴⁸ (1608) 77 ER 377.

into his heart, for his preservation and direction; and this is *lex oeterna*, the moral law, called also the law of nature.⁴⁹

Similarly, Lord Mansfield observed in *Moses v Macferlan*⁵⁰ that ‘[i]n one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.’⁵¹ However, there has been some debate in the past as to whether a corporation is entitled to natural justice. Certain commentators opposed the concept of incorporation by legislation because it allowed people to avoid their legal obligations such as debt payment.⁵² At the end of the 19th century, *Salomon v Salomon and Co Ltd*⁵³ changed the landscape of company law by confirming that a company is a separate legal entity from the owners of the company.⁵⁴ Today, this principle is confirmed by the *Corporations Act 2001* (Cth) through ss 119 and 124. In particular, s 124(1) notes that ‘[A] company has the legal capacity and powers of an individual both in and outside this jurisdiction.’ Accordingly, nowadays, procedural fairness is not only owed to individuals but also to companies.⁵⁵

The ‘ties of natural justice’ that are mentioned by Lord Mansfield⁵⁶ refer to two traditionally-accepted limbs of natural justice:

1. *audi alteram partem* — the right to be heard; and
2. *nemo iudex in causa sua* — the right to an unbiased decision.

While these are the more traditional strands of procedural fairness, the doctrine is a common law one and it is difficult to determine and quantify what constitutes procedural fairness in all circumstances. The courts have stressed the flexible character of procedural fairness, that may vary from one context to the next. For instance, in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*,⁵⁷ Kitto J observed that ‘[w]hat the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances.’⁵⁸ Similar comments can be found in *Kioa v West*.⁵⁹

⁴⁹ Ibid 391–2.

⁵⁰ (1760) 2 Burr 1005; (1760) 97 ER 676.

⁵¹ (1760) 2 Burr 1005, 1012; (1760) 97 ER 676, 681.

⁵² Cecil T Carr, *The General Principles of the Law of Corporations* (Cambridge University Press, 1905), chs 1, 10, 13; Noam Chomsky, *Profit Over People: Neoliberalism and Global Order* (Seven Stories Press, 1999) 97, 148.

⁵³ [1897] AC 22 (‘*Salomon’s case*’).

⁵⁴ The principle was already present before *Salomon’s case*. For instance, in *R v Arnaud* (1846) 9 QB 806, an English chartered corporation applied for the registration of one of its ships. The registering authority refused to complete the registration based on the fact that some of the company’s members were foreigners. The court ordered the registering authority to register the ship because the company owned the ship — not the members. The company was a separate legal entity distinct from its members.

⁵⁵ However, it is important to note that a corporation cannot be completely equated with a natural person. For example, the High Court held that a corporation is not entitled to the privilege against self-incrimination: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; *Corporations Act 2001* (Cth) s 1316A.

⁵⁶ *Moses v Macferlan* (1760) 2 Burr 1005, 1012; (1760) 97 ER 676, 681.

⁵⁷ (1963) 113 CLR 475.

⁵⁸ Ibid 504.

⁵⁹ *Kioa v West* (1985) 159 CLR 550, 612. See, eg, *National Companies and Securities Commission v News Corporation* (1984) 156 CLR 296, 311; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 526; *Salemi v MacKellar* (1977) 137 CLR 396, 419; *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118. See also Graeme Johnson, ‘Natural Justice and Legitimate Expectations in Australia’ (1985) 15 *Federal Law Review* 39, 71.

1 *The Right to Be Heard*⁶⁰

Even though administrative decisions involve a lesser degree of formality than judicial decisions, the right to be heard still has to be considered when dealing with administrative decisions, albeit at a different standard to judicial decisions.⁶¹ The importance of the entitlement to a hearing has been understood for a long time. For instance, a passage in the *Holy Bible* entitled ‘God Questions Adam and Eve’ states the following:

But the LORD God called to the man, and said to him, ‘Where are you?’ And he said, ‘I heard the sound of thee in the garden, and I was afraid, because I was naked; and I hid myself.’ He said, ‘Who told you that you were naked? Have you eaten of the tree of which I commanded you not to eat?’ The man said, ‘The Woman thou gavest to be with me, she gave me fruit of the tree, and I ate.’ Then the LORD God said to the woman, ‘What is this you have done?’ The woman said, ‘The serpent beguiled me, and I ate.’⁶²

This passage has been referred to in a number of cases. For instance, Lord Fortescue affirmed the obligation to give a hearing in 1723 when he noted in *R v University of Cambridge*⁶³ that:

The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence ... the same question was put to Eve also.⁶⁴

The right to be heard stems from the concept that a person should not be judged and condemned before he or she is allowed to explain his or her conduct. Even though the standards of procedural fairness may vary, the right to be heard is crucial to ensure the fairness of a decision. In *Russell v Duke of Norfolk*,⁶⁵ Tucker LJ noted:

The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice, which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.⁶⁶

More recently, the importance of the right to be heard has been discussed in a number of cases including *Kioa v West*⁶⁷ and *Bond v Australian Broadcasting Tribunal (No 2)*.⁶⁸

⁶⁰ This part of the article will look at only some of the main points relating to the right to be heard. It will consider only the issues that are going to be raised later in Part III when assessing the procedural fairness of an enforceable undertaking. For more information on this topic see Head, above n 23, ch 11; Aronson, Dyer and Groves, above n 24, ch 8; Roger Douglas, *Douglas and Jones’s Administrative Law* (Federation Press, 6th ed, 2009) ch 15.

⁶¹ *Ridge v Baldwin* [1964] AC 40; *Hamilton v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 48 FCR 20.

⁶² Andrew Louth, Marco Conti, Thomas Oden (eds), *Ancient Christian Commentary on Scripture: Genesis I–II* (Inter Varsity Press, 2001) 83.

⁶³ (1723) 1 Stra 557; 93 ER 698.

⁶⁴ (1723) 1 Stra 557, 567; 93 ER 698, 704.

⁶⁵ [1949] 1 All ER 109.

⁶⁶ *Ibid* 118.

⁶⁷ (1985) 159 CLR 550.

⁶⁸ (1988) 19 FCR 49.

Before the decision in *Ridge v Baldwin*,⁶⁹ the courts had limited the application of natural justice to the exercise of powers classified as judicial and quasi-judicial, and not as administrative or political, in nature.⁷⁰ The court in *Ridge v Baldwin*, however, held that natural justice was to be observed in instances where a decision affected the rights of individuals, thereby extending the application of procedural fairness to administrative decision-making.⁷¹ The fact that it is not possible to treat administrative decisions in the same manner as judicial decisions led to a variation of standards relating to the hearing rule.⁷²

Natural justice does not require the application of ‘fixed or technical rules’.⁷³ The content of the hearing rule is very flexible and may vary from one situation to another.⁷⁴ In instances where the relevant legislation is silent, the standards of the rule are established by reference to what seems appropriate given the context in which the decision is to be made. Accordingly, what constitutes a hearing may vary from a full court hearing to the mere submission of written responses.⁷⁵ As Lord Reid noted in *Wiseman v Borneman*,⁷⁶ the procedure should be sufficient to achieve justice.⁷⁷ However, for the hearing rule to be applied properly, it must include a requirement that a person receives fair notice of the charges against them.⁷⁸ These two concepts, the nature of the hearing and fair notice, are discussed further in the following paragraphs.

(a) *Nature of the Hearing*

Depending on the circumstances, a hearing may be conducted by way of written submissions, oral hearings or a combination of both. The nature of an administrative hearing may differ from the nature of a judicial hearing.⁷⁹ In relation to administrative decisions, for example, some statutes may require oral hearings to take place. In other instances, the statute may be silent or may not define the type of hearing a person must be afforded. In such instances, it is open to the court to consider that an oral hearing is not required and the

⁶⁹ [1964] AC 40.

⁷⁰ *James v Pope* [1931] SASR 441; See also Head, above n 23, 179.

⁷¹ [1964] AC 40; *Cooper v Wandsworth Board of Works* (1863) 143 ER 414 stated that natural justice is relevant in instances where a decision merely affects the right of individuals.

⁷² Loughlin, above n 27, 219; Graham Taylor, ‘Natural Justice — The Modern Synthesis’ (1975) 1 *Monash University Law Review* 258, 264–5; David Mullan, ‘Natural Justice and Fairness — Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making?’ (1982) 27 *McGill Law Journal* 250, 252; Graham Taylor, ‘Fairness and Natural Justice — Distinct Concepts or Mere Semantics?’ (1977) 3 *Monash University Law Review* 191, 202.

⁷³ *Roderick v Australian & Overseas Telecommunications Corporation Ltd* (1992) 111 ALR 355, 365.

⁷⁴ *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509, 517; *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591, 597.

⁷⁵ *Ibid.*

⁷⁶ [1971] AC 297.

⁷⁷ *Ibid* 308.

⁷⁸ *Kioa v West* (1985) 159 CLR 550, 629; *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 where the court unanimously held that the content of the adverse letter should have been disclosed to the applicant. See also Lee Beng Tat, ‘The Company in the Garden of Eden: Natural Justice and the Company’ [1991] *Singapore Journal of Legal Studies* 126, 129; Aronson, Dyer and Groves, above n 24, 556; Douglas, above n 60, 564; Roger Douglas, *Administrative Law* (LexisNexis Butterworths, 2nd ed, 2004) 201–2.

⁷⁹ *Local Government Board v Arlidge* [1915] AC 120, 138; *Barrier Reef Broadcasting Pty Ltd v Minister for Post and Telecommunications* (1978) 19 ALR 425, 445; *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 410 (affd *Chen Zhen Zi v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591, 601–2).

opportunity to make written submissions would be enough to fulfil the requirements of natural justice.⁸⁰

Another issue relating to hearings is whether the person is entitled to legal representation. Such representation has a number of benefits.⁸¹ Where, for instance, a person is unlikely to be capable of representing himself or herself efficiently,⁸² or is unable to address legal questions or complex issues,⁸³ then procedural fairness may require that the person be granted legal representation. However, the courts tend to dispense readily with requests for legal representation that claim it is required to satisfy procedural fairness. For instance, in *Cains v Jenkins*,⁸⁴ the Full Federal Court declared that ‘there is no absolute right to representation even where livelihood is at stake’.⁸⁵ Similarly, in *New South Wales v Canellis*,⁸⁶ the majority observed that ‘there is no authority for the proposition that the rules of procedural fairness extend to a requirement that legal representation be provided to a party at a trial, let alone a witness at an inquiry.’⁸⁷

Accordingly, in the absence of a statutory requirement to the contrary, the minimum requirement for a hearing may be set by the court as the right of the affected person to complete a written submission to address the issues raised by the person making the allegations.⁸⁸ However, for such a submission to be possible the affected person must be aware of the allegations made against him or her.

(b) Notice

For procedural fairness to apply, it is reasonable to expect that notice of the allegations is provided to the affected person. This allows the person to be made aware of any material information prejudicial to his or her case and provides them with an opportunity to respond

⁸⁰ *Barratt v Howard* (1999) 165 ALR 605, 619 where Hely J notes that ‘there is no requirement for an oral hearing’; *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 410–11; *Jorgensen v Australian Securities and Investments Commission* (1999) 30 ACSR 481, 486. See also Douglas, above n 60, 569–70.

⁸¹ Michael Hocken, ‘When is There a Right to Legal Representation Before a Statutory Body or Tribunal in Australia?’ (1994) 24 *Queensland Law Society Journal* 241; Aronson, Dyer and Groves, above n 24, 599. See also *WABZ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 271, 295 [69] where the court noted the statement of Woodward J in *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486, 490–1 that ‘the lack of representation at the earlier stage of merits review is probably of greater significance in terms of its effect upon the eventual outcome’.

⁸² *Cains v Jenkins* (1979) 28 ALR 219, 230; *R v Secretary of State for the Home Department; Ex parte Tarrant* [1985] 1 QB 251, 285–6; *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486, 491; *Majar v Northern Land Council* (1991) 37 FCR 117, 138–9.

⁸³ *Cains v Jenkins* (1979) 28 ALR 219, 230; *R v Equal Opportunity Board; Ex parte Burns* [1985] VR 317, 325; *R v Secretary of State for the Home Department; Ex parte Tarrant* [1985] 1 QB 251, 285; *Drew v Attorney-General* [2002] 1 NZLR 58, 73–5.

⁸⁴ (1979) 28 ALR 219.

⁸⁵ *Ibid* 230.

⁸⁶ (1994) 181 CLR 309.

⁸⁷ *Ibid* 330. However, the case referred to one exception (*Dietrich v The Queen* (1992) 177 CLR 292) in which the High Court noted that legal representation was required for fair criminal trials, especially when the court was dealing with serious offences. Certain considerations may support the view in *Cains v Jenkins* (1979) 28 ALR 219. For instance, legal representation may not be desired in informal and non-legalistic proceedings: *Enderby Town Football Club Ltd v Football Association Ltd* [1971] 1 Ch 591, 605; *R v Equal Opportunity Board; Ex parte Burns* [1985] VR 317, 325; *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486, 491; *Re Scott* (2001) 10 Tas R 148, 151. Further, the absence of legal representation allows decisions to be made quickly: *Enderby Town Football Club Ltd v Football Association Ltd* [1971] 1 Ch 591, 608; *R v Secretary of State for the Home Department; Ex parte Tarrant* [1985] 1 QB 251, 286.

⁸⁸ *Russell v Duke of Norfolk* [1949] 1 All ER 109, 118.

to the allegation made. For instance, in *Andrews v Mitchell*,⁸⁹ Lord Halsbury stated that notice in the context of natural justice is ‘impossible to disregard’.⁹⁰ Similarly, in *R v Small Claims Tribunal; Ex parte Cameron*,⁹¹ Anderson J noted that ‘[t]he rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice’.⁹²

However, this principle has been tempered in a number of cases. For example, in *Kioa v West*,⁹³ the court observed that ‘[w]here the circumstances are such that the purpose for which the power is conferred would be frustrated if notice were given ... the power may be exercised peremptorily without giving such notice to a person whose interests are likely to be affected’.⁹⁴

The content of the notice is very important because it provides the affected person a fair opportunity to respond to the allegation made.⁹⁵ However, due to the wide variety of administrative decision-making, what constitutes sufficient notice may vary from matter to matter.⁹⁶ Usually, a crucial element of a notice is that it conveys to the affected person ‘with reasonable clarity’ the allegation being made.⁹⁷ It is also expected that a notice will provide the time, date and location of any hearing or the deadline for the lodgement of written submissions.⁹⁸

2 *The Rule against Bias*⁹⁹

Another central component of procedural fairness is the rule against bias. An administrator or judge needs to approach a task with an open mind. Such an approach implies freedom from actual bias and freedom from perceived bias.¹⁰⁰ To determine if the perception of bias may arise, the court considers the matter from the perspective of a reasonable person and not necessarily from the perspective of the affected person.¹⁰¹ Accordingly, the bias rule forbids decision-makers from exercising their power if they are actually or ostensibly biased.¹⁰²

However, as with the hearing rule, the operation of the bias rule is flexible, and varies depending on the factual circumstances of the case. For instance, the standards imposed on

⁸⁹ [1905] AC 78.

⁹⁰ *Ibid* 80.

⁹¹ [1976] VR 427.

⁹² *Ibid* 432.

⁹³ (1985) 159 CLR 550.

⁹⁴ *Ibid* 615. The principle was tempered in *Bond v Australian Broadcasting Tribunal* (1988) 19 FCR 494; *Commissioner of Police v Tanos* (1957) 98 CLR 383, 396; *El-Sayed v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 22 ALD 767, 770.

⁹⁵ Aronson, Dyer and Groves, above n 24, 558.

⁹⁶ *Traill v McRae* (2002) 122 FCR 349, 380–1.

⁹⁷ *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 122 FCR 78, 104.

⁹⁸ *Hopkins v Smethwick Board of Health* (1890) 24 QBD 712, 715. This was not the case in *Graham v Baptist Union of NSW* [2006] NSWSC 818 (16 August 2006), where Young CJ (in Eq) held that the church had no obligation to tell the plaintiff the time and date of the hearing.

⁹⁹ This part of the article will look at only some of the main points relating to the rule against bias. It will consider only the issues that are going to be raised later in Part IV when assessing the procedural fairness of an enforceable undertaking. For more information on this topic see Aronson, Dyer and Groves, above n 24, ch 9; Douglas, above n 60, ch 16.

¹⁰⁰ *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509. See also Head, above n 23, 204.

¹⁰¹ *Bird v Volker* (Unreported, Federal Court of Australia, Kiefel J, 20 October 1994); See also *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70.

¹⁰² Aronson, Dyer and Groves, above n 24, 655. See also *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

judges¹⁰³ are different from the standards imposed on administrators and tribunals.¹⁰⁴ In situations where a person has been given the power to investigate and decide on a matter, the rule against bias will be even more diluted.¹⁰⁵ Ultimately, the scope of the bias rule differs in each instance.

B Criteria for Procedural Fairness from the Perspective of Regulated Entities

As noted in Part II of this article, from the psychological perspective, procedural fairness is of crucial importance because it may affect people's perception of the fairness of an outcome.¹⁰⁶ This has been acknowledged by a number of authors and philosophers. For instance, Aristotle was one of the first people to discuss and analyse the concept of fairness. His work focused on fairness in the distribution of resources between individuals or 'distributive justice', rather than on procedural fairness.¹⁰⁷ Interest in fairness was renewed in the 17th century with Locke's writings on human rights¹⁰⁸ and Hobbes' analysis of valid covenants.¹⁰⁹ Mill further revised notions of fairness through his studies on utilitarianism.¹¹⁰ The approaches of all these philosophers, while not identical, share a common orientation in viewing fairness as a normative ideal.

More recent studies focus on the notion of fairness as perceived by individuals, especially in the area of distributive justice. Some of these studies briefly alluded to procedural fairness or what they referred to as 'procedural justice'.¹¹¹ For instance, Blau noted that 'the intervening mechanisms in social exchange are social norms of fairness.'¹¹² Similarly, in 1976, Leventhal observed that when determining the fairness of a decision, individuals do not just consider the outcome they end up with, but also the procedure that led to such an outcome.¹¹³ Deutsch went one step further in observing that procedural fairness was an important source of fairness in social relationships.¹¹⁴

Although consideration of issues of procedural fairness may be traced to ancient times, the relevance of procedural fairness in the field of psychology only really became apparent in the 1970s when a number of researchers began to consider the impact that it may

¹⁰³ *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Urgate* [2001] 1 AC 119; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Antoun v The Queen* (2006) 224 ALR 51.

¹⁰⁴ *Century Metals and Mining NL v Yeomans* (1989) 100 ALR 383, 416–17; *Franklin v Minister of Town and Country Planning* [1948] AC 87; *Porter v Magill* [2002] 2 AC 357, 466; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 539.

¹⁰⁵ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Kioa v West* (1985) 159 CLR 550; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

¹⁰⁶ Neil Vidmar, 'Procedural Justice and Alternative Dispute Resolution' in Klaus F Röhl and Stefan Machura (eds), *Procedural Justice* (Ashgate, 1997) 121; Axel Tschentscher, 'The Function of Procedural Justice in Theories of Justice' in Klaus F Röhl and Stefan Machura (eds), *Procedural Justice* (Ashgate, 1997) 105.

¹⁰⁷ Aristotle, above n 47.

¹⁰⁸ John Locke, *An Essay Concerning Human Understanding* (1994; original work published 1669).

¹⁰⁹ Thomas Hobbes, *Leviathan* (Edwin Curley (ed), Hackett Publishing Co, 1994) 89–90.

¹¹⁰ John S Mill, *Utilitarianism and On Liberty* (Mark Warnick (ed), 2nd ed, 2004).

¹¹¹ Procedural justice may be considered synonymous with procedural fairness; this article uses the terms interchangeably. See Kees van den Bos and Allan Lind, 'Uncertainty Management by Means of Fairness Judgements' (2002) 34 *Advances in Experimental Social Psychology* 1, 8.

¹¹² Peter Blau, *Exchange and Power in Social Life* (Transaction Publishers, 1992) 89, 98, 155.

¹¹³ Gerald Leventhal, 'Fairness in Social Relationships' in John Thibaut, Janet Spence and Robert Carson (eds), *Contemporary Topics in Social Psychology* (General Learning Press, 1976) 211, 231.

¹¹⁴ Morton Deutsch, 'Equity, Equality and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?' (1975) 31(3) *Journal of Social Issues* 137, 140–1.

have on affected parties.¹¹⁵ Thibaut and Walker and philosophers such as Rawls started connecting procedure with people's perception of the fairness of an outcome. For instance, Rawls noted that '[a] fair procedure translates its fairness to the outcome only when it is actually carried out.'¹¹⁶ Further, he said that '[t]he idea of the original position is to set up a fair procedure so that any principles agreed to will be just.'¹¹⁷

Thibaut and Walker studied the fairness of procedure in a legal setting, and compared the satisfaction levels of people in an adversarial judicial system and an inquisitorial judicial system. They found that adversarial judicial systems were deemed to be fairer and more satisfactory than continental judicial systems because people believed that in an adversarial system the judge played the role of a referee, whose task was to allow both parties in a trial to fight a fair match.¹¹⁸ They also discovered that permitting the parties to have a say in their legal dispute increased the perception of the fairness of the verdict.¹¹⁹ Further research on procedural fairness was conducted by different researchers, especially after publication of Lind and Tyler's literature review on the topic.¹²⁰

Leventhal proposed six criteria for assessing the fairness of a procedure: consistency, bias suppression, accuracy, correctability, representation and ethicality.¹²¹ Some of the major studies relating to procedural fairness have relied on a mixture of Leventhal's criteria and other considerations. For instance, Tyler used Leventhal's criteria and the work of Thibaut and Walker when assessing the procedural fairness of judgments.¹²² When exploring the legal procedure that is usually deemed as fair by an offender, Tyler noted that criteria such as representation, neutrality, bias, honesty, quality of decisions and consistency are important. Further, he found that people placed great weight on inferences about the motives of the decision-maker.¹²³ Similarly, Makkai and Braithwaite based their criteria of procedural fairness on the work of both Leventhal and Tyler.¹²⁴

In the context of mediation, Dworkin and London assessed procedural fairness based on criteria including:

impartiality of the mediator, voluntary decisions by the parties, sufficient factual data on which to base decisions, participant understanding of both information and

¹¹⁵ Procedural justice theories have their roots in three approaches: Thibaut and Walker's theory of procedure, Leventhal's justice judgment theory, and Lind and Tyler's group value model. This article bases its criteria of procedural fairness on these studies. See Maureen Ambrose and Anke Arnaud, 'Are Procedural Justice and Distributive Justice Conceptually Distinct?' in Jerald Greenberg and Jason Colquitt (eds), *Handbook of Organizational Justice* (Lawrence Erlbaum, 2005) 59, 61.

¹¹⁶ John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 86.

¹¹⁷ Ibid 136.

¹¹⁸ John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum, 1975).

¹¹⁹ John Thibaut and Laurens Walker, 'A Theory of Procedure' (1978) 66 *California Law Review* 541.

¹²⁰ Lind and Tyler, above n 34; Robert MacCoun, 'Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness' (2005) 1 *Annual Review of Law and Social Science* 171, 172.

¹²¹ Gerald Leventhal, 'What Should Be Done with Equity Theory?: New Approaches to the Study of Fairness in Social Relationships' in Kenneth Gergen, Martin Greenberg and Richard Willis (eds), *Social Exchange: Advances in Theory and Research* (Plenum Press, 1980) 27.

¹²² Tom Tyler, 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law Society Review* 103, 111-13.

¹²³ Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006) 175.

¹²⁴ Toni Makkai and John Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20 *Law and Human Behavior* 83, 84.

decisions, noncoercive negotiations, power balance, full financial disclosure, and access to independent legal counsel.¹²⁵

Clearly, the meaning of procedural fairness varies depending on the nature of people's experiences with the decision-making authority. However, to assess the perception that the regulated community may have of the procedural fairness of an enforceable undertaking, this article takes into account literature in the field of psychology that has had a significant impact on thinking about procedural fairness,¹²⁶ and uses the following criteria:¹²⁷

1. consistency;
2. the rule against bias;
3. correctability; and
4. representation.

The next paragraphs study the above criteria and recognise the overlap that may appear between these criteria and the criteria that apply to procedural fairness from an administrative law perspective. It will become apparent that the criteria from a psychological perspective are richer than the criteria from an administrative law perspective (especially when dealing with administrative sanctions).

1 *Consistency*

Consistency is Leventhal's first criterion in determining the perception that affected persons may have of the fairness of a procedure.

(a) *Different interpretations*

The consistency criterion has been interpreted in a number of ways.¹²⁸ It may refer to consistency in the application of a procedure over time, which ensures the stability of the procedure, at least in the short term.¹²⁹ It may also refer to consistency in the application of the procedure between persons, implying that a similar procedure would be applied to all potentially affected persons.¹³⁰ The latter interpretation of the consistency rule is very important in the domain of business regulation.¹³¹

(b) *Consistency in Administrative Law*

The scope of consistency in administrative law is not as comprehensive as in the psychology theory field.¹³² However, consistency in the application of the procedure across persons is

¹²⁵ Joan Dworkin and William London, 'What is a Fair Agreement?' (1989) 7 *Mediation Quarterly* 3, 5–6.

¹²⁶ See above, n 122, which refers to the dominant theories relating to procedural fairness in the field of psychology; Tom Tyler (ed), *Procedural Justice I* (2005); Tom Tyler (ed), *Procedural Justice II* (2005); Kjell Törnblom and Riël Vermunt (eds), *Distributive and Procedural Justice* (Ashgate, 2007).

¹²⁷ These criteria are among the ones most used in the literature and are drawn from Leventhal and Tyler's work. See Leventhal, 'What Should Be Done with Equity Theory?', above n 121; Tyler, 'What is Procedural Justice?', above n 122. However, there is no consensus about the criteria that need to be followed to determine procedural fairness. Further, two of Tyler's criteria, the quality of interpersonal treatment and trust in motives of authority, are not considered here due to the lack of empirical evidence in this article.

¹²⁸ Tyler, above n 122, 111.

¹²⁹ Leventhal, above n 121.

¹³⁰ *Ibid.*

¹³¹ Makkai and Braithwaite, above n 124, 84.

¹³² From the psychology theory perspective, the standard of consistency between negotiated settlements and court proceedings is the same. However this is not necessarily the case in administrative law where consistency

still very relevant in administrative law. For instance, in *Hamilton v Minister for Immigration, Local Government and Ethnic Affairs*,¹³³ the court considered that the applicant was denied procedural fairness because she was not provided with the explanatory notes usually given to people filling out application forms. Beazley J noted that:

[A]s a general rule, consistency of treatment of persons the subject of administrative action is of primary importance in good administration. ... Where a decision-maker has introduced and formalised uniform procedures for persons the subject of the decision-making process, procedural fairness requires that in normal circumstances persons have equal access to those procedures.¹³⁴

Consistency helps to ensure the transparency of the process.¹³⁵

2 *The Rule against Bias*

The ability to minimise bias directly is linked to the successful implementation of a procedure that can prevent favouritism or external biases.¹³⁶

(a) *Neutrality*

There are a number of types of bias that may be taken into consideration when determining the procedural fairness of a decision. Leventhal focuses on two in particular. The first relates to the decision-maker's interest in the outcome of a decision. From the perspective of the regulated entity, an individual is likely to believe that procedural fairness is violated when the person deciding on the matter has a personal interest.¹³⁷ The second type of bias is apparent when a decision-maker relies on their prior views rather than the evidence presented when making a decision. Tyler established that bias exists where the treatment of affected persons is influenced by their 'race, sex, age, nationality, or some other characteristic of them as a person'.¹³⁸

(b) *Overlap with Administrative Law*

The rule against bias was discussed earlier in the article when the author considered procedural fairness from an administrative law perspective. However, as seen previously, such a rule is diluted in the exercise of administrative power. Accordingly, the standard of neutrality required in administrative law is less exacting than the one found in the psychological perspective. It forms a sub-part of the rule against bias as explained by the psychological perspective.

3 *Correctability*

(a) *Interpretation*

Correctability means that 'opportunities must exist to modify and reverse decisions made at various points in the allocative process.'¹³⁹ Tyler refers to this element as the right to

regarding the use of administrative sanctions such as enforceable undertakings may be more lax than consistency in court proceedings.

¹³³ (1993) 48 FCR 20.

¹³⁴ Ibid 36.

¹³⁵ Rawls, above n 116, 238.

¹³⁶ Tyler, above n 122, 119.

¹³⁷ Leventhal, above n 121.

¹³⁸ Tyler, above n 122, 112.

¹³⁹ Leventhal, above n 121, 43.

complain about the unfairness of the procedure.¹⁴⁰ In short, decisions should be able to be appealed if they are unfair. Mill also noted that there is a need to have constitutional checks and balances to ensure the fairness of a decision.¹⁴¹

(b) *Correctability in Administrative Law*

The correctability of a decision is also important from an administrative law perspective.¹⁴² Administrative law includes a series of checks and balances to deal with unfair decisions. The availability of merit and judicial reviews, for example, provides an opportunity for the review of a decision especially when an aggrieved individual is faced with the possibility that an administrative authority has behaved unlawfully.¹⁴³ It is the availability of these checks and balances in the context of an enforceable undertaking that will be the centrepiece of the criterion of correctability from a psychological perspective.

4 *Representation*

(a) *Interpretation*

The notion of representation may relate to the concept of control, which was divided by Thibaut and Walker into notions of ‘process control’ and ‘decision control’. Process control relates to the extent and nature of the control that the parties may have over the presentation of evidence. Decision control refers to the extent and nature of the affected person’s control over the making of the final decision.¹⁴⁴ Leventhal combines these notions when he refers to ‘representation’. Lind and Tyler also stress the importance of control and note that ‘the self-interest model suggests that people seek control over decisions because they are fundamentally concerned with their outcomes.’¹⁴⁵ Cropanzano, Kacmar and Bozeman refer to voice, due process and advance notice.¹⁴⁶ The presence of voice in representation is very important to ensure the fairness of a decision. Mill, too, illustrated the relevance of this point, when he noted that ‘he who knows only his own side of the case, knows little of that’.¹⁴⁷ Mill went one step further, in noting that authorities should not only consider the interests of the disputants, but also that of the general public, which may also be impacted by the decision.¹⁴⁸ Representation may be linked to administrative law and the notion of hearing.¹⁴⁹

¹⁴⁰ Tyler, above n 122, 113.

¹⁴¹ Mill, above n 110, 89.

¹⁴² Douglas, *Douglas and Jones’s Administrative Law*, above n 60, ch 19; Administrative Review Council, *Overview of the Commonwealth System of Administrative Review* (26 November 2007) <http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview_Overview_of_the_Commonwealth_System_of_Admin_Review>.

¹⁴³ Douglas, above n 60, chs 7, 19.

¹⁴⁴ Thibaut and Walker, above n 118.

¹⁴⁵ Lind and Tyler, above n 34, 222.

¹⁴⁶ Russell S Cropanzano, K Michele Kacmar and Dennis Bozeman, ‘Organizational Politics, Justice and Support’ in Russell S Cropanzano and K Michele Kacmar (eds), *Organizational Politics, Justice, and Support: Managing the Social Climate of the Workplace* (Quorum Books, 1995) 1, 5.

¹⁴⁷ Mill, above n 110, 115.

¹⁴⁸ *Ibid.*

¹⁴⁹ Hearings have been discussed under the heading ‘Criteria for Procedural Fairness from an Administrative Law Perspective’ above.

(b) *Overlap with Administrative Law*

As noted before, the hearing rule constitutes an important element of procedural fairness from an administrative law perspective. Further, this rule forms a component of representation. Accordingly, an overlap is apparent, once again, between the hearing rule and representation.

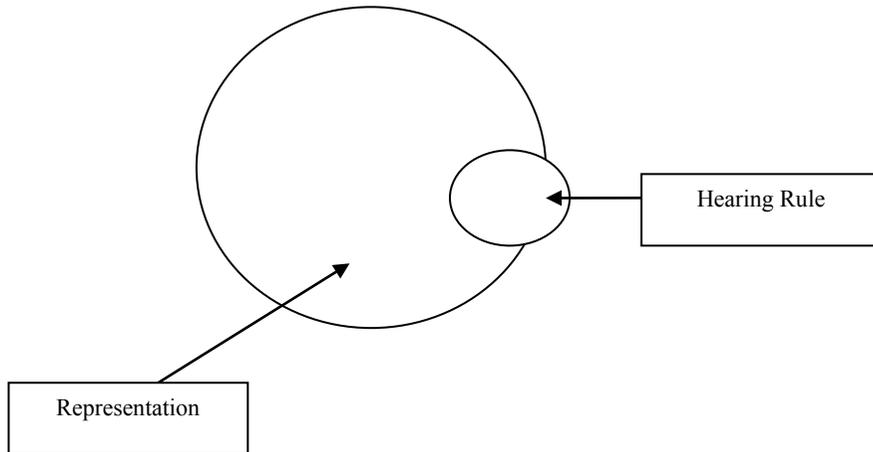


Diagram 3: Overlap

However, as characterised by Diagram 3, it is important to acknowledge that representation from a psychological perspective is broader than the hearing rule. Further, representation requires a greater input from the alleged offenders.

C Recapitulation

Part IV of this article studies procedural fairness of an enforceable undertaking from the perspective of administrative law and from the perspective of the promisor because ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done.’¹⁵⁰ The criteria considered above and summarised in Diagram 4 are central to determining the procedural fairness of an enforceable undertaking.

¹⁵⁰ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259.

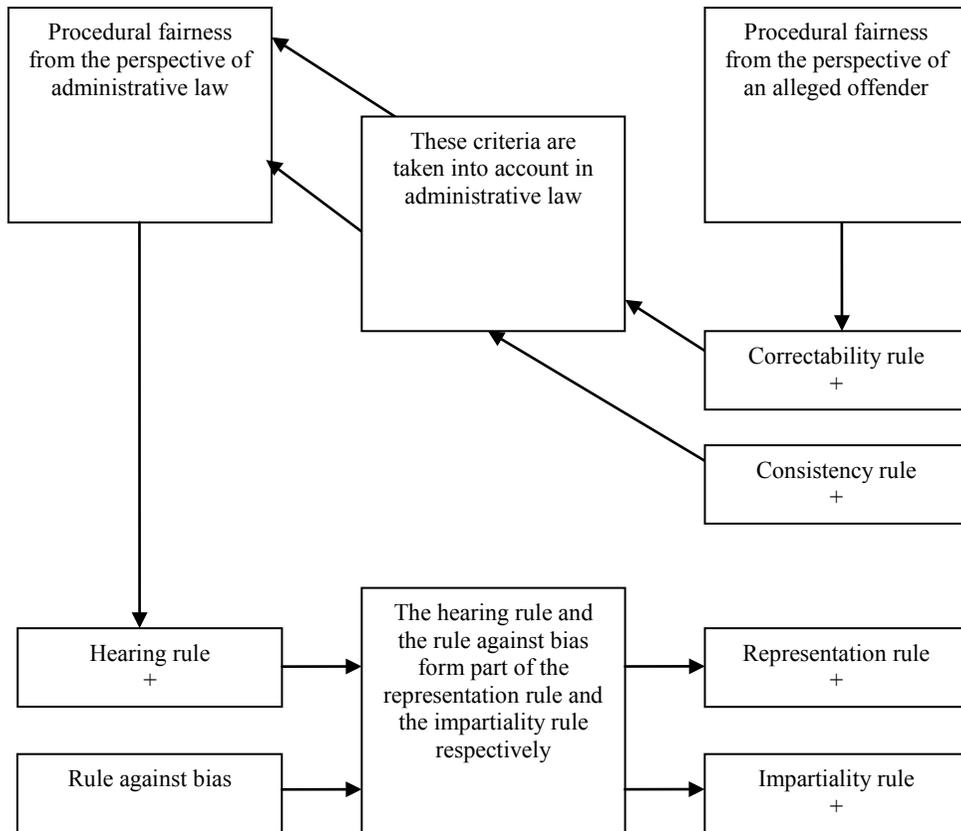


Diagram 4: Interaction of the different criteria.

As illustrated in Diagram 4, the criteria that relate to procedural fairness in administrative law interact with and are relevant to the criteria of procedural fairness from the perspective of the alleged offender and vice versa. For this reason, Part IV of this article will consider hearings under the representation rule and the rule against bias under the impartiality rule.

IV Extent of Procedural Fairness in Enforceable Undertakings

Before applying the procedural fairness criteria mentioned in Part III of this article, it is necessary to consider whether, under administrative law, procedural fairness must be taken into account by ASIC when entering into an enforceable undertaking with an alleged offender.¹⁵¹ Under the common law, procedural fairness is a right to which every member of the public dealing with administrative or judicial authorities is entitled unless the governing

¹⁵¹ Head, above n 23, 174.

legislation states otherwise.¹⁵² Accordingly, the relevant statute may extinguish or may specify the content of this right.¹⁵³

As noted in Part I of this article, ss 93AA and 93A of the ASIC Act do not contain any reference to procedural fairness.¹⁵⁴ However, when enforcing the terms of an undertaking, the court does take into account the circumstances that led the promisor and the regulator to agree to an undertaking.¹⁵⁵ As a consequence, it should be presumed that procedural fairness must be complied with when an enforceable undertaking is accepted by the regulator.

Sections 93AA and 93A of the ASIC Act do not specify any procedure that the regulator must comply with when accepting an enforceable undertaking. The provisions note only that the undertaking must be in writing.¹⁵⁶ The absence of any statutory criteria indicating the procedure that has to be followed to enter into an enforceable undertaking affords the regulator wide discretion in relation to the circumstances under which it may accept an undertaking. Such discretion inhibits the transparency of the process surrounding the formulation of an undertaking.¹⁵⁷ However, to deal with such concerns, ASIC has issued guidelines in relation to its policy on the use of enforceable undertakings.¹⁵⁸

Since procedural fairness is to be applied to enforceable undertakings and statutory procedures relating to entering into enforceable undertakings are non-existent, the following paragraphs assess the presence of procedural fairness based on the criteria outlined in Part III of this article.

A Representation

1 Administrative Law Perspective: The Hearing Rule

In the absence of any statutory requirements, an administrative authority such as ASIC is required to fulfil only minimal requirements in order to comply with the hearing rule. Basically, the corporate regulator must give the affected party notice and a right to respond to an allegation. In the case of an enforceable undertaking, this takes place when the alleged offender becomes aware of the allegation brought by ASIC either during ASIC's investigation or during the hearing looking at the conduct of the regulated entity.

During the investigation or hearing, ASIC must comply with the rules of procedural fairness.¹⁵⁹ In response to ASIC's concern, an alleged offender has the right to contact ASIC to discuss the possibility of entering into an enforceable undertaking. Similarly ASIC may initiate

¹⁵² *Annetts v McCann* (1990) 170 CLR 596; *Sanders v Snell* (1998) 196 CLR 329; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578.

¹⁵³ *Local Government Board v Arlidge* [1915] AC 120.

¹⁵⁴ Based on the statute, ASIC must comply with procedural fairness during its investigation and hearing. However, the provisions in the ASIC Act that relate to enforceable undertakings do not require compliance with procedural fairness during the negotiations that may lead to the creation of an enforceable undertaking.

¹⁵⁵ In *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* (2003) 52 ATR 1, when enforcing the undertaking entered into by the ACCC and Signature, Stone J took into account whether the undertakings were properly given by the promisor and properly accepted by the ACCC; Nehme, above n 14, 160–2.

¹⁵⁶ ASIC Act ss 93AA(1), 93A(1)

¹⁵⁷ Zumbo, above n 18.

¹⁵⁸ These guidelines will be referred to in the following paragraphs.

¹⁵⁹ Robert Baxt, Ashley Black and Pamela Hanrahan, *Securities and Financial Services Law* (LexisNexis Butterworths, 7th ed, 2008) ch 2.

such discussions with an alleged offender. The negotiations to enter into an enforceable undertaking would take place between an alleged offender and an officer of ASIC assigned to the investigation, with the aim of reaching an ‘appropriate regulatory outcome’.¹⁶⁰

Accordingly, the two main elements of the hearing rule — notice and the presentation of submissions — appear to be complied with because during the negotiation each party will have had an opportunity to present their point of view. As a result, from an administrative law perspective, the hearing rule is complied with.

2 *Psychological Perspective*

As illustrated in Part III of this article, the representation rule from a psychological perspective includes, but is not limited to, the hearing rule. Accordingly, in addition to complying with the hearing rule, other considerations need to be taken into account when determining whether the representation rule has been satisfied.

The fact that there are negotiations between the regulator and alleged offenders help to ensure that the parties are satisfied with the outcome of the undertaking. Further, such negotiations allow the promisor to have some control over the process relating to entering into an undertaking. Alleged offenders are not only given the right to voice their concerns and opinions about the alleged conduct but they are also given the opportunity, *in theory*, to play an active role in reaching a compromise with the regulator during the process of drafting the undertaking. ASIC has noted that it ‘will negotiate the terms of the undertaking with the promisor in order to arrive at an appropriate regulatory outcome.’¹⁶¹

Further, even though ss 93AA and 93A of the ASIC Act are silent about the right of the alleged offender to legal representation during the negotiation, in practice, ASIC gives an alleged offender the right to have such representation. For example, the corporate regulator has included in certain undertakings a clause noting that the alleged offender ‘has obtained legal advice in relation to the content and effect of this Enforceable Undertaking’.¹⁶² The presence of such a right ensures that alleged offenders are aware of their rights and of the implications of entering into an enforceable undertaking. It also provides them with some protection in their negotiations with the regulator. However, one improvement that can be made is to ensure that the negotiations that may result in the acceptance of an undertaking are conducted face-to-face and not just over the phone or through written correspondence. From a psychological perspective, people may feel that they had a fairer hearing if they have had a face-to-face meeting with the regulator to discuss the relevant issues.

3 *Presence of Representation?*

As a consequence, the representation that is available an enforceable undertaking is entered into seems adequate and fair both from an administrative law perspective and from the promisor’s perspective. However, in practice, there is a risk that the stronger party may influence the decision made by the weaker party.¹⁶³ As the parties involved in the

¹⁶⁰ Australian Securities and Investments Commission, above n 10, 5 [1.7], 5 [1.9].

¹⁶¹ *Ibid* 5 [1.9].

¹⁶² Australian Securities and Investments Commission and Richard John Swannell (Enforceable undertaking No 017029128, 21 May 2004) 3 [4.1(a)] <[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/017029128.pdf/\\$file/017029128.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/017029128.pdf/$file/017029128.pdf)>.

¹⁶³ *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* (2003) 198 ALR 417, [43].

undertaking do not necessarily have equal bargaining power, there is a risk that the stronger party may bully the other into entering into an undertaking.¹⁶⁴

B Correctability Rule

Correctability is of great importance from the psychological perspective. An aggrieved party usually would like to have an opportunity to rectify the decision made by an administrative authority. In considering the application of the correctability rule to enforceable undertakings, three questions must be considered:

1. Can an enforceable undertaking be varied?
2. Are enforceable undertakings subject to merits review or judicial review?
3. What are the consequences that may apply if an enforceable undertaking is breached?

1 *Can an Enforceable Undertaking be Varied?*

Sections 93AA(2) and 93A(2) of the ASIC Act note that the promisor ‘may withdraw or vary the undertaking at any time, but only with ASIC’s consent’. ASIC may therefore agree to the variation of an enforceable undertaking, when such a change is appropriate. ASIC usually accepts a request to vary an undertaking if:¹⁶⁵

- the variation will not alter the spirit of the original undertaking;
- compliance with the undertaking is subsequently found to be impractical; or
- there has been a material change in the circumstances which led to the undertaking being given.

For example, on 3 May 2000, ASIC accepted a variation of the undertaking given by CIBS World Markets Australia Ltd after the company discovered that the task of complying with the undertaking was very complex and as a result the company would not be able to meet the deadline specified.¹⁶⁶ If there is agreement that the terms of an enforceable undertaking are no longer appropriate, the regulator is typically willing to accept a variation of those terms.

Although enforceable undertakings may be varied, this requires the approval of the regulator, who has complete discretion in relation to this matter. Independent parties are not involved in the process. Therefore, it is important to consider whether, in addition to variation, merits review and/or judicial review of an enforceable undertaking is possible.

¹⁶⁴ Yeung, above n 13, 117. In certain instances, the regulator may not allow the alleged offender to have a say in the negotiation. However, the alleged offender may still go ahead with the undertaking because such a sanction may be seen as the lesser of two evils. An enforceable undertaking falls after all toward the bottom of Braithwaite’s pyramid (Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35) and may be preferred over the instigation of civil action against the alleged offender. For example, in *Donald v Australian Securities and Investments Commission* (2001) 38 ACSR 10, the AAT, while reviewing ASIC decision to ban Mr Donald, stood in the position of ASIC and decided that Mr Donald had a choice between entering into an undertaking or completing the banning order as originally made by ASIC (4-year ban): at 40–1 [135]. The reality is that the choice given by the tribunal is not a real choice: Mr Donald was asked to pick between an undertaking and a banning order. In normal cases, any reasonable person would pick the lesser penalty, which is in this case an undertaking. After all, a banning order is a harsher penalty than an undertaking. Following the AAT’s decision, on 18 June 2001, Mr Donald presented ASIC with a proposed undertaking.

¹⁶⁵ Australian Securities and Investments Commission, above n 10, 15 [3.13].

¹⁶⁶ Australian Securities and Investments Commission and CIBS World Markets Australia Ltd (Enforceable undertaking No 008 547 449, 3 May 2000).

2 *Are Enforceable Undertakings subject to Merits Review or Judicial Review?*

Merits review and judicial review provide different protections to regulated entities. While judicial review is limited to determining if a decision was lawfully made,¹⁶⁷ merits review allows the Administrative Appeal Tribunal ('AAT') to consider new evidence, which was not available to the original regulatory agency, in determining the 'best' or 'preferable' decision on the facts.¹⁶⁸ Accordingly, it would be preferable for an enforceable undertaking to be subject to both judicial review and merits review. However, it is important to acknowledge that an enforceable undertaking falls toward the bottom end of Braithwaite's enforcement pyramid as illustrated in Diagram 5.

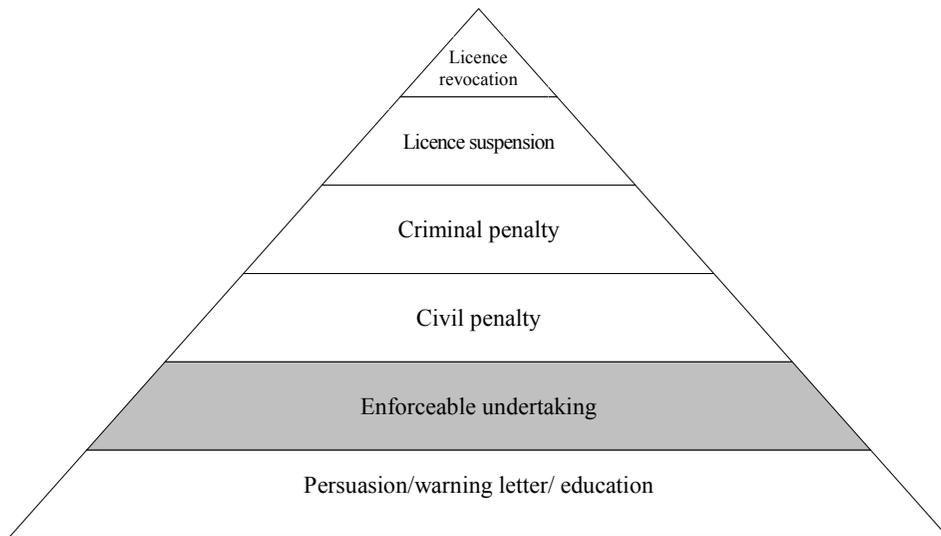


Diagram 5: Enforcement pyramid¹⁶⁹

In light of the fact that an enforceable undertaking falls toward the bottom of the enforcement pyramid, the availability of merit and judicial review may impose a higher burden on ASIC when accepting an enforceable undertaking because the process of negotiating and enforcing an undertaking may become lengthier and more expensive by opening the door for more people to challenge ASIC's decision to accept or reject an

¹⁶⁷ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36. See also Aronson, Dyer and Groves, above n 24, 19.

¹⁶⁸ *Kioa v West* (1985) 159 CLR 550, 622; *Abebe v Commonwealth* (1999) 197 CLR 510, 579–80.

¹⁶⁹ This pyramid is based on Ayres and Braithwaite's pyramid of enforcement. Ayres and Braithwaite, above n 164. The width of each layer in the pyramid represents the proportion of enforcement activities at that level. The explanation for the varying size is simple. If the regulator can plausibly threaten to match any noncompliance by moving successfully up the pyramid, then most of the regulator's work will be done effectively at the bottom layers of the pyramid. The lighter sanctions will dissuade the regulated entity from continuing its illegal activities because it will not want the regulator to use its strong sanctions. Put another way, when there is an equilibrium between harsh and soft sanctions, the regulator attains the result needed by treading softly.

enforceable undertaking.¹⁷⁰ Such reviews may also imply that the trust and confidence that are fundamental to the acceptance of an undertaking are missing. The presence of such methods of review could lead ASIC to prefer to instigate civil proceedings or rely on other administrative sanctions such as banning orders or licence revocations. Further, an enforceable undertaking cannot be entered into without the agreement of both parties. This has to be taken into account when deciding on the need for judicial or merits review. If an alleged offender is unhappy with the terms of the undertaking, the alleged offender can refuse to enter into the undertaking.¹⁷¹

Accordingly, when deciding if judicial or merit review should be available, one question has to be answered: are we considering the issue from the perspective of the regulator or the promisor? From the psychological perspective, consideration is from the position of the promisor. The promisor has to feel that when an enforceable undertaking is entered into there is ground to correct the content of an undertaking. Checks and balances need to be in place for the promisor to perceive that the procedure relating to an undertaking is fair. As seen in Diagram 2, the outcome of an enforceable undertaking is more effective in changing the compliance culture of an organisation if procedural fairness is perceived by the promisor to have been afforded.

(a) *Merits Review*

Section 244(2) of the ASIC Act lists the decisions by ASIC that may be reviewed by the AAT. The acceptance or rejection of an enforceable undertaking is not one of those decisions. As a consequence, an enforceable undertaking is not subject to external merits review. However, s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that when the AAT is reviewing a decision (including decisions by ASIC which are subject to merits review, such as banning orders), it stands in the place of the regulator (in that instance, ASIC) and is empowered to exercise all the powers and discretions conferred by the relevant enactment on the regulator.¹⁷² Therefore, in instances where ASIC refuses to enter into an enforceable undertaking and decides to impose a banning order on a person, the banning order paves the way for the affected person to apply indirectly, by challenging the banning order, for review of ASIC's decision to refuse to enter into an enforceable undertaking.¹⁷³

In this circumstance, the AAT has power to review the rejection of the undertaking indirectly under the guise of reviewing the decision to make the banning order, and may also dictate the content of the undertaking to ASIC, since the decision of the AAT may stand as if it was ASIC's decision.¹⁷⁴

(b) *Judicial Review*

As for judicial review, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') applies to 'a decision of an administrative character made ... under an

¹⁷⁰ Even though merits review is not available for enforceable undertakings, this has not stopped people in the past challenging ASIC's decision to refuse to accept an enforceable undertaking. See, eg, Marina Nehme, 'Expansion of the powers of the Administrative Appeals Tribunal in Relation to Enforceable Undertakings' (2007) 25 *Company and Securities Law Journal* 101.

¹⁷¹ However, as noted in n 164, above, the choice given to the promisor may not be a real choice after all.

¹⁷² *Donald v Australian Securities and Investments Commission* (2001) 64 ALD 717; *Australian Securities and Investments Commission v Donald* (2003) 136 FCR 7.

¹⁷³ *Ibid.*

¹⁷⁴ *Australian Securities and Investments Commission v Donald* (2003) 136 FCR 7; *Daws and Australian Securities and Investments Commission* [2006] AATA 321 (5 April 2006); *Australian Securities and Investments Commission v Daws* [2006] FCA 723 (24 May 2006). See also Nehme, above n 170.

enactment'.¹⁷⁵ It is therefore necessary to determine if an enforceable undertaking falls into this category. It is most likely that it does, as the court noted in *Australian Petroleum Pty Ltd v ACCC*,¹⁷⁶ that a decision by the regulator to vary or withdraw an enforceable undertaking was reviewable under the ADJR Act.¹⁷⁷ This implies that the regulator's decision to accept or refuse to enter into an undertaking is also subject to judicial review,¹⁷⁸ thus if an enforceable undertaking has not been entered into in compliance with natural justice, the promisor may apply for judicial review of ASIC's decision.¹⁷⁹ Similarly, the promisor may apply to the court to review conduct that relates to the regulator's acceptance or refusal to enter into an undertaking.¹⁸⁰ This seems to be confirmed by *BBC Hardware Ltd v Henneken*,¹⁸¹ where it was noted that the rejection of an enforceable undertaking by a regulator is a reviewable decision.¹⁸² Further, Mullins J 'determined the application on the basis of the law that governs the judicial review of a reviewable decision'.¹⁸³

3 *What are the consequences that may apply if an enforceable undertaking is breached?*

The scope of the judicial review by itself may provide enough protection for the promisor because a breach of the undertaking may not constitute contempt of court. Accordingly, a promisor, who is unhappy with his or her undertaking, may simply cease to comply with it. In instances where a promisor does stop complying with an undertaking, the regulator has two main options available to it. It may initiate further negotiations with the promisor, which may lead to the variation of the undertaking,¹⁸⁴ or it may enforce the undertaking in court.¹⁸⁵ If the second option is chosen, the court will not automatically enforce the undertaking, but would consider the issue of procedural fairness and the appropriateness of the terms of the undertaking.¹⁸⁶ For instance, if the undertaking imposes unfair or unclear terms, the court may refuse to enforce the terms of the undertaking.¹⁸⁷ This provides further protections to the promisor and may lessen the need for the availability of merits review.

¹⁷⁵ *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) ('ADJR Act'). See also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 335.

¹⁷⁶ (1997) 73 FCR 75.

¹⁷⁷ *Ibid* 394.

¹⁷⁸ Parker, above n 8, 242.

¹⁷⁹ ADJR Act s 5(1)(a).

¹⁸⁰ ADJR Act s 6(1)(a).

¹⁸¹ [2006] QSC 149 (22 June 2006).

¹⁸² This decision was in relation to enforceable undertakings under the *Workplace Health and Safety Act 1995* (Qld), but is nevertheless an indication that enforceable undertakings are considered to be reviewable administrative decisions. See also Kristy Richardson, 'Judicial Review of Enforceable Undertakings Under the *Workplace Health and Safety Act 1995*' (2007) 27 *Queensland Lawyer* 250; Richard Johnstone and Michelle King, 'A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *Australian Journal of Labour Law* 280.

¹⁸³ *BBC Hardware Ltd v Henneken* [2006] QSC 149 (22 June 2006) [36].

¹⁸⁴ Nehme, above n 13, 122.

¹⁸⁵ ASIC Act ss 93AA(3), 93A(3).

¹⁸⁶ Nehme, 'Enforceable Undertakings and the Court System', above n 14.

¹⁸⁷ Richard Farmer, 'Trade Practices Compliance Programs — Implications from *ACCC v Real Estate Institute of WA Inc*' (1999) 27 *Australian Business Law Review* 249, 252; *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79, 82 [13], [28]; *Australian Competition and Consumer Commission v Auspine Ltd* (2007) ATPR ¶42-131, 46,556 [35]. ASIC has attempted to clarify the terms of the enforceable undertakings. It released guidelines in 2007 in relation to the content of the enforceable undertakings more broadly. A template has been established in relation to details that may be included in a compliance program and the information that should be taken into consideration by the expert when auditing a compliance program. Additionally, the templates contain samples in relation to compensation and corrective advertisement: Louise Sylvan, 'Future proofing — working with the ACCC'

4 *Summary*

As can be seen, a number of options provide protection to the promisor to ensure that procedural fairness is complied with. The fact that an enforceable undertaking is a settlement, and that the regulator and the promisor may vary it to ensure its relevance, helps to ensure the fairness of the process. The lack of external merits review is not a major drawback and will not have a significant impact on the procedural fairness of an enforceable undertaking because of the availability of other protections.

Judicial review, for instance, is available to correct any undue coercion that may have led to the acceptance of an enforceable undertaking. Such review will, in short, focus on the quality of the negotiation. However, judicial review is a last resort strategy. Accordingly, the question that may arise is the following: Is judicial review all that is needed to protect aggrieved parties to an enforceable undertaking? The answer can be yes given that an undertaking is a negotiable sanction. Further, a person who is unhappy with the terms of his or her undertaking may stop complying with the undertaking and run the risk of being sued by ASIC for the breach.¹⁸⁸ Accordingly, an enforceable undertaking may be viewed as procedurally fair from the point of view of the promisor due to the application of the correctability rule.

C *Impartiality Rule*

1 *Administrative Law Perspective*

ASIC has a range of administrative sanctions at its disposal to deal with certain breaches of the law.¹⁸⁹ Some of these administrative sanctions are enforceable undertakings, banning orders, and suspension and revocation of licences. Accordingly, in certain instances, ASIC investigates and imposes sanctions without court intervention.

From an administrative law perspective, this means that the content of the rule against bias will be diluted when it is applied to determine the procedural fairness of ASIC's administrative decisions.¹⁹⁰ As a consequence, the regulator complies with the rule against bias as long as the investigation and the imposing of administrative sanctions are dealt with by different parties in the regulatory agency. Such a division seems to have been followed in the case of enforceable undertakings, since the negotiations to enter into an enforceable undertaking are usually conducted by the officer assigned to the investigation and the decision to accept or reject an undertaking is made by a senior executive in ASIC.¹⁹¹ As a result, from an administrative law perspective, the rule against bias is complied with. However, this may not be the case from the perspective of the promisor.

(Speech delivered at Australian Compliance Institute, Melbourne, 1 September 2005); Australian Securities and Investments Commission, 'Schedule 1: Standard EU terms, with an example of acceptable background' (1 August 2007).

¹⁸⁸ ASIC may sue for the alleged breach that led to the enforceable undertaking or it may enforce the undertaking in court: ASIC Act s 93AA(3).

¹⁸⁹ Australian Law Reform Commission, above n 1, 58.

¹⁹⁰ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342; *Kioa v West* (1985) 159 CLR 550; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509.

¹⁹¹ Australian Securities and Investments Commission, above n 10, 5 [1.7]–[1.8].

2 *Psychological Perspective*

As noted in Part III of this article, the impartiality rule under the psychological perspective is more exacting than the bias rule from an administrative law perspective. The fact that the rule against bias is complied with from an administrative law perspective does not mean that such compliance is there from a psychological perspective. An enforceable undertaking is a compromise between the alleged offender and ASIC. This by itself diminishes the need to involve an independent party. In addition, the impartiality rule may not be very important from the point of view of promisors because they have, in theory, a say in deciding the terms of the undertaking.¹⁹² That an enforceable undertaking may be varied in certain circumstances makes this even more likely to be so. One concern that a promisor may have, due to the lack of independent parties in the negotiation, is that, if ASIC rejects the offer to enter into an undertaking, the promisor cannot apply for merits review of the decision. However, judicial review is available and may lead to a review of the regulator's conduct. From the perspective of the promisor, then, the presence of an outsider, while beneficial, may be regarded as prolonging the process of entering into an undertaking and increasing the cost of entering into an undertaking.

Nevertheless, this does not mean that ASIC's system for accepting an undertaking is perfect. It would benefit from the involvement of independent parties. The author believes such involvement is beneficial and possible and would not necessarily complicate the process of entering into an undertaking. Other regulators involve independent parties in the process when accepting enforceable undertakings. For example, under the *Workplace Health and Safety Act 1995* (Qld), the Queensland Department of Employment and Industrial Relations

has established a group of experts as an advisory panel. Each application [to enter into an enforceable undertaking] is reviewed by a three member panel. ... For workplace health and safety applications the panel is made up of two industry representatives and the Executive Director of Workplace Health and Safety Queensland.¹⁹³

The Victorian Environmental Protection Authority goes one step further. Its procedure for accepting an undertaking requires referral to the authority's internal enforcement review panel and to an independent advisory panel.¹⁹⁴ The author believes it is advisable for ASIC similarly to involve independent parties. If an independent panel was involved in the process, the promisor may perceive that ASIC was not the only body involved in deciding whether to accept or reject an undertaking. This will lessen the perceived bias that may appear if ASIC is the only body deciding on the acceptance of an undertaking.

D *Consistency Rule*

Although the ASIC Act does not specify any procedure that the regulator must comply with when accepting an enforceable undertaking, ASIC has issued a regulatory guide in relation to its use of enforceable undertakings. *Regulatory Guide 100* states:¹⁹⁵

¹⁹² Ibid 5 [1.9].

¹⁹³ Department of Employment and Industrial Relations (Qld), 'Enforceable Undertakings under the *Workplace Health and Safety Act 1995* and the *Electrical Safety Act 2002*' (Information for applicants, Department of Employment and Industrial Relations (Qld) May 2008) 6.

¹⁹⁴ Environmental Protection Authority (Vic), 'Enforceable Undertakings: Draft Guidelines' (Publication No 1244, August 2008) 1–2.

¹⁹⁵ Australian Securities and Investments Commission, above n 10, 5 [1.7]–[1.9].

1.7 A person wishing to offer us an enforceable undertaking under ss 93A or 93AA (promisor) should first discuss it with an ASIC case officer assigned to the investigation.

1.8 Once the offer has been made and the terms of any undertakings discussed, the decision to accept or reject the offer is a formal decision made by a senior executive.

1.9 In the course of drafting the undertaking, we will negotiate the terms of the undertaking with the promisor in order to arrive at an appropriate regulatory outcome.

Regulatory Guide 100 further states that four critical considerations are taken into account when determining if the regulator should accept an undertaking:¹⁹⁶

- What is the position of the consumers and investors whose interests have been, or may have been, harmed by the suspected conduct?
- What is the effect of the enforceable undertaking on the regulated population as a whole?
- What is the effect of the enforceable undertaking on the regulated person's future conduct? Will it deter the alleged offender from future breaches of the law?
- How will the community benefit from entering into an undertaking?

The application of published considerations assists in achieving not only consistency in the acceptance of undertakings, but also the perception of such consistency. In addition, the fact that only a small number of senior staff are authorised to accept enforceable undertakings provides a further check to ensure consistency.¹⁹⁷

The corporate regulator has also issued a series of guidelines and templates to ensure that the public is aware of what ASIC takes into consideration when deciding whether an enforceable undertaking is appropriate to deal with an alleged breach.¹⁹⁸ This information is very useful because it allows an alleged offender to apply for judicial review should the regulator fail to follow its own guidelines in relation to negotiations that may lead to an enforceable undertaking.¹⁹⁹

V Conclusion

As seen in Part IV of the article, it appears that procedural fairness is complied with both from an administrative law perspective and from the perspective of the promisor. Based on administrative law, natural justice is present because the hearing rule and the rule against bias are followed by ASIC when negotiating an enforceable undertaking. Further, this article has argued that if the representation, correctability, impartiality and consistency rules are complied with, the promisor will perceive the process of negotiating an enforceable undertaking to be fair and accordingly should be more willing to fulfil his or her obligations under the agreement. The results of this article are summarised in Diagram 6.

¹⁹⁶ Ibid 8–9 [2.8]. Nehme, above n 13, 111.

¹⁹⁷ Interview with Jan Redfern, former executive director of Enforcement (Face to face meeting, 20 June 2008).

¹⁹⁸ Australian Securities and Investments Commission, *Regulatory Guides* (2 August 2010).

¹⁹⁹ *Hamilton v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 48 FCR 20.

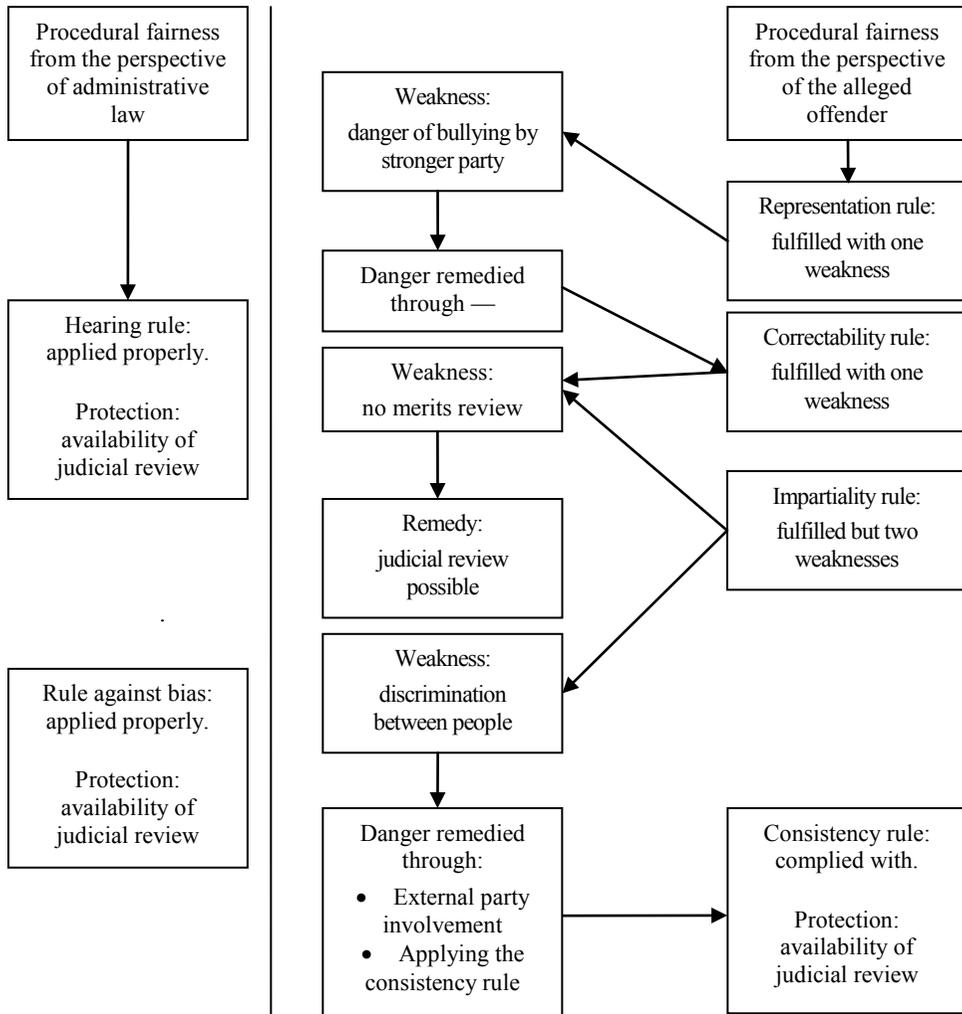


Diagram 6: Procedural fairness and its application to enforceable undertakings.

From the information available to the public, it appears that the representation rule has been complied with and, in instances where this goal is not achieved because the negotiation was dominated by one person (the stronger party), Diagram 6 illustrates that the remedy protecting the parties from such conduct is the presence of the correctability rule.

With respect to the correctability rule, the fact that an enforceable undertaking may be challenged in court provides protection to the promisor. The only weakness that may appear is the lack of merits review, but this is not a major issue since judicial review is possible and may be enough to provide the necessary protection to the promisor. This is especially the case because an enforceable undertaking cannot be entered into without the consent of both parties. Further, a promisor who is unhappy with the terms of his or her undertaking may refuse to enter into the undertaking or, where the undertaking has been accepted, the promisor may stop complying with the terms of the undertaking.

The fact that the decision to accept or reject an enforceable undertaking is made by a person within ASIC other than the person conducting the investigation ensures that the rule against bias is complied with from an administrative law perspective. From the perspective of the promisor, the impartiality rule may be said to have been complied with through the availability of judicial review and application of the consistency rule. However, to ensure that the impartiality rule is always complied with, it is beneficial to involve outside parties to ensure that the promisor perceives the process of accepting an undertaking as impartial.

The issuing of guidelines by ASIC in relation to the entering into and acceptance of enforceable undertakings ensures that the consistency rule is being complied with. If the guidelines are not complied with, the alleged offender may apply for judicial review.

In summary, there are checks and balances available to ensure that the process of entering into an enforceable undertaking is fair. However, it is important to note that this article has certain limitations. In relation to procedural fairness from the point of view of the promisor, further studies and interviews should be conducted to test and confirm the reaction of promisors to the fairness of the process that may lead to an enforceable undertaking.