

**12th Annual University of South Australia Competition and Consumer  
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**Statutory undertakings: their history, use and utility and the perspective of  
the Court**

*Justice Alan Robertson, Federal Court of Australia*

**History**

Section 87B was the first mechanism of its kind in the common law world.<sup>1</sup> It was the product of two inquiries into legislative control of mergers and acquisitions, which followed the 1980s takeovers boom, and was ultimately introduced into the *Trade Practices Act 1974* (Cth) (**TPA**) by the *Trade Practices Legislation Amendment Bill 1992* (Cth).

It appears the practice of the Trade Practices Commission (**Commission**) of accepting undertakings proffered by parties to address competition concerns emerged during the 1980s. Some of the agreements that were struck between the Commission and parties prior to the introduction of s 87B were the subject of formal deeds negotiated during consultation over prospective mergers,<sup>2</sup> while others emerged from the settlement of proceedings commenced by the Commission for the purpose of securing an injunction or divestiture orders.<sup>3</sup> These ad hoc arrangements came under increased public scrutiny in the late 1980s following the Commission's decision not to enforce divestiture undertakings secured during the Ansett/East

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I acknowledge with gratitude the very substantial assistance provided by my associate, Matt Sherman, in the preparation of this paper.

<sup>1</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) [2.159]; R Johnstone and C Parker, 'Enforceable Undertakings in Action – Report of a Roundtable Discussion with Australian Regulators' (Working Paper, February 2010) 1. The germ of the idea may have come from the then recently enacted s 69A of the *New Zealand Commerce Act 1986*, to which I later refer.

<sup>2</sup> A I Tonking and L M Castle, 'Mergers: The Use and Utility of Undertakings' (1993) 1 *Trade Practices Law Journal* 37, 37–38.

<sup>3</sup> See, eg, *Trade Practices Commission v Arnotts Ltd* [1989] ATPR 40-930; see generally House of Representatives Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition?* (May 1989) 80 [6.4.1].

West merger due to practical and legal difficulties in securing divestiture to a suitable buyer.<sup>4</sup> This event highlighted emerging concerns about the transparency<sup>5</sup> and enforceability of undertakings given by means of private agreements.<sup>6</sup>

In 1989, the Griffiths Committee recommended that the TPA be amended to provide remedies for breaches of undertakings entered into in connection with merger authorisations and consultation over mergers.<sup>7</sup> It expressly referred to the Ansett/East West merger.<sup>8</sup> Two years later the *Cooney Report* endorsed the Griffiths Committee's proposal and extended the recommendation to cover breaches of *all* undertakings between the Commission and other persons, based on a submission by the Commission which called for the issue of enforceability to be addressed 'urgently and not just in relation to undertakings linked to mergers, but across the board'.<sup>9</sup>

The explanatory memorandum for the Bill which introduced s 87B<sup>10</sup> the following year noted that the provision provided legislative recognition of a pre-existing practice and that the content of an undertaking would be a matter for agreement between the Commission and the person giving the undertaking.<sup>11</sup> In his second reading speech, the Minister observed:

It has proved efficient in some cases for the Commission to avoid prolonged litigation by accepting undertakings from businesses to cease particular conduct or to take action which will lessen the otherwise undesirable effects of their conduct. This approach has been used in appropriate cases for several years and has avoided considerable cost to both the Commission and the businesses concerned. At the same time the outcomes have been demonstrably advantageous to affected third parties and consumers generally.

Recognising the importance and desirability of affording the Commission a flexible approach to the resolution of trade practices matters, the Government has decided to provide legislative recognition of this practice. This will promote a greater public awareness of the range of options available in the administration and enforcement of the Act. By providing for the enforceability of undertakings, the scheme will remove

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<sup>4</sup> A I Tonking and L M Castle, 'Mergers: The Use and Utility of Undertakings' (1993) 1 *Trade Practices Law Journal* 37, 38; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition?* (May 1989) 81.

<sup>5</sup> *Ibid* 39

<sup>6</sup> *Ibid* 40, citing Trade Practices Committee, Submission No 1 to the Cooney Committee Inquiry, 26.

<sup>7</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Mergers, Takeovers and Monopolies: Profiting from Competition?* (May 1989) 80–83 (Recommendation 9).

<sup>8</sup> *Ibid* 81.

<sup>9</sup> Senate Standing Committee on Legal and Constitutional Affairs, *Mergers, Monopolies & Acquisitions: Adequacy of Existing Legislative Controls* (December 1991) 129–130 (Recommendation 19).

<sup>10</sup> *Trade Practices Legislation Amendment Act 1992* (Cth).

<sup>11</sup> Explanatory Memorandum, Trade Practices Legislation Amendment Bill 1992 (Cth) [55].

the need to rely on means outside the Act to enforce undertakings that people have given, should this prove necessary.<sup>12</sup>

It is evidence of the versatility and utility of the provision that the provision has been replicated and adapted in a variety of statutory contexts, both within Australia and overseas. Also, as I refer to later, in an Act which is so frequently amended, s 87B has remained stable. It has only been amended once since its introduction — in 2006, to introduce an additional sub-section which makes clear that undertakings can be accepted in connection with a formal merger clearance or an authorisation.<sup>13</sup>

### **Uses of enforceable undertakings**

Despite its origins as a flexible and commercially expedient remedy in the merger context, it appears that s 87B undertakings have most often been used as an enforcement tool, particularly as a means of concluding investigations into breaches of the consumer protection provisions now contained in the *Australian Consumer Law*. In 2012–13, the ACCC accepted eighteen undertakings under section 87B, only two of which were new undertakings offered in the context of mergers.<sup>14</sup> This pattern is broadly consistent with previous years, in which enforcement-related undertakings have tended to outnumber those proffered as merger remedies by a significant margin.<sup>15</sup>

### **Types of undertakings accepted under the CCA**

The scope and content of undertakings accepted under the *Competition and Consumer Act 2010* (Cth) (CCA) vary according to the nature and complexity of the legal issues addressed and the commercial and regulatory imperatives of the parties. Undertakings have ranged from relatively straightforward documents providing for corrective advertising and compliance training to more complex instruments providing for divestitures, interim arrangements and ongoing obligations in relation to commercial behaviour. At the complex end of the spectrum lie the highly technical access undertakings accepted under s 44ZZA and telecommunications

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<sup>12</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2407 (Mr Michael Duffy).

<sup>13</sup> *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth). I do not count s 218 of the *Australian Consumer Law* as an amendment. It is in substantially similar terms to s 87B and what follows about s 87B applies to s 218 — except the competition parts. Neither do I count s 87C, which provides a statutory basis for undertakings to the Secretary of the Department. This appears to be a reference to the role of the Secretary in instituting prosecutions under s 163.

<sup>14</sup> Australian Competition and Consumer Commission, *Annual Report 2012–13* (2013) Appendix 9.

<sup>15</sup> See, eg, S Andrews, ‘Section 87B Undertakings: Practice, Principles and Pitfalls’ (2010) 18 *Trade Practices Law Journal* 244, 245; Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) [2.162].

undertakings made under ss 151CQ and 152CBA(2). Apart from these more specialised access undertakings, it is useful to distinguish between two general species of undertaking:

- *Enforcement-related undertakings* tend to address alleged breaches of the Act, some of which are ongoing. These undertakings tend to be behavioural.
- *Merger-related undertakings* tend to look forward to the competitive dynamics of a hypothetical market or markets following a proposed merger or acquisition. While these undertakings may contain behavioural elements they generally have structural obligations at their core.<sup>16</sup>

The different purposes of these two species of undertaking inform the types of obligations that are imposed. However, there are some commonalities between the two. For example, it appears to be the practice that all undertakings contain explicit terms acknowledging that the document will be made public and that it does not derogate from the rights of and remedies available to third parties arising from the alleged conduct.<sup>17</sup>

#### *Enforcement-related undertakings*

Enforcement-related undertakings are generally entered into following an investigation into a breach of the CCA, often as an alternative to court proceedings. A typical enforcement-related undertaking would contain a description of the impugned conduct, an acknowledgement that the conduct constituted or was likely to have constituted a breach of the Act, a commitment not to engage in the conduct in the future, corrective measures and provision for compliance training and reporting.<sup>18</sup> Corrective steps are adapted to the circumstances of the alleged breach. For example, previous undertakings have provided for:

- direct communications with customers addressing the conduct in question;<sup>19</sup>
- corrective advertising<sup>20</sup> and funding of public information campaigns;<sup>21</sup>

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<sup>16</sup> Australian Competition and Consumer Commission, *Merger Guidelines* (November 2008) 63.

<sup>17</sup> Australian Competition and Consumer Commission, *Guide to Section 87B of the Competition and Consumer Act: Guidelines on the Use of Enforceable Undertakings by the Australian Competition and Consumer Commission* (April 2014) 5.

<sup>18</sup> *Ibid.*

<sup>19</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Tyco Australia Pty Ltd trading as ADT Security* (27 May 2005) cl 17 and 18.

<sup>20</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Maggie Beer Products Pty Ltd* (18 August 2014) cl 20.

- variation of advertising or packaging;<sup>22</sup>
- extended warranty periods and repairs;<sup>23</sup>
- cessation of supply, product recalls and product destruction;<sup>24</sup>
- assurances to counterparties that contractual rights will not be enforced;<sup>25</sup>
- refunds, returns or a compensation scheme for affected parties;<sup>26</sup> and
- (at least in the past) donations to community organisations or charities.<sup>27</sup>

### *Merger-related undertakings*

Merger-related undertakings are generally proffered to address competition concerns that have emerged during an informal review of a proposed merger. Final undertakings are usually accompanied by a public competition assessment.<sup>28</sup> These undertakings will generally provide an overview of the proposed merger or acquisition, the Commission’s review of the transaction and the Commission’s competition concerns. The Commission has a ‘strong preference’ for structural undertakings in the merger context,<sup>29</sup> which will usually entail divestiture of a business or asset to a suitable and viable purchaser which is independent of the merged firm. For example, previous undertakings have provided for:

- sale of subsidiaries or business units;<sup>30</sup>

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<sup>21</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Philip Morris* (5 May 2005) cl 20; *Undertaking to the ACCC given for the purposes of section 87B by British American Tobacco* (11 May 2005) cl 23.

<sup>22</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Maggie Beer Products Pty Ltd* (18 August 2014) cl 20.

<sup>23</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Optus Mobile Pty Ltd* (6 January 2011) cl 20, 21 and 22.

<sup>24</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Sony Trading Pty Ltd* (1 February 2010) cl 13(c) and (d).

<sup>25</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Express Mobile Services Australia Pty Ltd* (11 August 2014) cl 11(2)(a)(A).

<sup>26</sup> Australian Competition and Consumer Commission, *Guide to Section 87B of the Competition and Consumer Act: Guidelines on the Use of Enforceable Undertakings by the Australian Competition and Consumer Commission* (April 2014) 5; see, eg, *Undertaking to the ACCC given for the purposes of section 87B by Family Educational Publishers* (21 June 1995) cl 10 and *Undertaking to the ACCC given for the purposes of section 87B by Tyco Australia Pty Ltd* (27 May 2005) cl 19.

<sup>27</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Woolworths (South Australia) Pty Ltd* (16 December 2002) cl 2.

<sup>28</sup> Australian Competition and Consumer Commission, *Informal Merger Review Process Guidelines* (September 2013) [2.68].

<sup>29</sup> Australian Competition and Consumer Commission, *Merger Guidelines* (November 2008) 63.

<sup>30</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Caltex Australia Petroleum Pty Ltd* (15 May 2014) cl 2.11.

- sale or assignment of assets, product lines or key contracts;<sup>31</sup> and
- hold separate, ring-fencing and non-discrimination arrangements.<sup>32</sup>

In this context, behavioural obligations may be imposed as an auxiliary measure, in order to facilitate the divestiture to an appropriate purchaser or ensure the viability and competitiveness of the divested business. For example, an undertaking may oblige the merged firm to continue to provide the divested entity with access to key inputs, personnel, services or information.<sup>33</sup> Undertakings have also commonly been used as an interim measure, to ensure that no further action is taken to implement a merger or acquisition until the Commission has had an opportunity to assess its potential implications.

### **Undertakings in other statutory contexts**

Statutory undertakings have proved to be an attractive enforcement tool in a variety of other regulatory contexts.<sup>34</sup> For regulators with limited resources, enforceable undertakings are a cheap and effective means of addressing unlawful behaviour. In 1998, the Australian Securities and Investments Commission (**ASIC**) was given a general power along the lines of s 87B to accept undertakings in connection with matters relating to its functions and powers under the ASIC Act.<sup>35</sup> It also possesses specific powers to accept undertakings given by responsible entities of registered schemes<sup>36</sup> and undertakings given in relation to

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<sup>31</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Pfizer Inc and Pfizer Australia Pty Ltd* (30 September 2004) cl 6.

<sup>32</sup> See, eg, *Undertaking to the ACCC given for the purposes of section 87B by Pfizer Australia Pty Ltd* (22 November 2012) cl 2.14 to 2.16; *Undertaking to the ACCC given for the purposes of section 87B by Hertz Australia Pty Ltd and Hertz Global Holdings, Inc* (29 September 2014) cl 2.14.

<sup>33</sup> Australian Competition and Consumer Commission, *Merger Guidelines* (November 2008) 63; *Undertaking to the ACCC given for the purposes of section 87B by Pfizer Australia Pty Ltd* (22 November 2012) cl 5; *Undertaking to the ACCC given for the purposes of section 87B by Fonterra Co-Operative Group Limited* (18 January 2005) cl 2.1.

<sup>34</sup> See generally Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) 587–610; R Johnstone and C Parker, ‘Enforceable Undertakings in Action — Report of a Roundtable Discussion with Australian Regulators’ (Working Paper, February 2010).

<sup>35</sup> See *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA, which was introduced by the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth) sch 1, cl 11.

<sup>36</sup> See *Australian Securities and Investments Commission Act 2001* (Cth) s 93A, which was introduced by the *Managed Investments Act 1998* (Cth) sch 2, cl 183.

Commonwealth credit legislation.<sup>37</sup> ASIC has used undertakings extensively,<sup>38</sup> particularly in relation to disclosure obligations and misleading and deceptive statements.<sup>39</sup>

In the early to mid-2000s a number of other regulators were given the power to accept enforceable undertakings, either in general terms (along the lines of s 87B of the CCA and s 93AA of the ASIC Act) or subject to tighter purposive limitations. The list of federal regulators which may accept enforceable undertakings includes:

- the Australian Prudential Regulation Authority;<sup>40</sup>
- the Takeovers Panel;<sup>41</sup>
- the Australian Communications and Media Authority;<sup>42</sup>
- the Civil Aviation Safety Authority;<sup>43</sup>
- the Australian Transaction Reports and Analysis Centre;<sup>44</sup>
- Comcare;<sup>45</sup>
- the Therapeutic Goods Administration;<sup>46</sup> and
- the Office of the Fair Work Ombudsman.<sup>47</sup>

In addition, a number of federal Ministers<sup>48</sup> and State regulators — particularly those in the consumer protection, environmental and health and safety spheres<sup>49</sup> — also possess the power to accept enforceable undertakings.

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<sup>37</sup> *National Consumer Credit Protection Act 2009* (Cth) s 322.

<sup>38</sup> R Johnstone and C Parker, 'Enforceable Undertakings in Action — Report of a Roundtable Discussion with Australian Regulators' (Working Paper, February 2010) 7.

<sup>39</sup> M Nehme, 'Enforceable Undertaking: A Restorative Sanction?' (2010) 36 *Monash University Law Review* 108, 123.

<sup>40</sup> *Superannuation Industry (Supervision) Act 1993* (Cth) s 262A; *Insurance Act 1973* (Cth) s 126; *Banking Act 1959* (Cth) s 18A; *Life Insurance Act 1995* (Cth) s 133A.

<sup>41</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s 201A.

<sup>42</sup> *Broadcasting Services Act 1992* (Cth) ss 61AS, 205W; *Spam Act 2003* (Cth) s 38; *Telecommunications Act 1997* (Cth) s 572B; *Radiocommunications Act 1992* (Cth) s 298C.

<sup>43</sup> *Civil Aviation Act 1988* (Cth) s 30DK.

<sup>44</sup> *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) ss 197 and 198.

<sup>45</sup> *Work Health and Safety Act 2011* (Cth) s 216.

<sup>46</sup> *Therapeutic Goods Act 1989* (Cth) s 42YL.

<sup>47</sup> *Fair Work Act 2009* (Cth) s 715. See generally T Hardy and J Howe, 'Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman' (2013) 41 *Federal Law Review* 1.

<sup>48</sup> See, eg, *Private Health Insurance Act 2007* (Cth) s 197-1; *Competition and Consumer Act 2010* (Cth) s 10.49; *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 438DA.

## Statutory undertakings in other jurisdictions

While enforceable undertakings were an Australian invention,<sup>50</sup> the US and UK have both enforced agreements between parties and regulators in the merger context for some time. Consent decrees have been a prominent aspect of the antitrust regime in the US since the 1930s, although it appears that unlike enforceable undertakings these decrees are approved and supervised by the courts.<sup>51</sup> In the UK, since 1989 the Secretary of State has had the power to accept undertakings as an alternative to a merger reference to the Competition Commission (now Competition and Markets Authority).<sup>52</sup> However, breaches of these undertakings are remedied through a statutory instrument made by the Secretary of State, rather than through the courts,<sup>53</sup> and the range of available remedies is also significantly narrower than in Australia.<sup>54</sup> The European Commission also has the power to attach conditions to decision on a merger (or ‘concentration’) in order to ensure compliance with commitments made by parties.<sup>55</sup>

Closer to home, New Zealand and Hong Kong both have enforceable undertaking provisions. Since December 2013,<sup>56</sup> the New Zealand Commerce Commission has a general power in very similar terms to s 87B in consumer protection matters.<sup>57</sup> However, it has possessed a more specific power to accept written undertakings to dispose of assets or shares in the context of mergers since before the introduction of s 87B.<sup>58</sup> While a breach of consumer protection related undertakings can be addressed through court proceedings and remedied by similar orders to those available under s 87B(4),<sup>59</sup> a breach of a merger-related undertaking has the consequence of rendering the merger authorisation or clearance void.<sup>60</sup> In Hong Kong,

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<sup>49</sup> R Johnstone and C Parker, ‘Enforceable Undertakings in Action — Report of a Roundtable Discussion with Australian Regulators’ (Working Paper, February 2010) 9.

<sup>50</sup> See R Johnstone and C Parker, ‘Enforceable Undertakings in Action — Report of a Roundtable Discussion with Australian Regulators’ (Working Paper, February 2010) 1.

<sup>51</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2003) 98 ff 154.

<sup>52</sup> See *Fair Trading Act 1973* (UK) c 41, s 75G. That power was introduced into the *Fair Trading Act 1973* by the *Companies Act 1989* (UK) c 40, s 147. The Competition Commission was replaced by the Competition and Markets Authority on 1 April 2014.

<sup>53</sup> See *Fair Trading Act 1973* (UK) c 41, s 75K.

<sup>54</sup> See *Fair Trading Act 1973* (UK) c 41, s 75K(6); Sch 8, Pt II, paras 9A and 12–12C.

<sup>55</sup> See *Council Regulation No 139/2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation)* [2004] OJ L 24/1, arts 6(2) and 8(2).

<sup>56</sup> *Fair Trading Amendment Act 2013* (NZ) s 35.

<sup>57</sup> *Fair Trading Act 1986* (NZ) ss 46A and 46B.

<sup>58</sup> *Commerce Act 1986* (NZ) s 69A, introduced by the *Commerce Amendment Act 1990* (NZ) s 69A.

<sup>59</sup> *Fair Trading Act 1986* (NZ) s 46B.

<sup>60</sup> *Commerce Act 1986* (NZ) 69AB. The remedial provision was introduced some time after the power to accept undertakings, by the *Commerce Amendment Act 2008* (NZ) s 7(1).



the Competition Commission has the power to accept commitments. If a commitment is accepted, the Commission is precluded from commencing or continuing an investigation and bringing and continuing proceedings in the Tribunal in relation to matters addressed by the commitment.<sup>61</sup>

### **Statutory undertakings and the courts**

Notwithstanding the large number of enforceable undertakings that have been accepted under s 87B over the last two decades,<sup>62</sup> only a small number of cases have come before the courts. However, those cases have addressed a number of issues central to the operation of the section, including the matters I next consider in more detail: the scope of the Commission's powers under s 87B; factors going to the Court's discretion whether or not to make an order under ss 87B(3) and (4); the nature of third party interests in acceptance and variation; the proper approach to the construction of undertakings; and the scope of the Court's power to make orders in the event of a breach.

#### **The Commission's powers under s 87B**

Section 87B confers a number of distinct powers on the Commission, including the power to accept undertakings and the power to consent to withdrawal or variation. The first of these powers is subject to an *express* limitation — the undertaking must be given 'in connection with a matter in relation to which the Commission has a power or function under [the CCA]'<sup>63</sup> — while the second is not, but by implication would be limited by the subject-matter, scope and purpose of the provision.

The Court has previously observed that the Commission's power to accept an undertaking should be 'widely interpreted' in light of the expansive expression 'in connection with',<sup>64</sup> and that where the parties discussed but were unable to agree the terms of an undertaking 'it is not for the court to express a view that the Commission should have or should not have proceeded under s 87B'.<sup>65</sup> It is, however, possible that a court might take into account the

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<sup>61</sup> *Competition Ordinance* (Hong Kong) cap 619, s 60(4).

<sup>62</sup> R Johnstone and C Parker, 'Enforceable Undertakings in Action — Report of a Roundtable Discussion with Australian Regulators' (Working Paper, February 2010) 7–9.

<sup>63</sup> *Competition and Consumer Act 2010* (Cth) s 87B(1).

<sup>64</sup> *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* [2003] FCA 530; (2003) 198 ALR 417 at [55]–[58].

<sup>65</sup> *Trade Practices Commission v Cue Design Pty Ltd* [1996] FCA 1343; (1996) 85 A Crim R 500, 506.

Commission's refusal to accept a statutory undertaking when deciding on orders, or in relation to costs.<sup>66</sup>

Importantly, under s 87B(1) the validity of a decision to accept an undertaking does not depend upon the correctness of the Commission's view of the legal issue that provides the occasion for entering into the undertaking. The section attaches consequences to the consensual actions of the parties, provided there is a sufficient connection to the Act.

That is not to say that the Commission's power to accept an undertaking is unconstrained — clearly there are important textual and purposive limitations. It has been said that the Commission could not accept an undertaking 'which did not have a proper connection with the alleged contravening conduct'.<sup>67</sup> It appears that a breach or apprehended breach of the Act is a necessary basis for a s 87B undertaking.<sup>68</sup> It would also be beyond the Commission's power to accept an undertaking in order to give, that is, with the intention of giving, some commercial benefit to non-parties, although that may be an incidental consequence.<sup>69</sup> An undertaking involving illegal conduct would clearly fall outside the section, though it is difficult to envisage circumstances in which that might occur.<sup>70</sup>

### **Factors going to the Court's discretion**

A number of judgments have observed that the Court would not make an order under s 87B(4) in circumstances where it was beyond the Commission's power to accept the undertaking in question.

In *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd*, Stone J proceeded on the basis that the Court would need to be satisfied that the undertakings were 'properly given by the respondent and properly accepted by the ACCC' before making an order under s 87B(3) or (4).<sup>71</sup> That approach was endorsed by Mansfield J in *Australian*

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<sup>66</sup> *Australian Competition and Consumer Commission v Monza Imports Pty Ltd* [2001] FCA 1455 at [14].

<sup>67</sup> *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* [2003] FCA 530; (2003) 198 ALR 417 at [56].

<sup>68</sup> H Spier, 'Is the ACCC Using Section 87B Enforceable Undertakings to Legislate?' (2010) 18 *Trade Practices Law Journal* 286. It would not be necessary to describe this as legislating but rather it would be a question of the lawful exercise of the statutory power. I express no view on whether Mr Spier was correct in his description of the facts.

<sup>69</sup> *Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission* [2005] FCA 1315 at [77].

<sup>70</sup> *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* [2003] FCA 530; (2003) 198 ALR 417 at [43].

<sup>71</sup> [2003] FCA 3 at [38].

*Competition and Consumer Commission v Woolworths (SA) Pty Ltd*,<sup>72</sup> where his Honour observed that:

... the Court should not sit idly by when it is apparent that an undertaking to engage in a proposed course of conduct, or an undertaking to refrain from a proposed course of conduct, does involve a commitment to the ACCC beyond that which its powers permit it to have accepted.<sup>73</sup>

The circumstances in the *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* case were that the parties, acknowledging that the relevant respondents were in breach of s 45 in the Nhulunbuy takeaway alcohol market, requested the Court to note the undertakings given by each of the respondents to the Commission. The undertakings included making donations of \$150,000 by each of the first and second respondents, in quarterly instalments, to a suitable alcohol program of the Nambara School Council, and in the area of the Northern Territory in and around Nhulunbuy. Justice Mansfield examined whether the Court should note the proposed undertakings, particularly to pay the amounts of \$150,000. Justice Mansfield rejected the submission that the Court should ‘note’ undertakings proffered to the Commission under s 87B without regard to their content. This was for three reasons. First, if the Court was made aware of an undertaking, the Court should not note it where it may be clear that the Commission had no power to accept the undertaking. There might otherwise arise circumstances where the Court has noted what an entity has undertaken to do but at a later point in time finds that the Commission did not have power to accept the undertaking. The Court should consider the terms of the undertaking to be satisfied that, prima facie, it was one which the Commission was empowered to accept. Second, in a case where undertakings are proffered to the Court, it may accept them in lieu of granting an injunction provided it has the power to do so. The Court, when ‘noting’ proposed conduct, should not generally take a passive attitude. This was the context in which Mansfield J made his ‘sit idly by’ comment to which I have referred. The third reason was that the undertakings were part of the final resolution of issues between the Commission and two of the respondents. It was important that such final resolution, where it was to result in orders of the Court, should be properly recorded. Any undertakings under s 87B should be disclosed. It followed that the Court should not be entirely remote from consideration of the terms of the undertakings which it was asked to note. Justice Mansfield concluded that he did not regard the payment undertakings as clearly not falling within the Commission’s powers to accept

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<sup>72</sup> [2003] FCA 530; (2003) 198 ALR 417 at [42]–[43].

<sup>73</sup> *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* [2003] FCA 530; (2003) 198 ALR 417 at [48].

them, that is, as clearly not coming within the envelope of matters which were ‘in connection with’ the Commission’s performance of its powers and functions arising from the admitted contravening conduct. In finalising the orders against the third to sixth respondents, in a separate and later judgment,<sup>74</sup> Mansfield J expressed the view that the amount of any sum to be paid pursuant to such an undertaking may be a relevant consideration in determining whether the Commission has the power to accept the undertaking. An extreme example may arise where the Commission was prepared to accept an undertaking to pay to a third party a sum of money which was outside the range which the Court would regard as appropriate if the Court were to be imposing a penalty upon a party for the contravention. Justice Mansfield said he did not wish to be taken as accepting that the amount of money to be paid pursuant to a proposed undertaking should be unrelated to the amount which the Court might otherwise have imposed by way of penalty, or was not a matter which the Court had no role to address. On the limited information before the Court, the amounts to be paid by the respondents were in the range of monetary penalties which the Court might otherwise have applied.

In *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* Stone J declined to make an order that the respondents comply with the undertakings given by it to the ACCC saying:

I am satisfied as to the enforceability of undertakings given under s 87B where there is a dispute that the parties have elected to resolve by undertakings rather than in proceedings before the Court. I am not convinced however that the section was intended to apply to undertakings in circumstances such as this where the controversy between the parties has been resolved by the Court and where the effect of enforcing an undertaking would be to impose on a party obligations in excess of those imposed by the Act. Even if such an order is permitted under s 87B(4)(a), in the exercise of my discretion I would decline to make it.<sup>75</sup>

The Court has also held, in *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission*, that the decision not to consent to the variation or withdrawal of an undertaking under s 87B(2) is a decision under an enactment for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).<sup>76</sup> Moreover, in the same case Lockhart J expressed the view that an undertaking would constitute an ‘instrument’ made under the Act, with the effect that some decisions made under an

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<sup>74</sup> *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd (No 2)* [2004] FCA 128; [2004] ATPR 41-988 at [18].

<sup>75</sup> [2003] FCA 375 at [9].

<sup>76</sup> [1997] FCA 175; (1997) 73 FCR 75, 87–88.

undertaking may also be susceptible to judicial review.<sup>77</sup> This decision is no longer of the significance that it was, given the Federal Court's additional jurisdiction under s 39B of the *Judiciary Act 1903* (Cth), although an entitlement to reasons under s 13 of the ADJR Act may well be important to an applicant.

It remains unlikely that the Court would order the Commission to accept a s 87B undertaking. The usual remedy, if such an action succeeded, would be to remit the matter for further consideration by the Commission.

### **Third party interests**

Given the role that undertakings often play in resolving issues about competitive dynamics, it is unsurprising that third parties have attempted to challenge decisions concerning acceptance and variation. However, in the Court third party actions have been unsuccessful. In *Virgin Blue Airlines Pty Ltd v Australian Competition and Consumer Commission*,<sup>78</sup> Gyles J considered on a preliminary basis whether Virgin could challenge on judicial review the Commission's decision to accept an enforceable undertaking in connection with Qantas's proposed acquisition of Impulse and obtain reasons for the decision under s 13 of the ADJR Act. The Commission argued that its exclusive power to bring proceedings under s 80 in respect of anti-competitive mergers pointed against the availability of judicial review to third parties. Justice Gyles held that it was not appropriate to determine the question of standing on a preliminary basis, but observed:

There is certainly a respectable argument that the TP Act contemplates that the interests of commercial competitors of parties involved in transactions alleged to breach Pt IV of the TP Act will be vindicated by substantive action by the competitor in relation to which it has standing, rather than by judicial review of decisions of the ACCC such as that involved in this case. However, in order to properly consider that issue, it is necessary to form a view as to the scope and purpose of s 87B when considered in the light of the TP Act as a whole.<sup>79</sup>

More recently, that third parties do not have an interest in the exercise of the Commission's powers under s 87B was more broadly stated in *Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission*.<sup>80</sup> In that case a merger was completed on the basis that hospitals within the acquired portfolio would be held separate pending the Commission's review of the merger. In markets where there were competition concerns relevant hospitals

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<sup>77</sup> [1997] FCA 175; (1997) 73 FCR 75, 87–88.

<sup>78</sup> [2001] FCA 1271; (2001) 186 ALR 377.

<sup>79</sup> (2001) 186 ALR 377 at [33].

<sup>80</sup> [2005] FCA 1315.

nominated by the Commission were to be divested. The acquirer of the hospitals undertook to divest itself of the hospitals nominated by the Commission to a particular purchaser in accordance with a memorandum of understanding. The purchaser also undertook to acquire those hospitals. When commercial negotiations between the two parties broke down after the relevant hospitals were nominated, the Commission accepted a variation allowing for a new purchaser to be approved. The original purchaser challenged the decision to consent to a variation of the undertakings mainly on procedural fairness grounds. Justice Emmett rejected the application, first on the facts but also stating he would be inclined to conclude, having regard to the scheme of the Act, there was no right to be heard on the part of the applicants, observing:

The exercise of a power conferred by section 87B does not effect (sic) the rights or obligations of any person other than the parties to the undertaking ... I do not consider that the parliament would have intended that commercial competitors would have any entitlement to be heard in respect of acquisition arrangements prior to any administrative decision by the Commission. An undertaking under s 87B operates only to constrain the party proffering it and to create rights of enforcement only in the Commission.<sup>81</sup>

The width of these dicta has been criticised.<sup>82</sup> That criticism would now need to be recast so as to avoid the language of legitimate expectation but otherwise may be taken to argue that natural justice is fact intensive and there may be cases where it would be procedurally unfair to deny an opportunity to be heard to a non-party to a s 87B undertaking. An express assurance of consultation given to a non-party by the ACCC may provide an example.

Note also that in *Dresner Pty Ltd v Misu Nominees Pty Ltd* the Full Court held, by majority, that it was arguable that a breach of an enforceable undertaking given under s 87B might constitute the use of a lawful means for the purposes of the tort of conspiracy by unlawful means.<sup>83</sup>

## Construction

As I have already observed, in *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* it was held that enforceable undertakings are ‘instruments’ made under the CCA.<sup>84</sup> The status of undertakings as legislative instruments has significant

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<sup>81</sup> *Ironbridge Capital Pty Ltd v Australian Competition and Consumer Commission* [2005] FCA 1315 at [85]–[86].

<sup>82</sup> S Ng, ‘Section 87B Undertakings and the Right to be Heard’ (2006) 14 *Trade Practices Law Journal* 175.

<sup>83</sup> [2004] FCAFC 169 at [16].

<sup>84</sup> [1997] FCA 175; (1997) 73 FCR 75, 87–88.

implications for the principles of construction that are applicable. In *Toll Holdings Ltd v Australian Competition and Consumer Commission*,<sup>85</sup> Gray J rejected an argument that evidence of surrounding facts or circumstances was relevant to the construction of an undertaking, observing that:

Undertakings given pursuant to s 87B of the Trade Practices Act are given statutory force and effect by that section. They are properly to be regarded as statutory instruments, made under the Trade Practices Act: see *Australian Petroleum Pty Ltd v Australian Competition and Consumer Commission* (1997) 73 FCR 75 at 88-9. Such an instrument has a public purpose. Members of the public, including competitors of the person giving the undertaking, are entitled to rely on the fact that undertakings have been given, and upon their terms. So is the court, if proceedings to enforce an undertaking are ever instituted. The meaning of the words used in an undertaking cannot therefore be modified by reference to facts known only to the party giving the undertaking and the ACCC. The words of an undertaking are to be construed by reference to the principles of construction of a legislative document, and not by reference to the principles of construction of a private contract, whether entered into in settlement of a legal proceeding or not.<sup>86</sup>

As a result, the construction of an undertaking will begin and end with its text,<sup>87</sup> though ‘the meaning of the words used must be considered by reference to the purpose or object of the undertaking concerned.’<sup>88</sup> This has important consequences for the framing of undertakings. As I observed above, it is the Commission’s practice to require a description of the competition concerns which gave rise to the undertaking and the circumstances in which it came to be made. In light of the limited recourse to extrinsic facts this part of an undertaking is an important contextual aid.

#### **Breaches and the scope of orders available under s 87B(4)**

Where there is a breach, the Court has broad powers to make orders directed at enforcing the terms of undertakings. The question whether a breach has occurred is an objective one, and the intent of the breaching party is irrelevant.<sup>89</sup>

The Court’s power to make orders following a breach of an undertaking is not limited to the orders which might be made under other sections of the CCA. For example, in *Australian*

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<sup>85</sup> [2009] FCA 462; (2009) 256 ALR 631.

<sup>86</sup> *Toll Holdings Ltd v Australian Competition and Consumer Commission* [2009] FCA 462; (2009) 256 ALR 631 at [17].

<sup>87</sup> *Maloney v The Queen* [2013] HCA 28; (2013) 298 ALR 308 at [324] (Gageler J).

<sup>88</sup> *Toll Holdings Ltd v Australian Competition and Consumer Commission* [2009] FCA 462; (2009) 256 ALR 631 at [18]. I applied this approach in *Australian Competition and Consumer Commission v Coles Group Ltd* [2014] FCA 363 and *Australian Competition and Consumer Commission v Woolworths Ltd* [2014] FCA 364. See L Rich, ‘Section 87B Undertakings — Status and Interpretation: *Toll Holdings Ltd v ACCC*’ (2010) 18 *Trade Practices Law Journal* 124.

<sup>89</sup> *Australian Competition and Consumer Commission v StoresOnline International, Inc* [2007] FCA 1597 at [4].

*Competition and Consumer Commission v StoresOnline International, Inc*,<sup>90</sup> it was argued that the Court did not have power to grant injunctive relief in relation to a breach of a s 87B undertaking because s 80 was an exhaustive statement of the circumstances in which injunctive relief could be granted under the Act. In rejecting that submission, Tamberlin J said at [10] there was nothing in the language of s 87B which limited the jurisdiction of the Court to hear the Commission's application for orders under s 87B or any injunction to restrain breaches. Justice Tamberlin approved the view that 'Parliament introduced s 87B into the TPA to enhance enforcement by the ACCC by increasing the scope and flexibility of the powers of the Court to provide effective means of dealing with breaches or apprehended breaches of the TPA',<sup>91</sup> before observing that:

Section 87B(4) gave the Court power to better enforce undertakings by converting them into orders of the Court and to make other orders in its discretion, if and when it becomes appropriate.<sup>92</sup>

... where it is appropriate to do so ... the Court is empowered to make orders which extend beyond the ambit of ss 80, 87(2) and 87A(2) in the TPA and, if necessary, beyond the scope of the original undertaking to provide relief against apprehended breaches on a *quia timet* basis.<sup>93</sup>

This view accords with the outcome in *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd*.<sup>94</sup> In that case Mansfield J, as I have said, considered whether it was appropriate for the Court to note an undertaking proffered as part of a settlement between the Commission and some of the parties to the proceedings, which included a payment to a local alcohol harm reduction program. His Honour observed that '[w]ere the undertaking to the Court, there would be a serious question as to whether the Court was empowered under the Act to make orders in terms of the payment undertakings'.<sup>95</sup> However, his Honour noted that '[t]he nature and terms of undertakings which may be accepted by the ACCC under s 87B is different from, and more extensive than, the Court's power to grant injunctions (and to accept undertakings) under s 80'.<sup>96</sup> before concluding, as I have said above, that the payment undertakings were not clearly outside the ACCC's powers.<sup>97</sup> This approach is consistent with

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<sup>90</sup> [2007] FCA 1597.

<sup>91</sup> *Australian Competition and Consumer Commission v StoresOnline International, Inc* [2007] FCA 1597 at [13].

<sup>92</sup> *Australian Competition and Consumer Commission v StoresOnline International, Inc* [2007] FCA 1597 at [14].

<sup>93</sup> *Australian Competition and Consumer Commission v StoresOnline International, Inc* [2007] FCA 1597 at [22].

<sup>94</sup> [2003] FCA 530; (2003) 198 ALR 417.

<sup>95</sup> [2003] FCA 530; (2003) 198 ALR 417 at [40], [54].

<sup>96</sup> [2003] FCA 530; (2003) 198 ALR 417 at [56].

<sup>97</sup> [2003] FCA 530; (2003) 198 ALR 417 at [58].



the flexible role played by s 87B — the Court’s concern is not the underlying conduct that gave rise to the undertaking but rather with the enforcement of the instrument.

Justice Finn noted a similar matter in *Australian Competition and Consumer Commission v Harbin Pty Ltd*, saying that the undertaking in that case was, in several respects, more expansive in its terms than would be acceptable to a Court making orders under s 86C of the Act.<sup>98</sup>

The Court has made orders in the form of a declaration that the respondent has breached a paragraph of an undertaking given and accepted under s 87B, notwithstanding that the orders directed the respondent to comply with the terms of the undertaking.<sup>99</sup>

As to the role of substantive competition concerns in s 87B undertaking cases, undertakings represent the substitution of a consensual remedy for the possibility of a determination on the legal merits.<sup>100</sup> Where an undertaking is sought to be enforced under ss 87B(3) and (4), there may be a tendency for one of the parties to seek to call into question the merits of the legal issue which provided the occasion for the entry into the undertaking. The Court’s ability in these circumstances to explore the substance of the competitive concerns underpinning the undertaking is limited. Unless the undertaking ‘did not have a proper connection with the alleged contravening conduct’<sup>101</sup> or there is some basis to impugn the undertaking on the ground of improper purpose, there is limited scope to go behind the undertaking other than by fresh proceedings under a substantive provision (where the undertaking may be separately relevant). While the substantive competition issues addressed by the undertaking may be relevant to the question of construction, their role is limited to informing the Court’s understanding of the text of the undertaking.<sup>102</sup> The substantive concerns will generally need to be expressed in the undertaking itself.

The only occasion, so far as I am aware, on which the High Court has considered s 87B was in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*.<sup>103</sup> The majority said at [62]–[64] that the primary judge correctly took into account TPG’s

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<sup>98</sup> [2008] FCA 1792 at [2], [18].

<sup>99</sup> *Australian Competition and Consumer Commission v Global Green Plan Ltd* [2010] FCA 1057 at [8].

<sup>100</sup> See generally *Australian Competition and Consumer Commission v Signature Security Group Pty Ltd* [2003] FCA 375 at [41].

<sup>101</sup> *Australian Competition and Consumer Commission v Woolworths (SA) Pty Ltd* [2003] FCA 530; (2003) 198 ALR 417 at [56].

<sup>102</sup> *Toll Holdings Ltd v Australian Competition and Consumer Commission* [2009] FCA 462; (2009) 256 ALR 631 at [20], [28]–[29].

<sup>103</sup> [2013] HCA 54; (2013) 250 CLR 640.

undertaking not to engage in misleading and deceptive conduct generally in assessing the pecuniary penalty to be imposed on TPG in respect of the contraventions which he had found. The High Court majority went on to say that the Full Court had erred in reasoning that the primary judge had erred because ‘[t]he existence of the undertaking, where the facts underlying the undertaking were never proved and no breach was ever alleged, was not a relevant circumstance.’ The majority concluded:

64. The Full Court erred in failing to appreciate the relevance of the undertaking in relation to the claims of personal deterrence upon the sentencing discretion. The fact that the undertaking had not been sufficient to secure TPG’s adherence to the requirements of the TPA indicated that a more severe penalty was necessary to accomplish the task of securing that adherence. In *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [[2012] FCAFC 20; (2012) 287 ALR 249 at 266 [68]], it was rightly said by the Full Court of the Federal Court that the court, in fixing a penalty, must “make[] it clear to [the contravener], and to the market, that the cost of courting a risk of contravention ... cannot be regarded as [an] acceptable cost of doing business.”

### Utility

In light of the number of them that continue to be offered and accepted, there can be no doubt that undertakings under s 87B remain practically useful. It remains advantageous to the parties: compliance is enhanced by a quick and flexible procedure, lying between bare administrative undertakings and court proceedings, which, in most cases, avoids the financial and other costs of litigation on each side. Importantly, particularly in the context of mergers, certainty for the commercial parties is increased, again without the need for court proceedings. Where there is said to be a breach of an undertaking, a simple and quick procedure is available in the Court for resolving the issue, ideally some 7 or 8 weeks from filing to judgment.

Given the continuing use of statutory undertakings, as I have said an indicator of utility is that there seems to be only a limited call for reform. The ACCC requested that its power to obtain information under s 155 should be extended to cover potential breaches of s 87B undertakings.<sup>104</sup> Its power under s 155 is currently limited, relevantly, to matters that constitute, or may constitute, a contravention of the CCA. It is possible that the ACCC’s concern may stem from a comment in *Australian Competition and Consumer Commission v StoresOnline International, Inc.*<sup>105</sup> ‘Section 80 is a provision invoked when there has been

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<sup>104</sup> ACCC, *Reinvigorating Australia’s Competition Policy: Submission to the Competition Policy Review* (25 June 2014) at 101.

<sup>105</sup> [2007] FCA 1597 at [15] per Tamberlin J.

contravention or possible contravention of specified provisions in the TPA. Section 87B is not one of those provisions.’ Some recent undertakings have contained a provision in similar terms to s 155, permitting the ACCC to direct the party proffering the undertaking to provide information relating to their compliance with the undertaking.<sup>106</sup> However, the draft Harper report does not appear to have embraced the ACCC’s submission.<sup>107</sup> It seems that no substantial change is presently proposed in the context of the Harper Review.

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<sup>106</sup> *Undertaking to the ACCC given for the purposes of section 87B by Pfizer Australia Pty Ltd* (22 November 2012) cl 7; *Undertaking to the ACCC given for the purposes of section 87B by Hertz Australia Pty Ltd and Hertz Global Holdings, Inc* (29 September 2014) cl 8.

<sup>107</sup> I Harper et al, *Competition Policy Review: Draft Report* (September 2014) at [20.3].

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