

# COMPANY AND SECURITIES LAW JOURNAL

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## ARTICLES

**The who, why and what of enforceable undertakings accepted by the Australian Securities and Investments Commission** – *Helen Bird, George Gilligan and Ian Ramsay*

This article examines the deployment of enforceable undertakings by the Australian Securities and Investments Commission (ASIC). Enforceable undertakings are formal settlement agreements between a regulator and regulated parties to resolve issues of non-compliance with laws administered by the regulator. This article analyses the circumstances and context under which 414 enforceable undertakings were accepted by ASIC from 1 July 1998 until 31 December 2015 (17.5 years). It addresses three fundamental questions: who are the regulated parties that gave enforceable undertakings; why did they give them; and what fundamental promises or obligations did their agreements contain? The study shows that ASIC utilises enforceable undertakings to remove law-breaking individuals from an industry and to promote legal and regulatory compliance on a systemic basis within individual firms and more broadly, especially within the financial planning and wealth management sector. .... 493

**Safe harbour or shipwreck? A critical analysis of the proposed safe harbour for insolvent trading** – *Carmen Boothman*

It is often said that Australia lacks a restructuring culture. A key component of this is argued to be the current duty to prevent insolvent trading that incentivises directors to place companies into external administration prematurely, eroding enterprise value and damaging the prospects of a successful restructure. This argument is prefaced on the existence of some inherent fear of liability for insolvent trading on the part of directors; a proposition that is plainly unsupported by the available empirical evidence. This article will consider the veracity of the claims that such a fear not only exists, but is also the impetus for early entry into external administration. It will then consider whether the safe harbour proposals set forth by the Australian Government, informed by the findings of the Productivity Commission, are capable of achieving their stated aims of preserving enterprise value and fostering the taking of appropriate business risk by directors. .... 520

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