



## **Comparative research into the use of enforceable undertakings**

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## Abbreviations

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
AUSTRAC	Australian Transaction Reports and Analysis Centre
CASA	Civil Aviation Safety Authority
CAV	Consumer Affairs Victoria
EU	Enforceable Undertaking
EPA NSW	Environmental Protection Authority (NSW)
EPA Vic	Environmental Protection Authority (Vic)
ESO Qld	Electrical Safety Office (Qld)
FWO	Fair Work Ombudsman
NCCPA	<i>National Consumer Credit Protection Act 2009 (Cth)</i>
OFT NSW	Office of Fair Trading (NSW)
OFT Qld	Office of Fair Trading (Qld)
POEO Act	Protection of the Environment Operations Act 1997 (NSW)
TGA	Therapeutic Goods Administration

## I INTRODUCTION

Enforceable undertaking (EU) is a sanction available to a range of regulators at both Federal and State levels. This sanction is a promise enforceable in court. When the regulator suspects that a party is breaching the law, either the regulator or the party may propose entering into an undertaking. The undertaking reflects a compromise reached by the two parties.<sup>1</sup> In it, the alleged offender will promise to do or not to do certain things. One of the key purposes of the undertaking is the protection of the public and the prevention of similar conduct in the future.<sup>2</sup> To give a comprehensive picture of the use of EUs, this report maps the regulatory practices of nine Federal and nine State regulators in this regard.

The regulators considered at a Federal level are the following:

- Australian Competition and Consumer Commission (ACCC)
- Australian Securities and Investments Commission (ASIC)
- Australian Communications and Media Authority (ACMA)
- Australian Transaction Reports and Analysis Centre (AUSTRAC)
- Australian Prudential Regulation Authority (APRA)
- Civil Aviation Safety Authority (CASA)
- Comcare
- Therapeutic Goods Administration (TGA)
- Fair Work Ombudsman (FWO)

The regulators considered at a State levels are the following:

- Consumer Affairs Victoria (CAV)
- Office of Fair Trading (NSW) (OFT NSW)
- Office of Fair Trading (Qld) (OFT Qld)
- Environmental Protection Authority (NSW) (EPA NSW)
- Environmental Protection Authority Victoria (EPA Vic)
- Access Canberra
- WorkCover Qld (including the Electrical Safety Office Queensland (ESO Qld))
- WorkSafe Tasmania
- WorkSafe Victoria

To give a holistic picture of the use of EUs, Part II of the report considers the reason behind the introduction of EUs to the regulators. Part III assesses the aims that the regulators are trying to achieve when entering into an EU and the factors that lead them to accept an EU. This Part will also consider the regulators' policy regarding disclosure of the terms of the EU. Part IV discusses the number of EUs that have been entered into over a period of 10 years (from 2008 to 2017), the areas that are usually the subject of the EU and the type of promises included in an EU. Lastly, Part V describes the monitoring systems used by regulators to ensure the promisor complies with the terms of the EU.

## II INTRODUCTION OF EUs INTO THE REGULATORY ARENA – THE WHY

The first regulator who had EUs at its disposal was the ACCC in 1993. The use of this sanction by the regulator attracted positive publicity in the 1990s and as a result more Australian and overseas regulators started lobbying to introduce this sanction to their system. Table 1 provides information on the EU provisions introduced to 18 regulators. This will be followed by more in-depth explanation of why this sanction was introduced to each regulator.

Regulator	EU provisions	Date of introduction	Scope	Differences with s 87B <i>Competition and Consumer Act 2010</i>	Context of Introduction and other interesting factors
<b>ACCC</b>	<i>Competition and Consumer Act 2010</i> (Cth) s 87B	1993	Breaches of ACL and competition laws	–	The EU were introduced to formalise the ACCC's use of informal settlements and allow such settlements to be enforceable
<b>ASIC</b>	<i>ASIC Act 2001</i> (Cth) ss 93AA, 93A  <i>National Consumer Credit Protection Act 2009</i> (Cth) s 322	1998  2010	Breaches of corporate and financial services regulations  Matters regarding consumer credit	Difference relates to the scope in which this section applies	
<b>APRA</b>	<i>Superannuation Industry (Supervision) Act 1993</i> (Cth) s 262A; <i>Insurance Act 1973</i> (Cth) s 126; <i>Banking Act 1959</i> (Cth) s 18A	2000	Breaches of prudential laws, regulations and standards; Breaches of insurance laws; Breaches of banking regulatory laws	Difference relates to the scope in which this section applies	
<b>CASA</b>	<i>Civil Aviation Act 1988</i> (Cth) s 30DK	2003	Breaches of civil aviation safety laws and regulations	<ul style="list-style-type: none"> <li>- Limits undertakings to 12 months;</li> <li>- Requires publicity under the Act;</li> <li>- Precludes undertakings from (having the effect of) requiring a person to pay money to CASA;</li> <li>- Removes provision empowering court to make a compensatory order for breaching the EU</li> </ul>	The sanction was introduced to CASA as it allows it to fill a gap in the regulator's tool kit
<b>ACMA</b>	<i>Spam Act 2003</i> (Cth) s 38  <i>Broadcasting Services Act 1992</i> (Cth) s 205W  <i>Telecommunications Act 1997</i> (Cth) s 572B	2004  2006  2005	Matters relating to commercial electronic messages or address-harvesting software  Breaches of broadcasting laws or registered codes of practice  Breaches of telecommunications laws	<p>Section 38: Court may have regard to criteria specified in assessing the amount of compensation payable for breach of the EU</p> <p>For all the sections:</p> <ul style="list-style-type: none"> <li>-Describes the content of the EU;</li> <li>-The undertaking must be expressed to be an undertaking under the relevant provision;</li> <li>-May cancel the EU with notice;</li> <li>-May publish on website</li> </ul>	
<b>TGA</b>	<i>Therapeutic Goods Act 1989</i> (Cth) s 42YL	2006	Breaches of therapeutic goods laws	-Requires publicity	



<b>AUSTRAC</b>	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) s 197</i>	2006	Breaches of anti-money laundering and counter-terrorism legislation and regulations	-Describes content of the EU; Undertaking must be expressed to be an undertaking under this section; -May publish on website, but must delete certain information and include a note stating information has been deleted	Explanatory Memorandum notes that the advantage of this section is: <sup>3</sup> - Negotiation to achieve full compliance - Avoid litigation - Faster outcome - Outcome focused rather than punishment
<b>ComCare</b>	<i>Work Health and Safety Act 2011 (Cth) s 216 (previously Occupational Health and Safety Act 1991 (Cth))</i>	2004	Breaches of work health and safety laws	-An EU does not constitute an admission of guilt; -Requires regulator to publish guidelines; -EUs cannot be accepted for contraventions that are a Category 1 offence; -Regulator must publish reasons of decision to accept/reject; -Prescribes fine for breach of the EU; -Prohibits regulator from bringing proceedings if an EU is in effect or has been discharged; -Court can order the person to pay the State's costs for the proceedings and monitoring compliance	This sanction was introduced to expand the range of remedies that it has at its disposal.
<b>Fair Work Ombudsman</b>	<i>Fair Work Act 2009 (Cth) s 715</i>	2009	Breaches of civil remedy provisions	-Applies where regulator 'reasonably believes' there has been a contravention; -Regulator cannot accept an undertaking if one is already in place or the person has been given a compliance notice; -Court not empowered to make an order compensating the Commonwealth	When a regulator cannot reasonably believe that there has been a contravention then proactive compliance deeds are entered into.
<b>CAV</b>	<i>Australian Consumer Law and Fair Trading Act 2012 (Vic) s 198 (previously Fair Trading Act 1999 (Vic) s 146)</i>	1999	Breaches of ACL and Fair Trading laws	-The Director, with consent of the promisor, may apply for a compliance order; -Orders can be made against officers of a body corporate if they knowingly authorised or permitted the breach	Usually EUs include an admission of liability. Only recent EUs available on website. The rest can be accessed via physical location.
<b>OFT NSW</b>	<i>Australian Consumer Law 2010 (NSW) s 218 (previously Fair Trading Act 1987 (NSW) s 73A)</i>	1998	Breaches of ACL	Applies to ACL only	Only recent EUs available on website. The rest can be accessed via physical location.

<b>OFT Qld</b>	<i>Australian Consumer Law 2010 (Qld) s 218 (previously Fair Trading Act 1989 (Qld) ss 91H-91L)</i>	1997	Breaches of ACL	Applies to ACL only	One advantage noted during Parliamentary debates is that the acceptance of an EU can quickly send a message to the regulated community and to consumers that the conduct is unacceptable.
<b>EPA NSW</b>	<i>Protection of the Environment Operations Act 1997 (NSW) s 253A</i>	2005	Any matter in relation to which the EPA has a function under the Act	-EU can include restorative justice activities; -Court can make additional orders specific to environmental protection	EUs are viewed as quicker and cost-effective alternatives to litigation
<b>EPA Vic</b>	<i>Environment Protection Act 1970 (Vic) s 67D</i>	2006	Contraventions of environmental protection laws under which the EPA may take proceedings	-Contempt proceedings can be brought if a person does not comply with a court order; -Regulator may publish guidelines; -Proceedings cannot be brought for contraventions that are the subject of current or discharged EUs; -Proceedings can be brought if a person withdraws an EU before it is fulfilled	Sanction is introduced to allow the regulator to move away from punishment. EU will provide it with such an alternative.  The review of the regulator's powers has recommended that the regulator uses EUs more often. To do so EPA Vic need to have a better understanding of this sanction. <sup>4</sup>
<b>Access Canberra</b>	<i>Work Health and Safety Act 2011 (ACT) s 216 (previously Occupational Health and Safety Act 1989 (ACT) s 169)</i>	2004	Contraventions of work health and safety legislation	-Requires regulator to publish guidelines; -EUs cannot be accepted for contraventions that are an offence; -An EU does not constitute an admission of guilt; -Regulator must publish reasons of decision to accept/reject; -Prohibits regulator from bringing proceedings if an EU is in effect or has been discharged; -Court can order the person to pay the State's costs for the proceedings and monitoring compliance; -Prescribes fine for breaching the EU	Benefits noted of EUs are the following: -provides significant and ongoing commitments for improving systems and conducting organisational reforms -Deterrent effect similar to legal proceedings -Communication with industry and community on practices
<b>WorkCover (Qld)</b>	<i>Work Health and Safety Act 2011 (Qld) s 216 (previously Workplace Health and Safety Act 1995 (Qld) s 42D)</i>	2003	Breaches of work health and safety legislation	-EUs cannot be accepted for contraventions that are an offence; -An EU does not constitute an admission of guilt; -Regulator must publish reasons of decision to accept/reject; -Court can order the person to pay the State's costs for the proceedings and monitoring compliance	EU viewed as an alternative to prosecution

<b>ESO Qld</b>	<i>Electrical Safety Act 2002 (Qld) s 49</i>	2002	Breaches of electrical safety legislation	-An EU does not constitute an admission of guilt; -Regulator must publish reasons of decision to accept/reject; -Court can order the person to pay the State's costs for the proceedings and monitoring compliance; -Must publish reasons for its decision to accept or reject the EU; -Prohibits regulator from bringing proceedings if an EU is in effect or has been discharged	The Parliamentary debates noted that the benefits of EU extend to: <ul style="list-style-type: none"> <li>- General deterrence</li> <li>- Broader outcome than litigation</li> <li>- Cost effective for regulator</li> </ul>
<b>WorkSafe (Tas)</b>	<i>Work Health and Safety Act 2012 (Tas) s 216 (previously <i>Workplace Health and Safety Act 2002 (Tas) s 55A</i>)</i>	2002	Breaches of workplace health and safety legislation	-An EU does not constitute an admission of guilt; -Regulator must publish reasons of decision to accept/reject; -Court can order the person to pay the State's costs for the proceedings and monitoring compliance; -Must publish reasons for its decision to accept or reject the EU; -Prohibits regulator from bringing proceedings if an EU is in effect or has been discharged	
<b>WorkSafe (Vic)</b>	<i>Occupational Health and Safety Act 2004 (Vic) s 16</i>	2004	Breaches of workplace health and safety laws and regulations	-Prescribes fine for breaching the EU; -No power for court to order compensation to persons affected or state; -Prohibits regulator from bringing proceedings if an EU is in effect or has been discharged	

**Table 1: EUs and Regulators**

## **A The ACCC**

The EU provisions were made available to the ACCC in 1993 (under the then s 87B of the *Trade Practices Act 1974* (Cth)). Before that date, it was quite common for the ACCC to decide not to take tough enforcement action against possible regulatory breaches on the basis that it could achieve acceptable compliance with potential offenders through negotiation and settlement. EUs serve to legitimate and formalize such agreement.<sup>5</sup> When the Bill inserting s 87B into the then *Trade Practices Act 1974* (Cth) was introduced, the then Attorney-General explained the purpose behind s 87B in his second hearing speech, as follows:<sup>6</sup>

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 to consumers generally.

Recognizing 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 the need to rely on means outside the Act to enforce undertakings that people have given, should this prove necessary.

The then chairman of the Commission, Allan Fels, noted that he expected that the introduction of s 87B will have a moderating effect on the overall use of litigation. This statement implied that the level of court enforcement action would decline in favour of EUs. Accordingly, contraventions of the Act would be solved without resorting to expensive and potentially long litigation.<sup>7</sup> Allan Fels strongly supported the provision as a regulatory tool stating that 'legally enforceable undertakings... [have] made the Act both more effective and helped avoid court procedures.'<sup>8</sup> The Commission's power to accept an EU appears broadly defined. Section 87B of the *Competition and Consumer Act 2010* (Cth) states that:

- (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 (other than Part X).

Additionally, EUs are not solely used as a substitute for litigation. The ACCC also accepts some EUs as a supplement to litigation and to settle court proceedings rather than proceed to a final hearing.<sup>9</sup> In retrospective, s 87B constitutes a form of intermediate sanction that provides a more formal and more powerful deterrent than simple administrative resolution in seeking compliance, but without the degree of legal and financial severity and publicity and protracted of litigation.<sup>10</sup>

## **B Introduction of EUs to ASIC**

ASIC was given the power to accept EUs in July 1998 by the *Financial Sector Reform (Amendments and Transitional Provisions) Act 1998* (Cth).<sup>11</sup>

Item 11 of this Act allowed ASIC to accept a written undertaking, which may be enforced by a court where the court finds that the undertaking has been breached. The Explanatory Memorandum noted that under s 93A, the Commission will be given the power to accept a written undertaking without first having to go to court.<sup>12</sup> As a consequence of the passage of the Financial Sector Reform (Amendments and Transitional Provisions) Bill 1998 (Cth), the provisions that are related to EUs are

today contained in ss 93AA (generally) and 93A (in relation to registered managed investment schemes) of the *ASIC Act 2001* (Cth).<sup>13</sup>

Further, as a result of the 2010 expansion of ASIC's responsibility to the administration and enforcement of the *National Consumer Credit Protection Act 2009* (Cth) (NCCPA), ASIC can enter into EUs for regarding consumer credit in accordance with s 322 of the NCCPA.

### **C Introduction of EUs to APRA**

APRA has been given the power to accept EUs under s 262A of the *Superannuation Industry (Supervision) Act 1993* (Cth). The *Financial Sector Legislation Amendment Act (No.1) 2000* (Cth) provided the enforceable undertakings provisions to APRA<sup>14</sup> with item 36 of this Act inserting a section that allowed this regulator to accept EUs. This provision is similar to section 87B of the Competition and Consumer Act.

As a consequence, section 262A of the *Superannuation Industry Act* allows the regulator to accept undertaking in relation to matters where the regulator has a function or power under the Act.<sup>15</sup> Even though the provisions of the Act are similar to those applying to the ACCC and ASIC, there is a major difference. While ASIC prides itself for the transparency with which it operates when accepting EUs, APRA's undertakings are not always available to the public. APRA may not disclose names and other sensitive information relating to particular cases and some of the undertakings are kept secret to protect the promisor from negative publicity.<sup>16</sup>

Additionally, APRA can accept EUs under s 126 of the *Insurance Act 1973* (Cth) and s 18A of the *Banking Act 1959* (Cth).

### **D Introduction of EUs to CASA**

As of July 2003, CASA has the power to accept EUs under s 30DK of the *Civil Aviation Act 1988* (Cth). The *Civil Aviation Amendment Act 2003* in Division 3B introduced EUs to this regulator.<sup>17</sup> The Explanatory Memorandum to this enactment notes that the provisions of the abovementioned Act are modelled after the then s 87B of the *Trade Practices Act*.<sup>18</sup> One key difference is the fact that the period for which the EU applies must not exceed 12 months.

The then Director of CASA, Mike Toller welcomed the move by noting that EUs can fill a gap in the tools available for CASA; for instance, CASA did not in the past have a pyramid of enforcement. Its sanctions will start with formal counselling. They will go from there to suspension, cancellation or a certificate which threatens the livelihood of a business. For this reason, a scheme for voluntary enforceable undertaking was tabled before Parliament in 2003. Accordingly, EUs could allow the regulator to take the middle ground between the use of soft and drastic measures.<sup>19</sup>

### **E Introduction of EUs to ACMA**

Part 6 of the *Spam Act 2003* (Cth) gave ACMA the power to accept EUs. The EU provisions in this Act (ss 38A and 39 of the *Spam Act 2003* (Cth)) are modelled upon the then s 87B of the *Trade Practices Act 1974* (Cth).<sup>20</sup>

Part 6 of the *Spam Act 2003* (Cth) came into effect on 10 April 2004.<sup>21</sup> Additionally, ACMA can accept EUs under s 205W of the *Broadcasting Services Act 1992* (Cth) and s 572B of the *Telecommunications Act 1997* (Cth).<sup>22</sup>

## **F Introduction of EUs to TGA**

EUs became available to the TGA as a result of the enactment of the Therapeutic Goods Amendment Bill 2005 (Cth). Section 42YL of the *Therapeutic Goods Act 1989* (Cth) is once again modelled upon the then s 87B of the *Trade Practices Act 1974* (Cth).<sup>23</sup> Further, similar to s 30DK of the *Civil Aviation Act 1988* (Cth), the EUs, once accepted should be published on the regulator's website.<sup>24</sup>

## **G Introduction of EUs to AUSTRAC**

EUs became available to AUSTRAC with the enactment of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).<sup>25</sup> The Explanatory Memorandum noted that the advantages of having this sanction are the following:<sup>26</sup>

- enable the reporting entity to negotiate with AUSTRAC a plan to achieve full compliance;
- negate the need for prosecution or civil penalty actions to be taken;
- achieve faster compliance outcomes than punitive actions; and
- it is outcome-focussed rather than punitive in approach.

## **H Introduction of EUs to ComCare**

ComCare has EU at their disposal when the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002 was enacted. The agency had this sanction added to its arsenal in a bid to expand the range of remedies that it has to ensure more effective protection of the health and safety of Commonwealth employees at work.<sup>27</sup> Today, s 216 of the *Work Health and Safety Act 2011* (Cth) allows Comcare to accept EUs from the regulated entities in connection with a matter relating to a contravention or alleged contravention by the person of this Act. Such conduct cannot be classified as a Category 1 Offence. Further, s 216(3) specifically noted that acceptance of an EU is not an admission of liability.

## **I Introduction of EUs to the FWO**

EU was introduced to the FWO to achieve 'co-operative and voluntary compliance' as a result of the passage of Fair Work Bill 2008 in 2009.<sup>28</sup> They are designed to remedy the effect of a contravention.<sup>29</sup> An EU cannot be accepted if the person has given a compliance notice under s 716 of the *Fair Work Act 2009* (Cth).<sup>30</sup>

## **J Introduction of EUs to CAV**

EUs were introduced to CAV in 1999 under s 146 of the *Fair Trading Act 1999* (Vic). Today, EUs are accepted under s 198 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

There are two key differences from the EU provisions available to other regulators:

- Under s 198(3), '[t]he Director of VAC, with the consent of the promisor, may apply, at any time, to the Magistrates' Court for an order directing the promisor to comply with the undertaking';
- Under 198(7), 'if a body corporate is found to have breached an undertaking, each officer of the body corporate is deemed to have so breached the undertaking if the officer knowingly authorised or permitted the breach and the Magistrates' Court may, against the officer, make all or any of the orders' that the Magistrates' Court thinks appropriate.'

Additionally, usually, the EU will contain an acknowledgement that the organisation has contravened the law.

### **K Introduction of EUs to the OFT NSW**

The EU provisions were introduced to the OFT (NSW) in 1998 as a result of the passage of the Fair Trading Amendment Bill 1998 (NSW). The then s 73A was modelled based on the then s 87B of the TPA.<sup>31</sup>

With the enactment of the ACL, the Fair Trading Amendment (Australian Consumer Law) Bill 2010 (NSW) repealed s 73A and inserted Part 6. Section 218 of the ACL now applies allowing the OFT NSW to accept enforceable undertakings.

### **L Introduction of EUs to the OFT Qld**

EUs were introduced to the Office of Fair Trading (Qld) (OFT (Qld)) as a result of the enactment of the *Fair Trading Amendment Act 1997* (Qld). Sections 91H-91L dealing with EUs commenced on the day of assent, 15 May 1997. During the Parliamentary debates, it was noted that:<sup>32</sup>

This Bill will increase protection for Queensland consumers and honest traders by enhancing the enforcement mechanisms and options available to the Office of Consumer Affairs under the Fair Trading Act. [...] The Bill gives the Commissioner for Consumer Affairs the power to accept undertakings from traders who have breached the Act. If the terms of an undertaking are subsequently breached by a trader, the undertaking will be enforceable through the courts...

The Australian Competition and Consumer Commission has had a similar power under the Trade Practices Act since January 1993 and has used this power often and effectively. While enforceable undertakings will be accepted by the commissioner as an alternative to prosecution, this does not mean that Consumer Affairs will no longer prosecute traders who breach the Act. It simply means that Consumer Affairs will have more choices when dealing with such traders. The acceptance of enforceable undertakings in appropriate cases, combined with timely media releases, will give Consumer Affairs the ability to quickly get the message out to both the business community and to consumers that breaches of the Act will not be tolerated.

However, the provisions were repealed by the *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Qld). Section 218 of the ACL now applies allowing the OFT Qld to accept enforceable undertakings.

### **M Introduction of EUs to EPA NSW**

Section 253A dealing with EUs was introduced in 2005 by the Protection of the Environment Operations Amendment Bill 2005 (NSW). In the Parliamentary Debates, it was noted that:<sup>33</sup>

The bill further expands these alternative sentencing orders to provide more options for courts to make the most appropriate orders in the circumstances... The bill will also allow the EPA, for the first time, to accept court enforceable undertakings, like the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission.

Court enforceable undertakings are administrative resolutions to breaches or potential breaches of the Act that, if not adhered to by the person given the undertaking, can be enforced in court. They represent a quicker, more cost-effective alternative to litigation in appropriate cases. The EPA will be developing publicly available guidelines on when it will be appropriate for it to accept court enforceable undertakings, to ensure such undertakings are entered into in a transparent and accountable way.

Nowadays, the EPA NSW can accept an EU under the following laws:

- *POEO Act* (s 253A)

- Any Act for which the EPA has a function under the POEO Act (i.e. *Petroleum (On-Shore) Act 1991*)
- *Contaminated Land Management Act 1997* (s 96A)
- Environmentally Hazardous Chemicals Act 1985 (s 213(2) of POEO Act)
- Ozone Protection Act 1989 (s 213(2) of POEO Act)
- Pesticides Act 1999 (s 110)
- Radiation Control Act 1990 (s 24A)
- Waste Avoidance and Resource Recovery Act 2001 (s 213(2) of POEO Act)

### **N Introduction of EUS to EPA Vic**

The EPA Vic received the power to enter into EUs as a result of the introduction of s 67D by the Environment Protection (Amendment) Bill 2006. This sanction was introduced to provide a more balanced approach to the regulatory regime available to the regulator. As noted in the Parliamentary Debates:<sup>34</sup>

The primary focus of existing enforcement sanctions under the Environment Protection Act 1970 is on punishing the offender and deterring through punishment future breaches of the act. While it is critical to environment protection, this enforcement approach does not require systemic changes to be made which will help prevent similar breaches in the future.

To address this shortcoming, this bill introduces a capacity for the Environment Protection Authority to enter into a voluntary enforceable undertaking with an offender in relation to a breach of the act or regulations made under the act. An enforceable undertaking is a voluntary, negotiated, written set of promises given by an offender as a part of a settlement for contravention of an act.

Should an offender fail to comply with an undertaking, the authority will be empowered to seek a court order for compliance. Failure to comply with such a court order may result in the commencement of proceedings for contempt of court.

This enforcement model has been adopted by the Australian Securities and Investments Commission, Consumer Affairs Victoria, the Victorian WorkCover Authority, and most recently in NSW environment legislation.

To ensure transparency in the use of this enforcement mechanism, the use of enforceable undertakings will be governed by publicly available guidelines made under the act, and all undertakings will be made available to the public.

EU fit within the EPA Vic's responsive sanctioning approach to regulation which complement its compliance and enforcement activities.<sup>35</sup>

### **O Introduction of EUs to Access Canberra**

EUs were first introduced to WorkCover ACT in 2004 as a result of the enactment of *Occupational Health and Safety Act 2004* (ACT). As part of the national harmonisation of occupational health and safety laws, Access Canberra replaced WorkCover ACT and is now empowered to enter into EUs as a result of the introduction of s 216 under the *Workplace Health and Safety Act 2011* (ACT). EUs cannot be accepted regarding Category 1 Offences. Further, the acceptance of an EU does not amount to admission of liability.

Access Canberra noted that the benefit of accepting an EU are the following:

- provides for significant and ongoing commitments that aim to achieve improved work, health and safety outcomes and compliance;



- provides an opportunity for organisational reform to implement effective workplace health and safety;
- provides a similar deterrent effect to a successful legal proceeding, due to the terms of the *enforceable undertaking*; and
- provides an opportunity for the person to communicate to their industry peers and the community generally about the consequences of unsafe work practices and the opportunities that putting in place safe work practices can bring.

### **P Introduction of EUs to WorkCover QLD**

EU were first introduced to Workplace Health and Safety Queensland in 2003 as a result of the enactment of the WorkPlace Health and Safety and Another Act Amendment Bill 2002 (Qld). The Explanatory Memorandum noted that the section was introduced with the intention of:

Providing greater consistency with other safety legislation and streamlining reporting requirements for employers. The changes will bring the Workplace Health and Safety Act 1995 in line with the recent Electrical Safety Act 2002 with the introduction of enforceable undertakings as an alternative to prosecution and will align penalties with that Act and the Dangerous Goods Safety Management Act 2000.

With the enactment of the *Work Health and Safety Act 2011* (Qld), the new regulator, WorkCover Qld can now enter into EU as per s 216 of the legislation. EUs are high level sanctions for contraventions of the Law.<sup>36</sup>

### **Q Introduction of EUs to ESO Qld**

ESO Qld had the power to accept EUs since 2002 through s 49 of the *Electrical Safety Act 2002* (Qld). At the Parliamentary Debates, it was noted that:<sup>37</sup>

In addition, the bill includes a new enforcement tool, that is, an 'enforceable undertaking' that has been introduced as part of a holistic approach to enforcement strategy, broadening the options available to help achieve compliance with the new laws. While relatively new to state legislation, the Australian Competition and Consumer Commission currently uses enforceable undertakings under the Commonwealth Trade Practices Act 1974 as an option for enforcement with its legislation. This issue is also being canvassed in the current review of the Queensland Workplace Health and Safety Act 1995.

An enforceable undertaking is an alternative to prosecution available only at the discretion of the electrical safety regulator. It allows the chief executive of the department to enter into a written undertaking with an obligation holder detailing the future actions the obligation holder will take in relation to the alleged contravention. For example, a company may agree to provide publicity or educative programs to deter potential offenders, or implement programs to prevent future contraventions. The main benefits of this new tool include—

- undertakings can be publicised in the community to deter other duty holders from committing similar breaches;
- outcomes of undertakings can be practical and broader in range, as they are not limited by what the legislation allows the courts to impose; and
- they can be implemented on a relatively cost neutral basis.

It is important to note that enforceable undertakings will not replace prosecution for non-compliance. Rather, an undertaking can only be entered into as a means of settling a complaint prior to a prosecution hearing. Just as importantly, an enforceable undertaking will also be a legally binding commitment - enforceable in court.

## **R Introduction of EUs to WorkSafe Tasmania**

The sanction of EU was first introduced to the then Workplace Standards Tasmania in 2002 with the passage of the Workplace Health and Safety Amendment Bill 2002 (Tas). With the signature of the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, WorkSafe Tasmania was established. Under s 216 of the *Work Health and Safety Act 2012* (Tas), the regulator had the power to accept an EU. The sanction cannot be accepted regarding Category 1 offences. Additionally, entering into an EU is not an admission of liability. Lastly, EUs need to be made available to the public once accepted.

The WorkSafe Tasmania refers to EUs as ‘a high-level sanction which is legally binding and is used where the alleged contravention is of a serious nature.’<sup>38</sup> The sanction cannot be accepted in the context of a Category 1 Offence.

## **S Introduction of EUs to WorkSafe Victoria**

Section 16 of the Occupational Health and Safety Act 2004 (Vic) was introduced by the Occupational Health and Safety Bill 2004 (Vic). This section allows WorkSafe Victoria to enter into EUs with alleged offenders. This sanction was introduced to provide the regulator with more tailored solutions to deal with different offences they may face. Further the Parliamentary Debates noted that ‘WorkSafe will also be able to accept undertakings as a constructive alternative to prosecution.’<sup>39</sup>

WorkSafe Victoria may accept an EU as an alternative to prosecution of the person for a particular offence. The acceptance of an EU does not constitute an admission of liability.<sup>40</sup> The acceptance of an EU is assessed by an EU Panel (made of internal stakeholders).<sup>41</sup>

# **III REGULATORY TOOL**

## **A Aims Behind the Use of EUs**

EU may be classified as an administrative sanction. According to the *Compliance with the Trade Practices Act 1974* (Cth), the ALRC recommended that administrative actions should achieve one or more of the following purposes:<sup>42</sup>

- Prevention of similar offences from occurring again;
- Protection of the public by stopping the offending conduct; and
- Corrective action.

The purpose of the EU cannot be punitive in nature from a Commonwealth level. The objectives for entering into an EU may vary from one regulator to the next. However, there is a similarity between the aims most regulators have adopted. As highlighted in Table 2, the key aims of EUs for most regulators fall under the following:

- Review of existing systems and rehabilitation;
- Education and general deterrence; and
- Remediation and restorative justice.

These aims have been mainly put forward in the guidelines most regulators issue regarding their use of EU.

<p><b>ASIC<sup>43</sup></b></p> <ol style="list-style-type: none"> <li>Promotes the integrity of, and public confidence in, our financial markets and corporate governance;</li> <li>Specifically deters the person from future instances of the conduct which gave rise to the undertaking;</li> <li>promotes general deterrence in making the business community aware of the conduct and the consequences arising from engaging in that conduct; or</li> <li>provides an ongoing benefit by way of improved compliance programs.</li> </ol>	<p><b>ACCC<sup>44</sup></b></p> <ol style="list-style-type: none"> <li>cessation of the conduct leading to the alleged breach</li> <li>redress for parties adversely affected by the conduct</li> <li>implementation of compliance measures to help prevent future breaches by the company/business concerned</li> <li>general education and deterrence, particularly in the industry concerned, by way of public awareness</li> </ol>	<p><b>APRA</b></p> <p>No information regarding this on APRA's website.</p> <p>From APRA's submission to the royal commission, potential objectives:</p> <ol style="list-style-type: none"> <li>rectify prudential or compliance failures</li> <li>rehabilitation</li> </ol>	<p><b>CASA<sup>45</sup></b></p> <p>Remedial in nature- reduce risk to aviation safety:</p> <ol style="list-style-type: none"> <li>seek cooperative rectification and prevention of all aviation safety problem identified</li> </ol> <p><b>Note:</b> The Enforcement Manual note that publication of the EU may provide a deterrence value and promote compliance with the aviation Law by educating the aviation industry and the public at large about the requirements of that law and CASA's expectations of those who must comply with it.</p>
<p><b>ACMA<sup>46</sup></b></p> <p>'EUs are a valuable enforcement and regulatory tool as they can provide, among other things:</p> <ol style="list-style-type: none"> <li>a tailored and flexible resolution of the issues that are of concern to the ACMA</li> <li>an opportunity for you to be involved in the resolution of a matter</li> <li>a more cost-effective and timely outcome compared to litigation.'</li> </ol>	<p><b>TGA<sup>47</sup></b></p> <ol style="list-style-type: none"> <li>influence behaviour</li> <li>encourage compliant conduct</li> <li>provides mechanism to encourage and assist regulates to observe their obligations under the law: Clarify position</li> </ol> <p>Note: The Guide also notes that one desired outcome is the use of the publication of EU for general deterrence</p>	<p><b>AUSTRAC</b></p> <p>No information regarding this on AUSTRAC's website. But from the Explanatory Memorandum:</p> <ol style="list-style-type: none"> <li>Tailored solution to deal with compliance issue</li> </ol>	<p><b>Comcare</b></p> <p>Prevention rather than punishment, through implementing new measures to improve compliance with the Law.<sup>48</sup></p>
<p><b>Fair Work Ombudsman<sup>49</sup></b></p> <ol style="list-style-type: none"> <li>Prevention: 'fix a problem and make sure it doesn't happen again'</li> </ol>	<p><b>CAV</b></p> <p>No information available</p>	<p><b>OFT NSW<sup>50</sup></b></p> <ol style="list-style-type: none"> <li>Quick Redress; Reasonable solution to prevent future non-compliance</li> </ol>	<p><b>OFT Qld<sup>51</sup></b></p> <ol style="list-style-type: none"> <li>Stop conduct; Redress and steps to prevent similar breaches in the future (compliance processes)</li> </ol>
<p><b>EPA NSW<sup>52</sup></b></p> <ol style="list-style-type: none"> <li>Improvement in the promisor's environmental Performance</li> <li>Deliver benefits to the local environment/ community</li> <li>Improve environmental performance industry wide</li> </ol>	<p><b>EPA Vic<sup>53</sup></b></p> <ol style="list-style-type: none"> <li>Settle an alleged breach and</li> <li>Drive improvement in company's environmental performance</li> <li>Deliver benefits to the local area/environment affected by the company's conduct</li> <li>Assist in improving standards within industry</li> </ol>	<p><b>Access Canberra</b></p> <ol style="list-style-type: none"> <li>improve health and safety at the workplace;</li> <li>Deliver health and safety initiatives to the relevant industry/broader community.</li> </ol>	<p><b>WorkCover QLD (including ESO Qld)<sup>54</sup></b></p> <ol style="list-style-type: none"> <li>Go beyond requirement under the law.</li> </ol>
<p><b>WorkSafe Tasmania</b></p> <ol style="list-style-type: none"> <li>achieve improved WHS outcomes and compliance beyond what is required by the law, whereas legal proceedings may not achieve such outcomes</li> <li>an opportunity for organisational reform to improve WHS practices</li> <li>a similar deterrent effect to a successful legal proceeding, due to the financial imposition of the WHS undertaking</li> <li>an opportunity for the person to communicate to their industry peers and the community about the consequences of unsafe work practices and the opportunities that putting in place safe work practices can bring</li> </ol>		<p><b>WorkSafe Victoria<sup>55</sup></b></p> <ol style="list-style-type: none"> <li>achieve improvements in health and safety generally</li> <li>deliver benefits beyond compliance with the law</li> </ol> <p>PS: There is no requirement that the undertakings offered within the EU address the root cause of any incident or directly relate to the contravention, particularly where such matters have already been addressed voluntarily or via other means.</p>	

**Table 2: Aims of EUs**

## **B Factors Considered when Entering into an EU**

There are a range of factors that regulators may consider when entering into an EU. As highlighted in Table 2, there is a consistency in the factors that regulators take into account when accepting an EU. The key factors considered are the following:

- The promisor's history and cooperation;
- Likelihood of compliance with the EU; and
- The seriousness and impact of the conduct.

The promisor's history of corporate misconduct may provide evidence of the culture of the promisor and whether they will take the EU seriously. Considering the identity of the promisor is a crucial factor that would ultimately play a role in whether the EU will reach its full potential in changing the culture of an organisation to prevent similar conduct from occurring in the future: the promisor must be on board to comply with the letter as well as the spirit of the EU.

Additionally, the seriousness of the breach and its impact will also be important to assess whether an EU is the appropriate remedy to deal with the alleged conduct breach. In accordance with the information in Table 3, if an EU is on an egregious matter, it is unlikely for this sanction to be a suitable remedy for the situation.

<p style="text-align: center;"><b>ASIC<sup>57</sup></b></p> <ul style="list-style-type: none"> <li>• Is the person prepared to publicly acknowledge ASIC's views about the conduct and the necessity for protective or corrective action?</li> <li>• Was the conduct that ASIC considers to be a breach inadvertent?</li> <li>• Was the conduct that ASIC considers to be a breach a result of the conduct of one or more individual officers or employees of the company?</li> <li>• What was the seniority and level of experience of the individual(s) involved in the breach?</li> <li>• Has the person co-operated with ASIC, including providing us with complete information about the underlying breaches and any remedial efforts?</li> <li>• Will the undertaking achieve an effective outcome for those who have been adversely affected by the conduct or compliance failure?</li> <li>• Is the person likely to comply with the enforceable undertaking?</li> <li>• Has the person been the subject of complaints or previous ASIC enforcement action?</li> <li>• What are the prospects for a speedy resolution of the matter?</li> </ul>	<p style="text-align: center;"><b>ACCC<sup>58</sup></b></p> <p>The list is not exhaustive:</p> <ul style="list-style-type: none"> <li>• the nature of the alleged breach in terms of: the seriousness of the conduct involved; the impact of the conduct on third parties and the community at large; the product or service involved; the size of the company/business involved</li> <li>• the ability of a s. 87B undertaking to offer redress to affected consumers and businesses</li> <li>• the history of complaints and/or ACCC action against the company, business or individuals involved</li> <li>• the history of complaints and/or ACCC action involving the practice, the product or the industry generally</li> <li>• prospects for rapid resolution of the matter</li> <li>• the apparent good faith of the company/business.</li> </ul>	<p style="text-align: center;"><b>APRA</b></p> <p>Secure a rapid and effective remedies for contravention without court involvement</p>	<p style="text-align: center;"><b>CASA</b></p> <p>The list is not exhaustive:</p> <ul style="list-style-type: none"> <li>• The impact of the alleged breaches on aviation safety and the magnitude of risk created</li> <li>• The compliance history of the holder</li> <li>• The extent to which any meaningful undertakings can be given to remedy the breaches and mitigate the risk</li> <li>• The likelihood that the EU will be fulfilled, i.e. does the holder demonstrate a commitment to the promises made, and to comply in the future?</li> <li>• The apparent good faith of the holder</li> <li>• The ability of CASA to properly monitor compliance with the EVU</li> <li>• The prospects of rapid resolution of the matter.</li> </ul>
<p style="text-align: center;"><b>ACMA</b></p> <ul style="list-style-type: none"> <li>• whether the conduct was deliberate, inadvertent or reckless</li> <li>• whether the conduct has caused, or may cause, detriment to another person, and the nature, seriousness and extent of that detriment</li> <li>• whether the conduct involved indicates systemic issues that may pose ongoing compliance or enforcement issues</li> <li>• whether the person has been the subject of prior compliance or enforcement action, and the outcome of that action</li> <li>• the person's compliance history and culture</li> <li>• the personal and general educative/deterrent effect of taking action</li> <li>• the seniority and level of experience of the person/s involved in the conduct</li> <li>• what, if any, action has been taken to remedy and address the consequences of the conduct</li> </ul>	<p style="text-align: center;"><b>TGA</b></p> <p>Not exhaustive list:</p> <ul style="list-style-type: none"> <li>• any impact on public health and safety in relation to the activity concerned</li> <li>• the seriousness of the alleged conduct involved</li> <li>• any history of complaints and/or non compliance with regulatory requirements by the company or individual involved</li> <li>• the attitude of the company or individual involved (which may be demonstrated by cooperation and/or admissions made)</li> <li>• the prospect of a speedy and economical resolution of the matter that will fully address any health and safety issues, and</li> <li>• the size of any company involved (which might suggest that compliance programs should have been in place to prevent a breach).</li> </ul>	<p style="text-align: center;"><b>AUSTRAC</b></p> <p><b>No information regarding this.</b></p>	<p style="text-align: center;"><b>Comcare<sup>58</sup></b></p> <ul style="list-style-type: none"> <li>• Nature and extent of the conduct</li> <li>• Can the outcome of the EU be achieved by other measures under the Act?</li> <li>• Take advantage of the flexibility inherent in the EU mechanism to achieve the best possible outcome</li> </ul>

<ul style="list-style-type: none"> <li>• whether the subject of the investigation has cooperated with the ACMA</li> <li>• whether the issues involved require urgent action/intervention by the ACMA.</li> </ul>			
<p style="text-align: center;"><b>Fair Work Ombudsman<sup>59</sup></b></p> <ul style="list-style-type: none"> <li>• ‘an investigation has shown that workplace laws have not been followed</li> <li>• the employer is prepared to voluntarily fix the issue and</li> <li>• they agree to preventative actions for the future.’</li> </ul>	<p style="text-align: center;"><b>VAC</b></p> <p style="text-align: center;"><b>No guidelines available</b></p>	<p style="text-align: center;"><b>OFT NSW<sup>60</sup></b></p> <ul style="list-style-type: none"> <li>• cooperation by the promisor</li> <li>• Rectify situation without the need for litigation</li> </ul>	<p style="text-align: center;"><b>OFT Qld<sup>61</sup></b></p> <ul style="list-style-type: none"> <li>• Never carried out enforcement action against the business for similar conduct</li> <li>• The business is unlikely to offend</li> </ul>
<p style="text-align: center;"><b>EPA NSW</b></p> <ul style="list-style-type: none"> <li>• Nature of alleged breach</li> <li>• Impact of alleged breach</li> <li>• History of party</li> <li>• Conduct of party</li> <li>• General circumstances such as good prospect of speedy resolution of matter and investigation in early stages</li> </ul>	<p style="text-align: center;"><b>EPA Vic<sup>62</sup></b></p> <ul style="list-style-type: none"> <li>• Type of breach</li> <li>• The promisor takes active responsibility for the offence and its impacts</li> <li>• it is the most appropriate form of enforcement response and will achieve a more effective and long-term environmental outcome than prosecution</li> </ul>	<p style="text-align: center;"><b>Access Canberra</b></p> <ul style="list-style-type: none"> <li>• proposed work, health and safety undertaking's merits and benefits;</li> <li>• person's financial ability to meet the terms of the proposed <i>undertaking</i>;</li> <li>• significance of the commitment compared to the capability of the person;</li> <li>• person's compliance history;</li> <li>• support the person has provided to injured person(s);</li> <li>• input from injured person(s); and,</li> <li>• likely outcome should the matter be dealt with through legal proceedings.</li> </ul>	<p style="text-align: center;"><b>WorkCover QLD (and ESO Qld)</b></p> <ul style="list-style-type: none"> <li>• the objective gravity of the contravention and the nature of the applicant's alleged misconduct (the greater the gravity of the contravention, the less likely the undertaking being given will be accepted)</li> <li>• meeting timeframe expectations set out in Annexure B, OIR EU Program Timeframes/Service Standards</li> <li>• submissions received from any relevant party, including any injured worker/s or next of kin, in relation to the contravention</li> <li>• the person's conduct in respect of mitigation and remedial action, regarding both the contravention and any person effected by the contravention</li> <li>• the applicant's past performance and history of compliance with the safety Acts, including the management of workers' compensation</li> <li>• any other matter which the regulator considers relevant</li> </ul>
<p style="text-align: center;"><b>WorkSafe Victoria</b></p> <ul style="list-style-type: none"> <li>• the EU extends beyond the applicant's obligations to comply with the Law and offers tangible health and safety benefits to improve health and safety outcomes in the workplace/the workforce, the industry and the community;</li> <li>• The EU is in the public interest.</li> <li>• The significance and seriousness of the contravention;</li> <li>• The injuries arising from the contravention;</li> <li>• Any aggravating circumstances which exist (e.g. specific knowledge about the hazard or risk; relevant compliance history);</li> <li>• The prior criminal history of the applicant; The prevalence of the risks arising from the contravention;</li> <li>• Whether the applicant is likely to comply with the EU; The EU does not include a denial of responsibility or the attribution of responsibility to another party; The EU is capable of enforcement.</li> </ul>	<p style="text-align: center;"><b>WorkSafe Tasmania</b></p> <p>List is not exhaustive:</p> <ul style="list-style-type: none"> <li>- objective gravity and nature of the alleged contravention</li> <li>- the merits and benefits of the proposed undertaking</li> <li>- the person's financial ability to meet the terms of the proposed undertaking</li> <li>- the significance of the commitment compared to the capability of the person</li> <li>- the person's past performance and history of compliance with the law</li> <li>- the support the person has provided, and has committed to provide into the future, to affected parties</li> <li>- input from injured persons, next of kin or guardians (as relevant)</li> <li>- the likely outcome should the matter be dealt with through legal proceedings</li> </ul>		

**Table 3: Factors Considered when Accepting EUs**

### **C *Disclosure Attached to EU***

Disclosure of the terms of EU by regulators is important to ensure transparency and accountability of this sanction. Additionally, such disclosure plays a key role if the regulator wishes to achieve general deterrence or desires to use the EUs as an educational tool to promote its expectation regarding what is deemed as acceptable/unacceptable conduct. As highlighted in Table 4, most regulators have an online register, however the availability of the EUs may be limited to a particular period. EUs may be less transparent to the public and may also have a limited impact on how the conduct leading to the EU is perceived by the industry.

Some regulators such as ASIC, the ACCC and FWO have all their EUs available to the public. Others will only have the most recent EUs online such as the CASA and CAV. As highlighted in Table 4, the regulators' practices may vary in this area.

Regulator	Register online	Access only through physical location of register	EU accessibility- original	Media Release (as general rule- exceptions may apply)	Targeted approach (as a generally policy)	Ad hoc promotion
<b>ASIC</b>	Yes	No	Yes	Yes	No	Yes
<b>ACCC</b>	Yes	No	Yes	Yes	No	Yes
<b>APRA</b>	Yes	No	Yes (if there is no sensitive information attached to the EU)	Yes	No	Yes
<b>CASA</b>	Yes	No	Yes- this is a requirement under the law, but only recent EUs are available.	No – Details of EUs regarding numbers is from Annual report as only recent EUs available online.	No	Yes
<b>ACMA</b>	Yes	No	Yes	Yes	No	Yes
<b>TGA</b>	No	No	Yes	No	No	No
<b>AUSTRAC</b>	Yes	No	Yes	Yes	No	Yes
<b>ComCare</b>	No	No	No	Yes, for some of the EUs. Information on EUs (notice of decision and reason for decision are available on the Comcare website). EUs info accessible via annual report.	No	Yes
<b>FWO</b>	Yes	No	Yes	Yes	No	Yes
<b>CAV</b>	Yes	Yes	Yes (only of recent EUs)	Yes	No	Yes
<b>OFT NSW</b>	Yes	Yes	No (only summary of EUs)	No	No	Yes
<b>OFT Qld</b>	Yes	Yes	No (fees apply to access EU)	Yes (for some of the EUs)	No	Yes
<b>EPA NSW</b>	Yes	No	Yes (difficult to navigate register)	Yes (for some of the EUs)	No	Yes
<b>EPA Vic</b>	Yes	No	Yes	Yes	No	Yes
<b>Access Canberra</b>	Yes	No	Depending – Mostly in full	No	No	Yes
<b>WorkCover Qld</b>	Yes	No	Yes (for the last 5 years)		No	Yes
<b>WorkSafe Tasmania</b>	Yes	No	No EUs have been entered into	Policy is that the promisor will advertise EUs in Media at own cost	No	Yes
<b>WorkSafe Victoria</b>	Yes	No	Yes	Yes	No	Yes

**Table 4: Disclosure of EUs**



## IV EUs ENTERED INTO BY THE DIFFERENT REGULATORS

This part focuses on the number of EUs accepted by the different regulators, the demography of the promisors, type of alleged breaches and the undertakings given to remedy the alleged breach.

### A Number of EUs

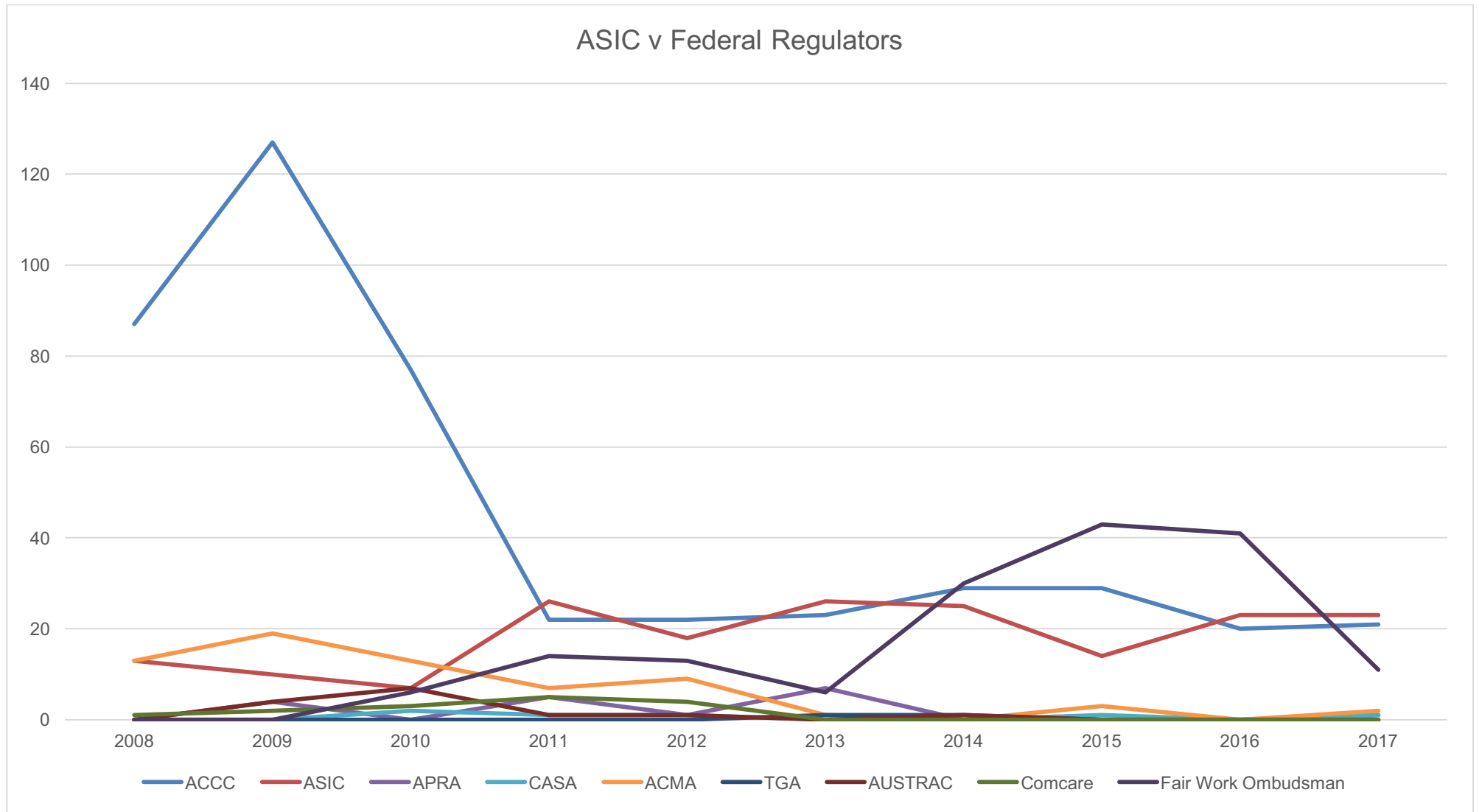
The number of EUs may vary from regulator to regulator. Diagram 1 and 2 respectively compare ASIC's use of enforceable undertakings with Federal and then State regulators. As highlighted in Diagram 1, the ACCC used to rely on this sanction heavily prior to 2010, however this trend has changed since the introduction of the new legislation, the *Competition and Consumer Act 2010* (Cth). One reason behind the change is the fact that the ACCC has been provided with more powers. Further, the State regulators now can rely on the ACL to enter into enforceable undertakings as highlighted in Table 1 (in Part II of this report). The use of EUs by some regulators such as APRA may be consistent with low enforcement practices adopted by the regulators.

Diagram 2 does not include the number of EUs for CAV, OFT NSW, Access Canberra and Worksafe Tasmania.

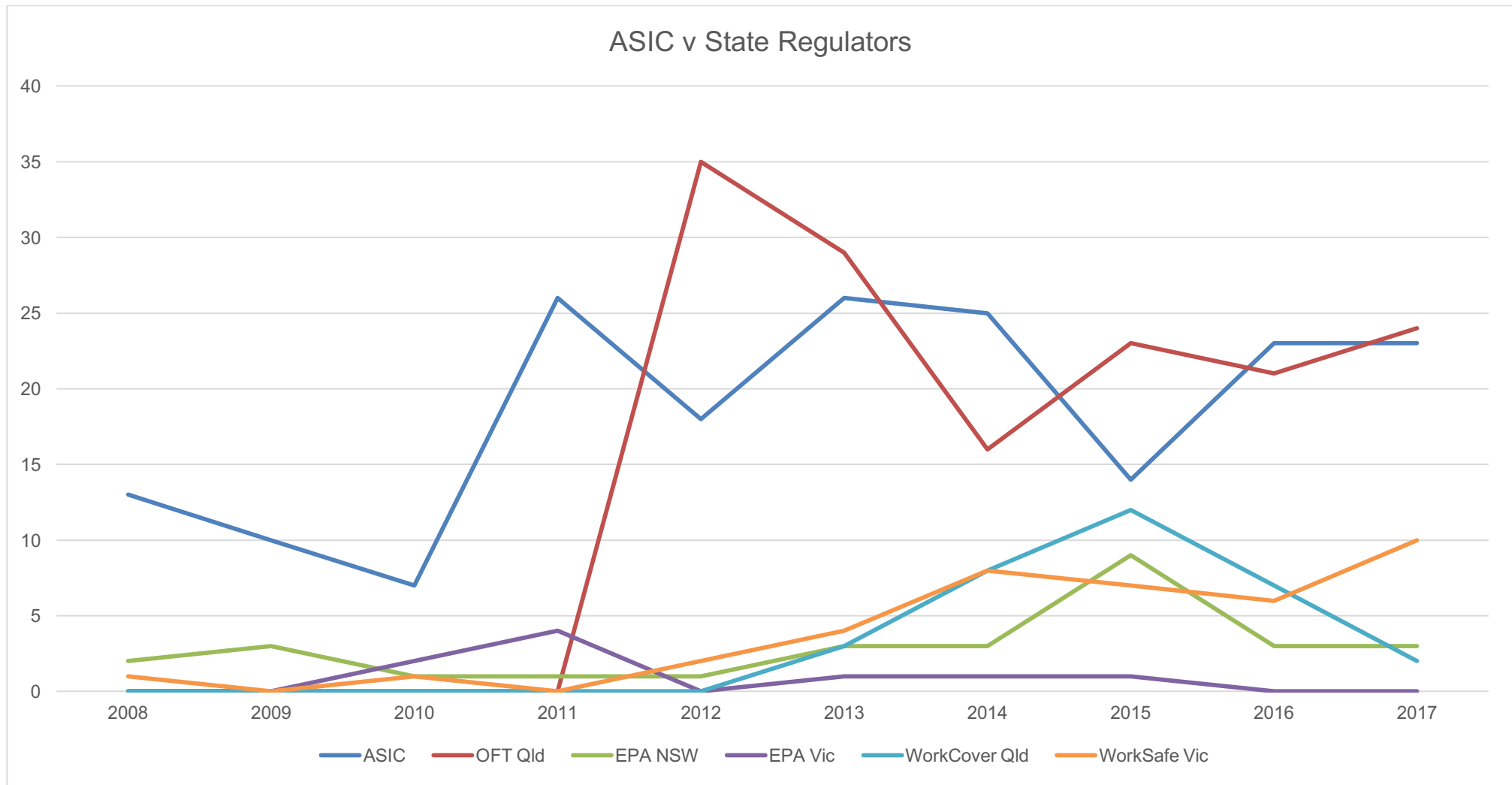
Worksafe Tasmania is not included as the regulator has not accepted an EU so far. For CAV and OFT NSW, the number of EUs are not included as only recent EUs are accessible online. For CAV the data is from 2014 to 2017 and is the following: 2017: 12; 2016: 4; 2015: 2; 2014: 3.

For the OFT NSW, the information available is from 2015 to 2017: 2017: 1; 2016: 2; 2015: 1

Regarding Access Canberra, the EUs are not represented in the table as not all EUs are available on the register. The numbers available are low: 6 EUs in total.



**Diagram 1: Use of EU by Federal Regulators as Compared with ASIC**



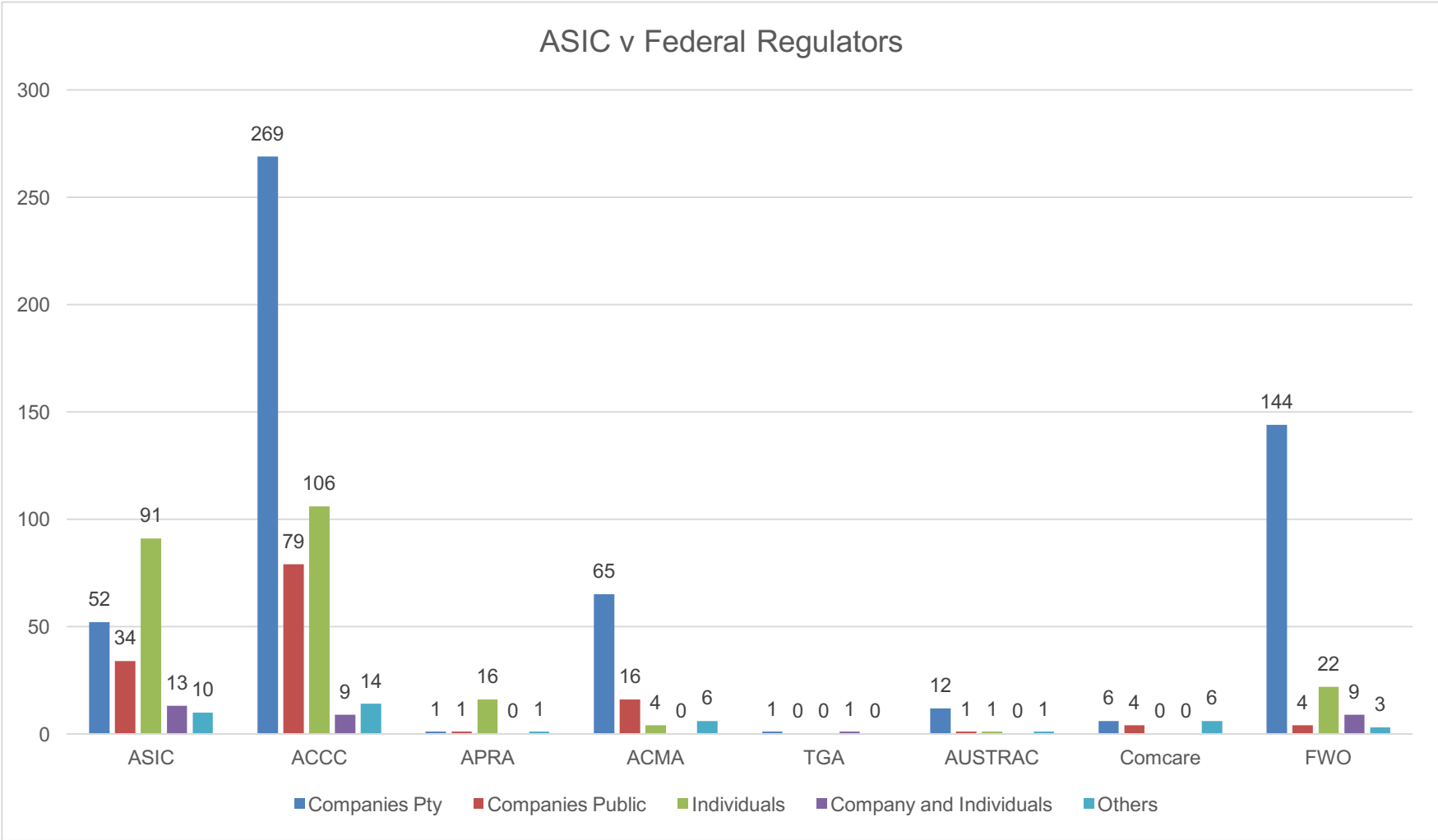
**Diagram 2: Use of EU by State Regulators as Compared with ASIC**

## **B Demography of the Promisors**

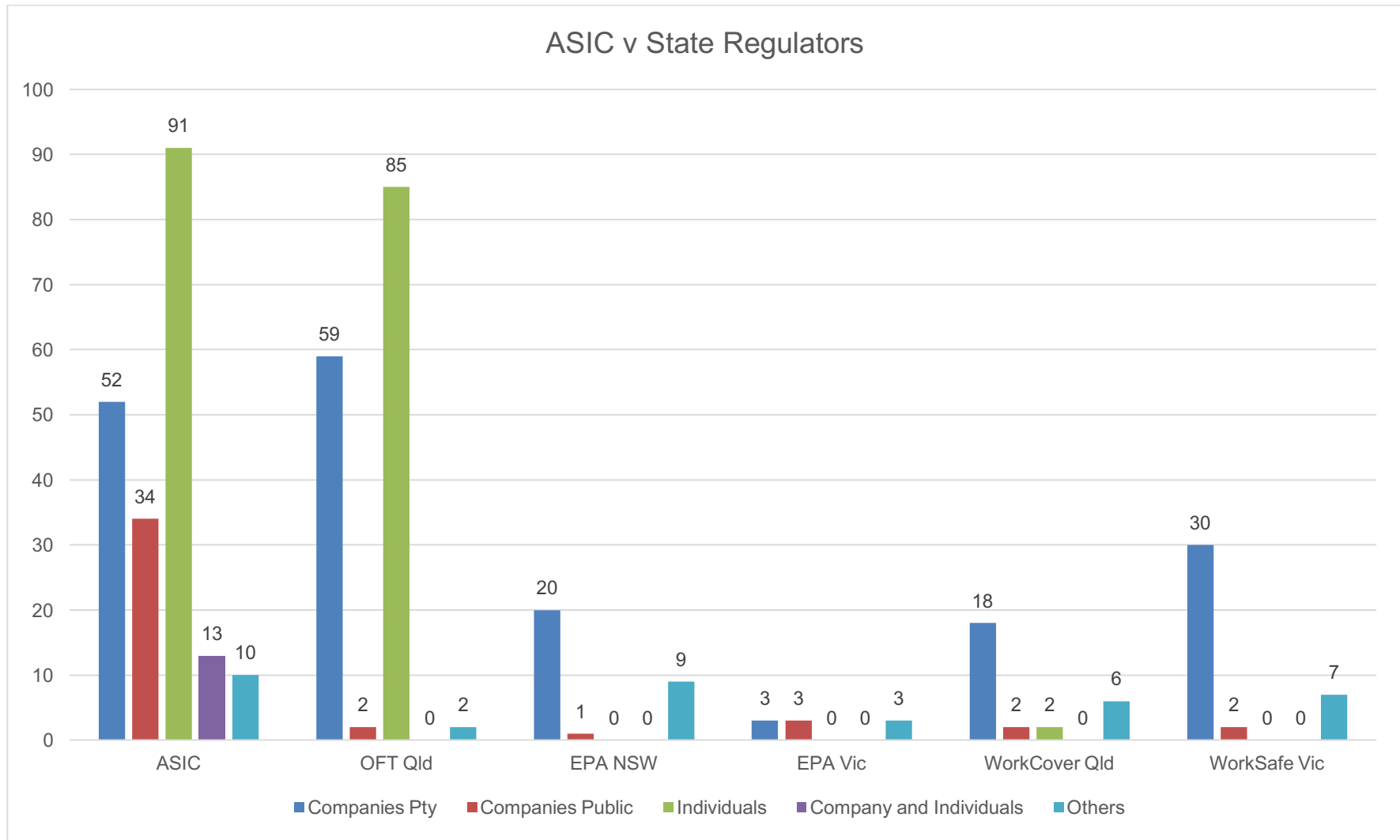
A review of Diagram 3 and 4 highlights that the majority of promisors are proprietary companies. ASIC, the ACCC (especially prior to 2010) and the OFT Qld have entered into EUs with individuals as well as companies. APRA has mostly accepted EUs with individuals. The other regulators have either never entered into an EU with individuals (such as Comcare) or have entered into such EUs on limited occasions (such as Austrac).

Some regulators such as ASIC have accepted EUs that involve both the companies and individuals working in the organisations subject to the EU. In those instances, the individuals are mainly directors who are partly or fully responsible for the conduct of the promisor. Their involvement in the EU is aimed to ensuring that the organisation complies with the terms of the EU.

The information regarding the promisors entering into an EU with CASA is not included in Diagram 3 as such data is not accessible online as this regulator only provide access on its website to the most recent EUs. The same can be said about CAV, OFT NSW and Access Canberra and as such they are not included in Diagram 4.



**Diagram 3: Demography of Promisors Entering into an EU per Federal Regulator**



**Diagram 4: Demography of Promisors Entering into an EU per State Regulator**

### ***C Types of Alleged Offences Leading to an EU***

A quick review of the alleged offences leading to an EU can be found in Appendix 2 of this report. However, as a general rule, an EU may apply to different types of conduct depending on the scope each regulator has been provided under the law. The scope of EU for each regulator has been outlined in Table 1 in Part II of this report. The breaches vary from technical alleged breaches which are easy to prove (such as conduct relating to the sale of goods that are non-compliance with Australian Standard) to more complex alleged breaches (such as conduct allegedly contravening the continuous disclosure rules).

From ASIC's perspective, most of the EUs accepted fall in the area of financial services law. The ACCC breaches are mainly regarding alleged breaches of misleading and deceptive conduct with a range of EUs dealing with non-compliance with competition issues including potential breaches of misuse of market power (a conduct which is notoriously difficult to establish). The OFT Qld also focuses mainly on accepting EUs in the area of misleading and deceptive conduct.

More technical alleged breaches can be the subject of EUs with other regulators. For instance, the majority of conduct leading to an EU with the FWO relate to underpayment of employees. More serious breaches relating to non-compliance with health and safety obligations leading to physical harm to employees and members of the public are also subject to EUs with the WorkCover Qld and WorkSafe Vic. All of this highlights the broader role EUs can play in those areas.

### ***D Promises Included in an EU***

As illustrated in Table 5, the majority of EUs accepted by regulators focused on enhancing the policies/compliance systems organisations had in place. The aim behind this in most of the cases is to prevent the occurrence of similar conduct in the future. EUs also included remediation promises (eg disclosure of EUs compensation to affected parties) as well as community benefits. Community benefits were especially popular with regulators such as the EPA NSW, EPA Vic, WorkCover Qld and WorkSafe Vic highlighting the fact that these regulators have a specific aim for an EU to deliver benefits to the broader community and/or require the promisor to go beyond the requirement set by the law. Some regulators (mainly state regulators) require the promisor to pay the cost of their investigation.

Ultimately, the promises included in the EUs are aimed to fulfil the aims set out in Table 2 of this report.

<p style="text-align: center;"><b>ASIC</b></p> <ul style="list-style-type: none"> <li>-Stop committing the alleged offence</li> <li>-Put a compliance program in place</li> <li>-Agree to a voluntary self- ban</li> <li>-Fulfil some education requirements</li> <li>-Compensate affected parties</li> <li>-Community benefits</li> <li>-Disclose the undertaking to a certain category of people</li> </ul>	<p style="text-align: center;"><b>ACCC</b></p> <ul style="list-style-type: none"> <li>-Corrective advertising in the print and electronic media</li> <li>-Refunds to affected consumers</li> <li>-Community service remedies</li> <li>-Industry-wide education programs funded by the company/business providing the undertaking including compliance training programs</li> </ul>	<p style="text-align: center;"><b>APRA</b></p> <ul style="list-style-type: none"> <li>-Voluntary ban</li> <li>-Training/education</li> <li>-Review of compliance programs and systems</li> <li>-Ensuring liquidity and compliance with capital requirements</li> </ul> <hr/> <p style="text-align: center;"><b>AUSTRAC</b></p> <ul style="list-style-type: none"> <li>-Take specific action to improve compliance system in place</li> <li style="padding-left: 40px;">-Stop taking specified action</li> </ul>	<p style="text-align: center;"><b>CASA</b></p> <ul style="list-style-type: none"> <li>-Develops and disseminates throughout the organisation a clear compliance policy</li> <li>-Undertakes a remedial course of training</li> <li>-Introduces and implements a safety management system</li> <li>-Introduces and implements a compliance monitoring system verifiable by independent third-party audit, with audit reports provided to CASA at set intervals</li> <li>-Not employ, for a particular period of time, a particular person in a management position or position which must be approved by CASA</li> </ul>
<p style="text-align: center;"><b>ACMA</b></p> <ul style="list-style-type: none"> <li>-The development of documented compliance procedures and systems</li> <li>-The appointment of an independent auditor to assess and report on compliance procedures and systems</li> <li>-The implementation of specific practices or procedures to reduce the risk of future contraventions (for example, use of pre-recorded rather than live-to-air programs; periodic audits)</li> <li>-The development and implementation of training programs</li> <li>-Repayment of monies received/payment of compensation or damages for losses sustained by people affected by the conduct</li> <li>-Refraining from engaging in specified conduct</li> <li>-Expenditure or payment of an agreed sum of money which is designed to foster compliance and/or act as a disincentive to any future non-compliance</li> <li>-Publishing of information, including a correction, customer information or industry-specific information</li> <li>-Removal or clarification of information from a website or other publication</li> </ul>	<p style="text-align: center;"><b>TGA</b></p> <ul style="list-style-type: none"> <li>-Where relevant, cessation of the particular activity that is alleged to be a breach or potential breach of the legislation</li> <li>-The taking of various specified actions to ensure compliance with the Act, or remedy the consequences of non-compliance</li> <li>-In appropriate cases, destruction of the goods concerned at the Promisor's expense and providing the TGA with a certificate of destruction of those goods</li> <li>-A commitment to future compliance with the requirements of the legislation, or particular requirements of the legislation, whether or not supported by the Promisor's use of expert assistance to formulate robust standard operating procedures when dealing with therapeutic goods, or any other means specified by the person in breach, noting that in order to be enforceable the undertaking has to be sufficiently specific for the Promisor to know exactly what is expected of them and so that any failure to comply will be readily apparent</li> <li>-Where relevant, a commitment to future adherence to the requirements of the Therapeutic Goods Advertising Code which might include corrective advertising or notices to rectify misleading conduct, noting that in order to be enforceable, the undertaking has to be sufficiently specific for the Promisor to know exactly what is expected of them</li> </ul>	<p style="text-align: center;"><b>OFT (NSW)</b></p> <ul style="list-style-type: none"> <li>-Stop conduct</li> <li>-Take measure to prevent the conduct from occurring in the future through implementation of compliance program</li> <li>-Imposition of pecuniary penalties</li> <li>-Pay commission investigation cost</li> <li>-Publication and disclosure</li> </ul>	<p style="text-align: center;"><b>Comcare</b></p> <ul style="list-style-type: none"> <li>-A commitment to outcomes that are tangible, measurable and achievable, with specified timeframes</li> <li>-Measures to address the impact of an incident on persons who have been injured and/or their families</li> <li>-Improvements that are not limited to the specific contravention or alleged contravention, covering a range of risks or different subdivisions within an organisation</li> <li>-Implementation of systems that are considered 'best practice', rather than minimum compliance</li> <li>Conducting research into a safety issue, the results of which will lead industry practice</li> </ul>



<p><b>Fair Work Ombudsman</b></p> <ul style="list-style-type: none"> <li>-Corrective action through remedying an underpayment, apologising, printing a public notice)</li> <li>-Community benefits</li> <li>-A commitment by the employer to future compliance measures (eg. regular internal audits, training for managers and staff, future reporting to the Fair Work Ombudsman).</li> </ul>	<p><b>CAV</b></p> <ul style="list-style-type: none"> <li>-Stopped and will not repeat the conduct</li> <li>-Implement system to prevent the conduct from taking place again;</li> <li>-Community benefits</li> <li>-Disclosure and refund and recall</li> </ul>		<p><b>OFT Qld</b></p> <ul style="list-style-type: none"> <li>-Stop doing certain activities that breach its laws</li> <li>-Fix or change certain activities or documents to comply with our law</li> <li>-Pay compensation to consumers affected by those activities.</li> </ul>
<p><b>EPA NSW</b></p> <ul style="list-style-type: none"> <li>-Commitment to cease the conduct</li> <li>-Take measure to prevent similar conduct in the future</li> <li>-Community benefits</li> <li>-Pay cost of regulator</li> <li>-Publication/disclosure of EU by promisor</li> </ul>	<p><b>EPA Vic</b></p> <ul style="list-style-type: none"> <li>-Commitment to cease the conduct</li> <li>-Take measure to prevent similar conduct in the future (compliance program/ training...)</li> <li>-Community benefits</li> <li>-Public apologies</li> </ul>	<p><b>Access Canberra</b></p> <ul style="list-style-type: none"> <li>-Commitment to cease the behaviour that led to the contravention or alleged contravention</li> <li>-A commitment to the ongoing effective management of work, health and safety risks</li> <li>-Providing details of tangible health and safety initiatives that will be delivered to benefit workers, industry and the community (through community benefits)</li> <li>-Agreement to disseminate information about the undertaking within the workplace</li> <li>-Where required, implement and maintain an occupational health and safety management system acceptable to the regulator that meets the principles of 'AS/NZS 4804:2001 Occupational health and safety management systems -General guidelines on principles, systems and supporting techniques'</li> <li>-Where required, undertake auditing of the occupational health and safety management system by a suitably qualified third party authority, forward reports arising from the audits to the regulator, and implement the agreed actions arising from the report</li> </ul>	<p><b>WorkCover Qld and ESO Qld</b></p> <ul style="list-style-type: none"> <li>-Apology</li> <li>-Remedying the breach through implementation of compliance program</li> <li>-Providing guidance to the industry regarding a particular conduct</li> <li>-Community benefits</li> <li>-Cost and fees</li> </ul>

**WorkSafe Victoria**

- Statement of regret
- Remedying the breach through implementation of compliance program
- Training and education for employees, the industry and the community
- Improving workplace health and safety within industries
- Disclosure of EU to public
- Community benefits

**WorkSafe Tasmania**

- Ceasing the behaviour that led to the alleged contravention
- A commitment to the ongoing effective management of WHS risks
- Details of tangible WHS initiatives that will be delivered to benefit workers, industry and the community
- Reimbursing the agreed regulator's costs associated with the WHS undertaking
- Disseminate information about the WHS undertaking within the workplace
- Where required, implementing and maintaining a work health and safety management system (WHSMS) acceptable to the regulator that meets the principles of AS/NZS 4804:2001 Occupational health and safety management systems—General guidelines on principles, systems and supporting techniques
- Where required, undertaking auditing of the WHSMS by a suitably qualified third party auditor, forwarding reports from the audits to the regulator, and implementing the agreed actions from the reports

**Table 5: Promises Included in EUs**

## **V MONITORING OF EUs**

The presence of a sound monitoring system attached to EUs plays a key part in ensuring the effectiveness of the sanction. If the monitoring regime is weak or non-existent, then promisors may decide to ignore the terms of the EU and only comply with some aspect of it, if at all. As such it is important for the regulators to actively monitor the compliance of entities with the EU.

A review of the practices of the regulators highlights the fact that there are different practices in place regarding the monitoring of the EUs. Some regulators are more passive and wait for the promisor to advise them regarding their compliance with the terms of the EU. In some instances, no such requirement is needed. Other regulators are more active in this space as they regularly assess compliance of the promisor with the terms of the EU. The practices are described in Table 6. The information in that Table is based on data available from the EUs and the regulators' websites.

Regulator	Monitoring by the regulator: active/passive	Reporting by Promisor to regulators	Involvement of independent experts	Transparency regarding monitoring: reports made available to public
<b>ASIC</b>	Passive/ active (more active through release of compliance report to the public)	Yes, usually	Usually	Yes
<b>ACCC</b>	Passive	Yes, usually	Where appropriate	No
<b>APRA</b>	Passive	Depends	Where appropriate	No
<b>CASA</b>	Limited Information online regarding this.	Yes	information not available online	No
<b>ACMA</b>	Passive	Yes, usually	Where appropriate	No
<b>TGA</b>	Passive	Yes, usually	No reference to independent experts in EUs	No
<b>AUSTRAC</b>	Passive	Yes, usually	No information available to that regard	No
<b>ComCare</b>	Active	Yes, usually	Where appropriate	No
<b>FWO</b>	Active	Yes, usually	Where appropriate	No
<b>CAV</b>	Passive	Yes, usually	Yes	No
<b>OFT (NSW)</b>	Information not available online	Information not available online	Information not available online	No
<b>OFT (Qld)</b>	Information not available online	Information not available online	Information not available online	No
<b>EPA (NSW)</b>	Active	Yes, usually	Where appropriate	Yes – encouraged to be completed on the Promisor’s website
<b>EPA (Vic)</b>	Active	Yes, usually	Yes	No
<b>Access Canberra</b>	Active	Yes, usually	Yes	No
<b>WorkCover (Qld)</b>	Active	Yes, usually	Yes	No
<b>WorkSafe (Tas)</b>	Active	Yes, usually	Yes	No
<b>WorkSafe (Vic)</b>	Active	Yes, usually	Yes	No

**Table 6: Monitoring of EUs**

## VI Conclusion

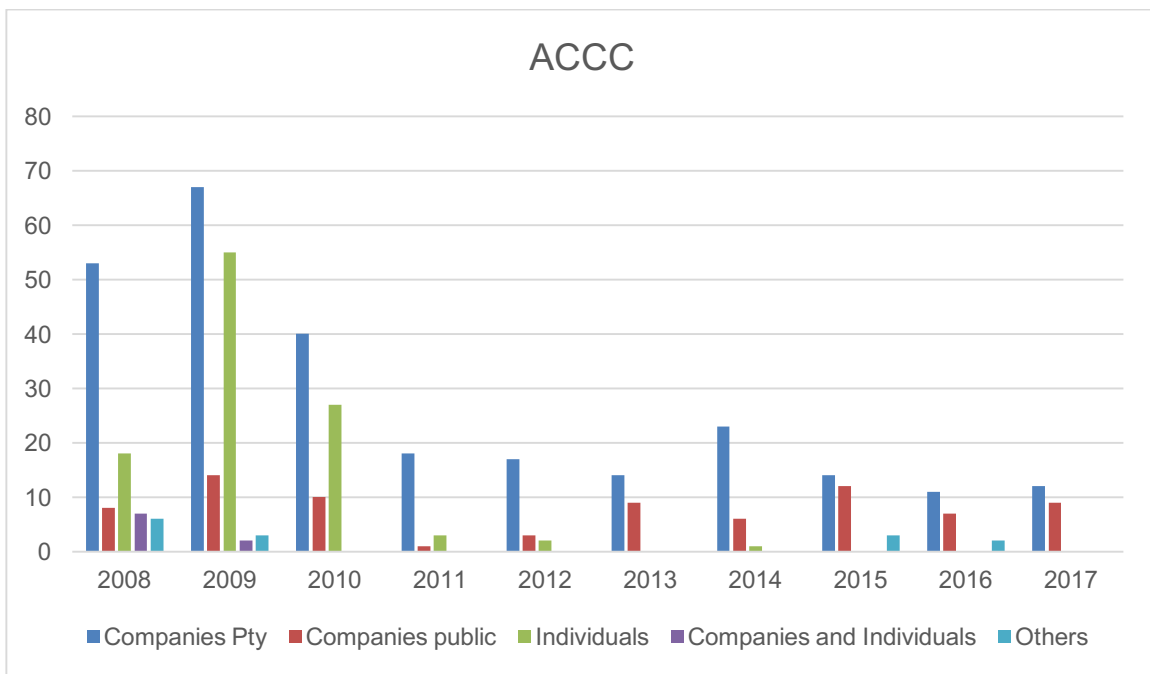
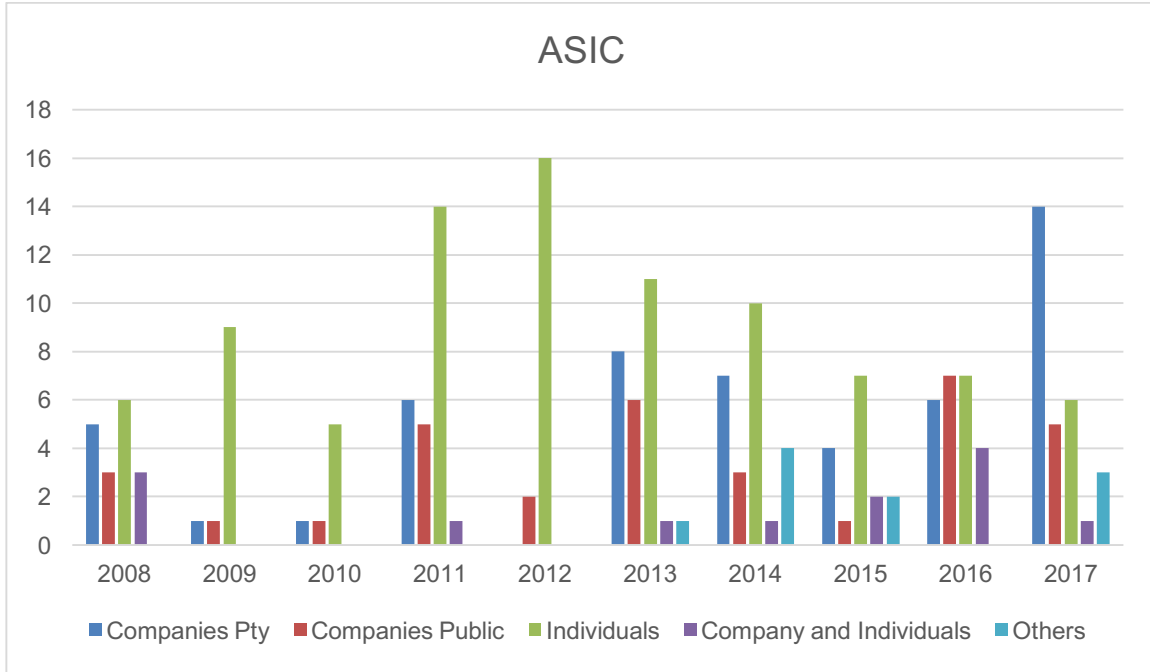
As highlighted in this report, EUs are a very versatile sanction that have been used by a range of regulators. The review of 18 regulatory practices have shown that EUs have been relied on to achieve a range of purposes from changing the compliance culture of an organisation to addressing the harm caused by the conduct to a broad range of parties. It is apparent from this review that some regulators view this sanction as restorative in nature.

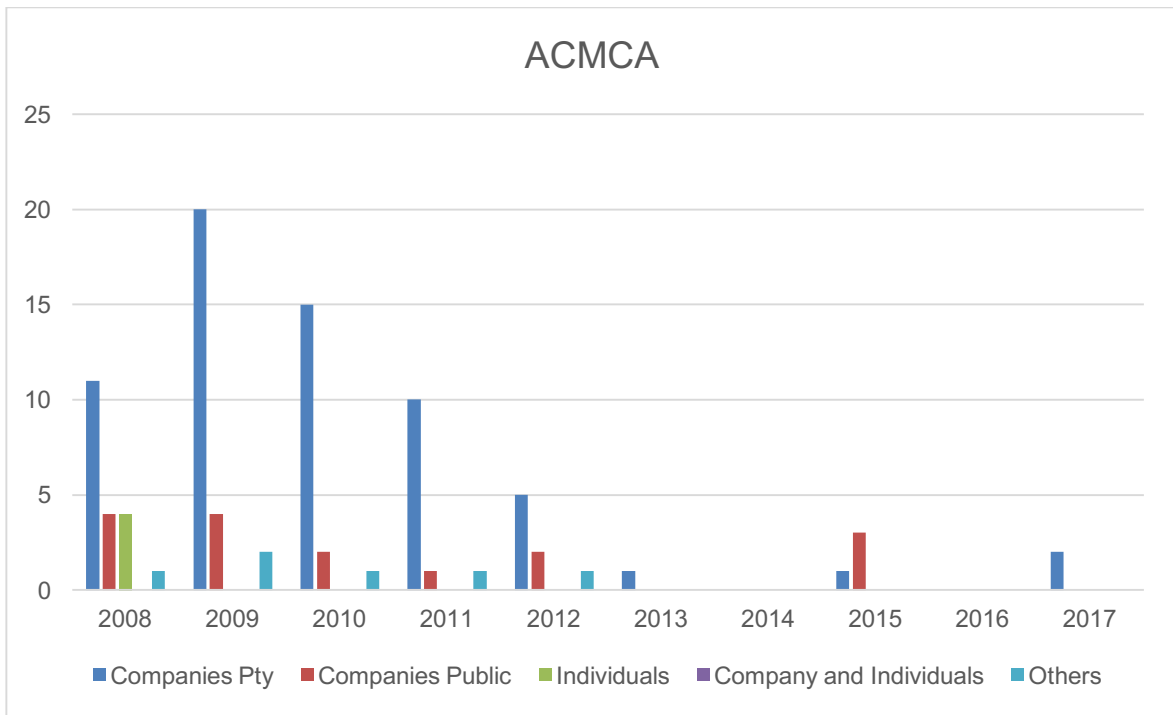
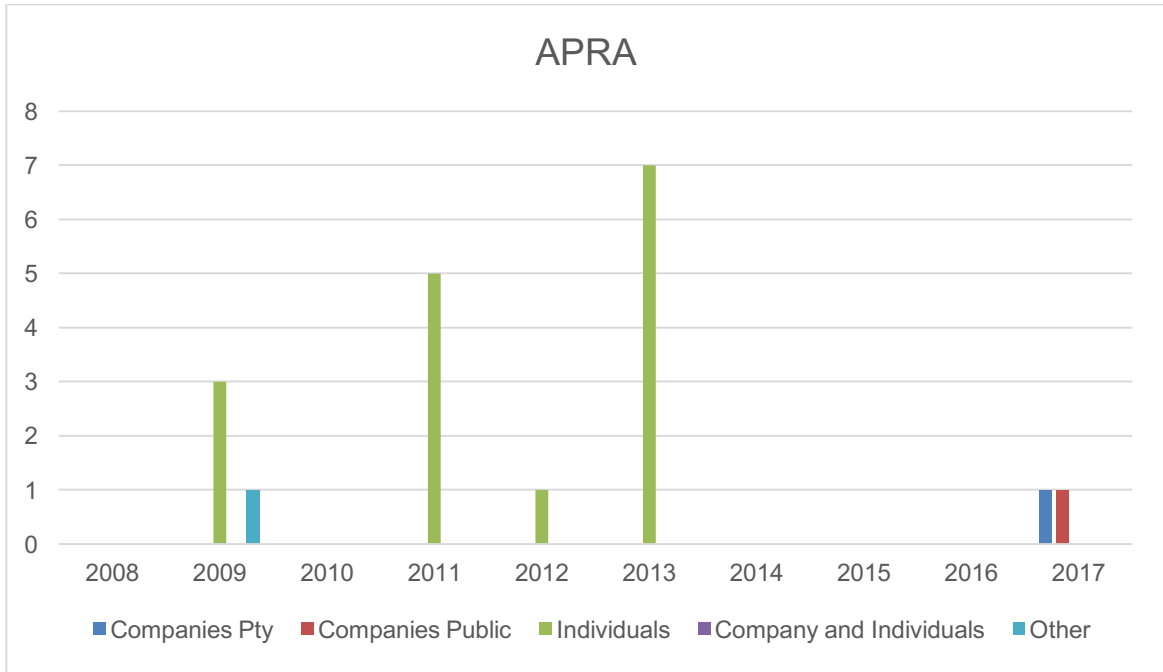
Additionally, some regulators perceive this sanction as a mean to educate the industry about acceptable standards. As an administrative sanction, it has been used differently by regulators and consequently, the numbers of accepted EUs by 18 regulators have varied. An independent review of the EPA Vic regulatory practices has found that the low numbers of EUs that have been accepted is the result of a poor understanding of the agency regarding the practices surrounding this sanction.

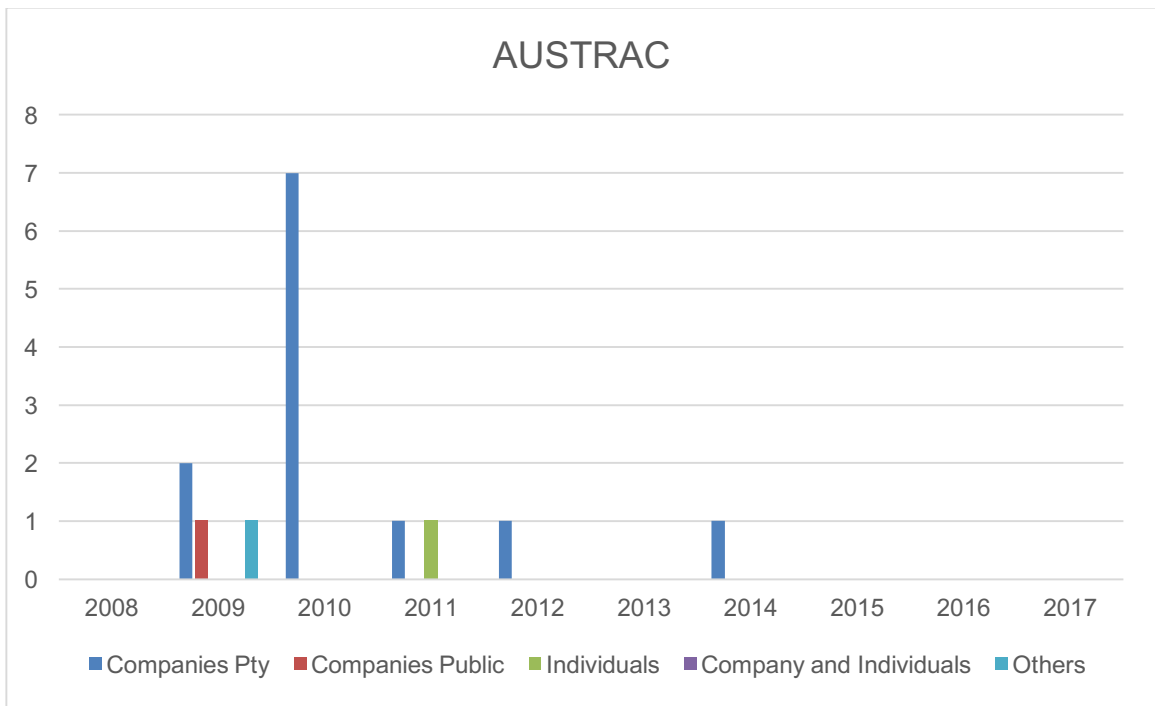
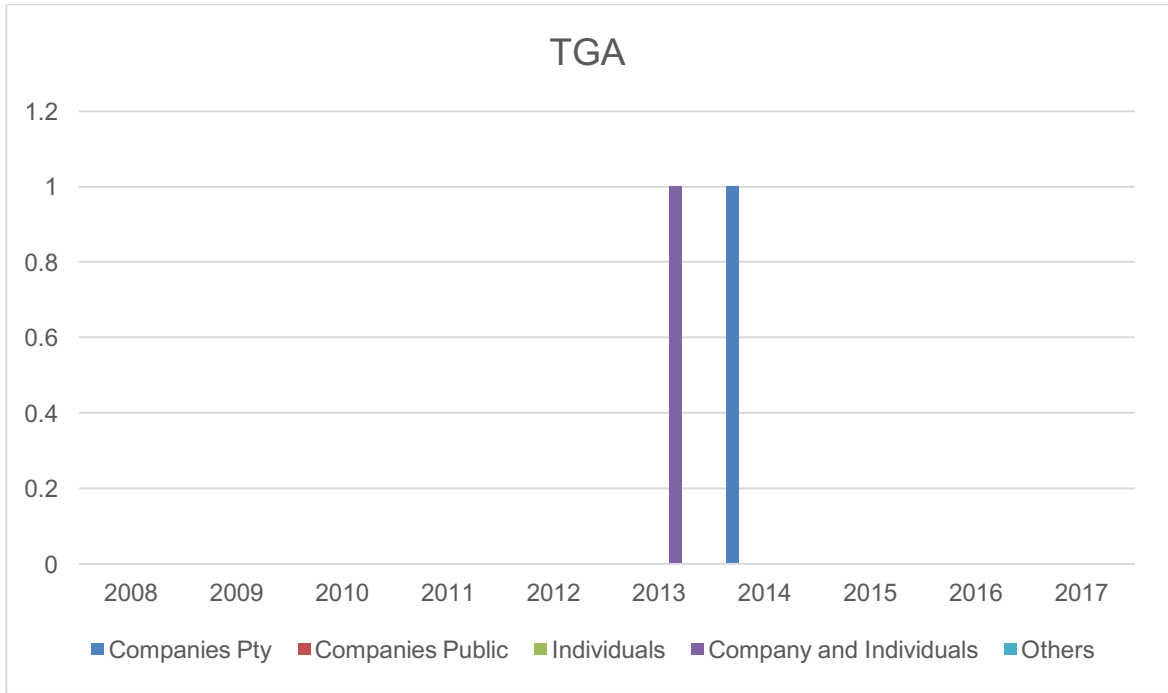
More research can be conducted in the area to get a better insight regarding how each of the regulators considered in this paper uses EUs. This could be achieved through interviews with the different regulatory agencies studied in this report. The limitation of this research is that it is a desktop study of the materials available on the regulators' website. This provided limited insight in certain cases regarding the regulatory practices of each regulator especially when regulators such as the AUSTRAC and CAV do not have any guidelines issued regarding their use of EUs.

In conclusion, the use of EUs by different regulators such as the ACCC, ASIC, FWO, EPA NSW and WorkCover Qld highlights that this sanction has a place in our regulatory system as it may achieve in certain instances better regulatory outcomes than other sanctions. Unlike other regulatory actions, an EU, when used properly, can achieve in one go a change of compliance culture within an organisation, restorative justice and education to the industry. Accordingly, EUs can play an important role within the regulatory landscape.

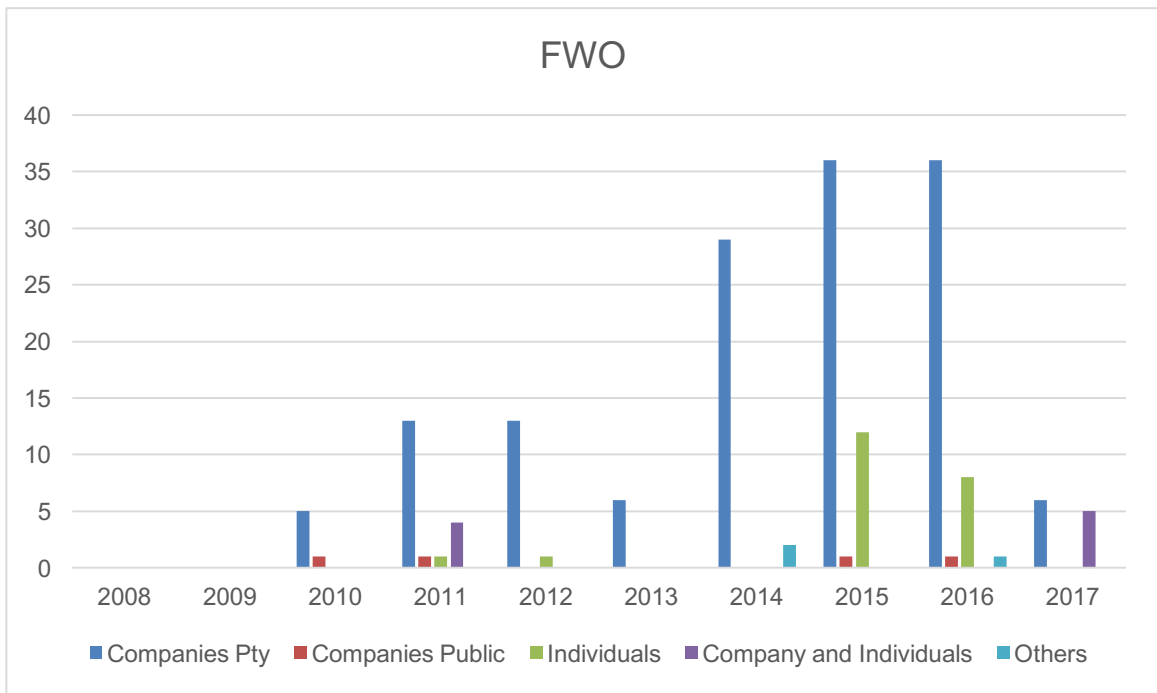
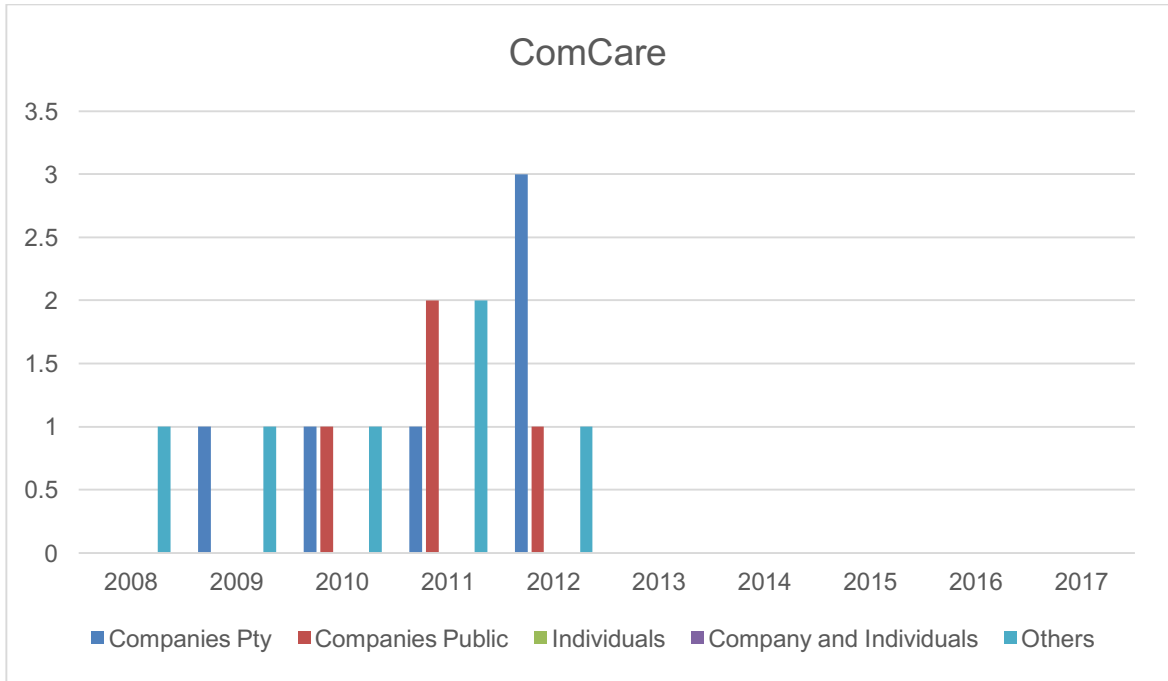
## Appendix 1: Diagrams Regarding the Demography of Promisors by Regulator Per Year

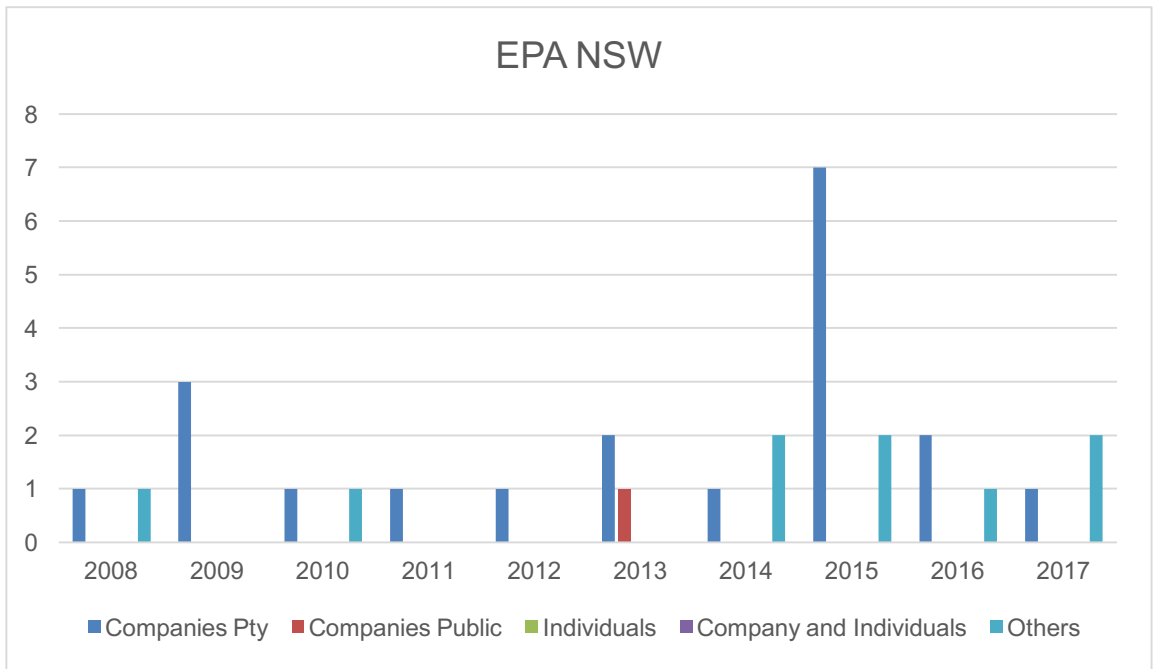
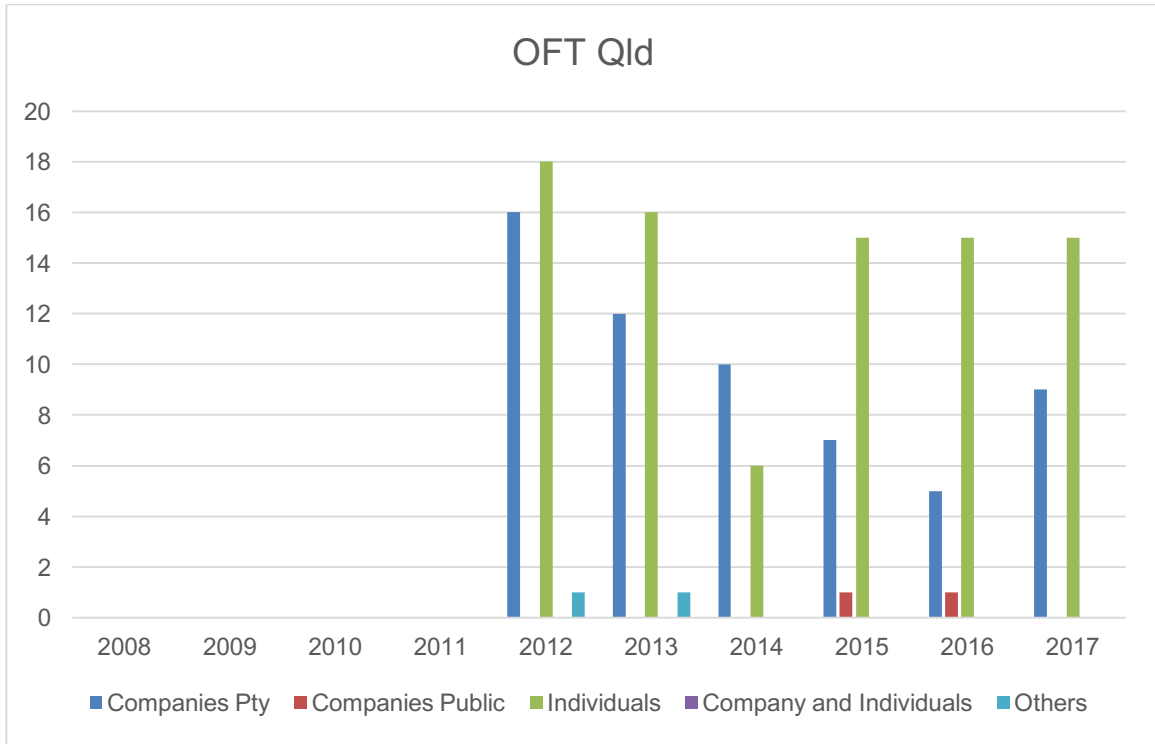


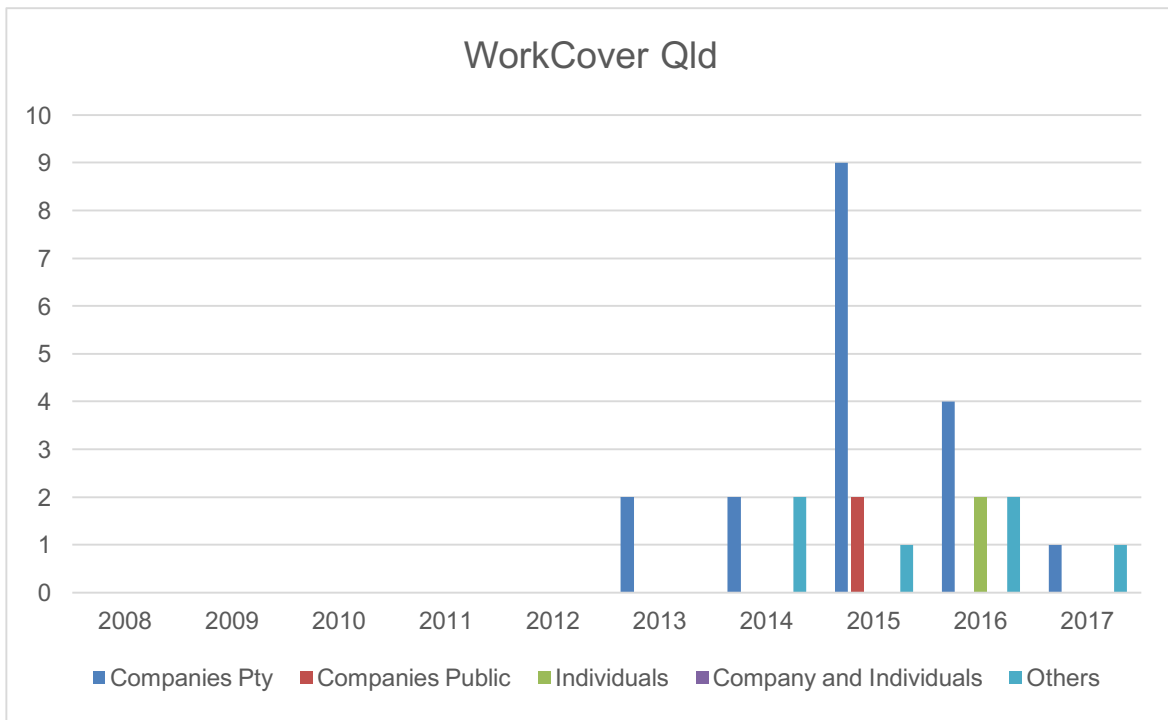
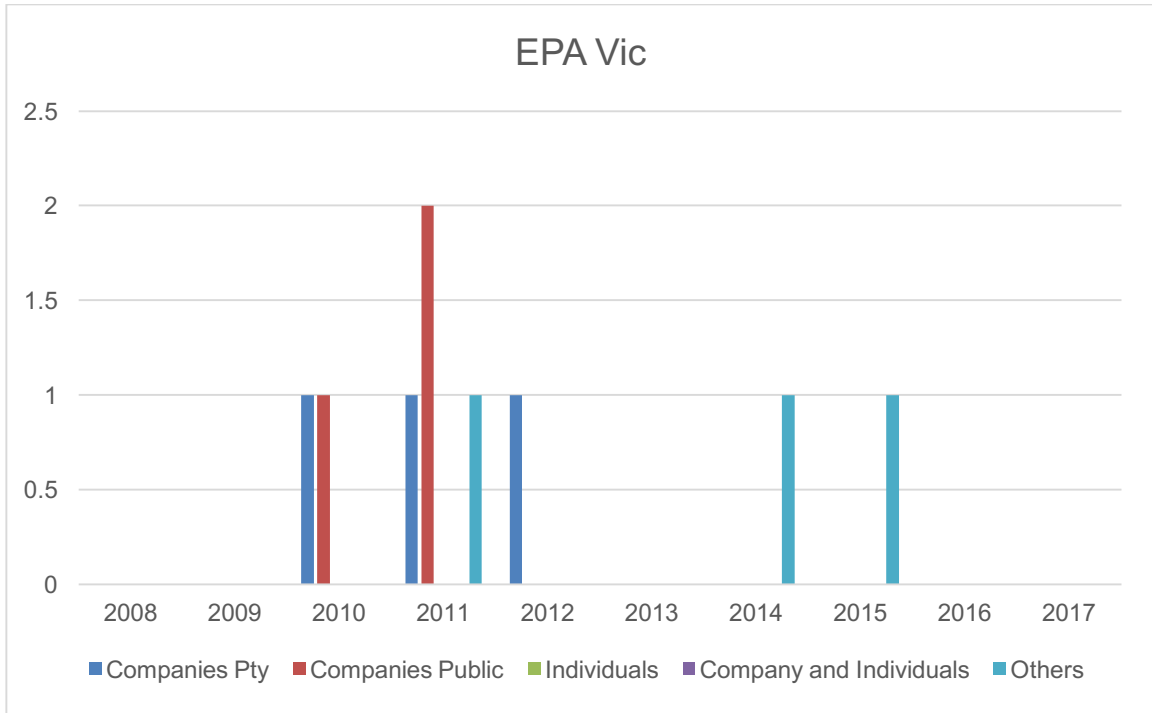














## Appendix 2: Alleged Offences

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Misleading and deceptive Conduct	10	5.4%
Providing inappropriate advice and/or deficiencies in training/supervision systems of representatives	50	27%
Breaches of s 912A excluding training and supervision deficiencies	24	12.9%
Breaches Relating to managed investment scheme rules	15	8.1
Providing consumer credit with no licence	7	3.9%
Providing financial services with no licence	3	1.6%
Issuing securities in contravention of Ch6D	4	2.2%
Breach of responsible lending provisions	10	5.4%
Auditor non-compliance with obligation	21	11.3%
Liquidator non-compliance with obligation	15	8.1%
Director non-compliance with obligations	2	1.1%
Continuous disclosure	4	2.2%
Others	20	10.8%
<b>Total</b>	<b>185</b>	<b>100</b>

**Table 7: Alleged Offences Leading to EU with ASIC**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Misleading and Deceptive Conduct	187	40.9%
Non-Compliance with Safety Standards	49	10.7%
Unfair/Unconscionable contracts	3	0.7%
S 50	140	30.6%
S 45	27	5.9%
S 46	1	0.2%
S 47	2	0.4%
S 48	20	4.4%
Others	28	6.2%
Total	457	100

**Table 8: Alleged Offences Leading to EU with the ACCC**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Breaches of directors obligation regarding covenants – s 52 and 55 of the SIS Act	13	72.2%
Accounting Misstatement/Mistreatment of Reinsurance transactions	1	5.5%
Failure of management systems and adequate supervision and auditing and monitoring systems	1	5.5%
Ensuring compliance with prudential standards and capital maintenance	1	5.5%
Disqualification swapped with EU as a result of appeal to the AAT	2	11.1%
Total	18	Approx 100%

**Table 9: Alleged Offences Leading to EU with the APRA**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Breach relating to <a href="#">commercial electronic messages</a> ; or <a href="#">address-harvesting software</a> .	16	23.9%
Breach relating to Broadcasting Services Act 1992	24	35.8%
Breach relating to Telecommunication Act 1997	27	40.3%
<b>Total</b>	<b>67</b>	<b>100%</b>

**Table 10: Alleged Offences Leading to EU with the ACMA**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Therapeutic goods not included on the Australian Register of Therapeutic Goods (Civil/ Criminal breach)	2	100%
<b>Total</b>	<b>2</b>	<b>100%</b>

**Table 11: Alleged Offences Leading to EU with the TGA**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Breach of anti-money laundering and counter-terrorism financing program	2	14.3%
Breach of rules attached to identification of client, due diligence	7	50%
Poor risk based control and systems to identify and mitigate and manage ML/TF risk	3	21.5
Reporting failure	1	7.1
Possible future contravention of the law	1	7.1
<b>Total</b>	<b>14</b>	<b>100%</b>

**Table 12: Alleged Offences Leading to EU with the AUSTRAC**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Failure of safety systems leading to serious (including fatal) injury to employees at work	10	66.7%
Failure of safety systems leading to serious injury to contractors	2	13.3%
Endangering Members of the public and/or causing injury	2	13.3%
Use hazardous substances	1	6.7%
<b>Total</b>	<b>15</b>	<b>100%</b>

**Table 13: Alleged Offences Leading to EU with the Comcare**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Underpaid/not paid employees (this can be accompanied by lack of appropriate documentation such as keeping records or pay slips...)	135	82.3%
Misclassification of employment (between employee/contractor/apprentice) Leading mostly to underpayment)	8	4.9%
Failed to keep employee records and false record keeping	1	0.6%
Breach of the adverse action provision in the Fair Work Act	8	4.9%
Unlawfully stood down	1	0.6%
Unauthorised deduction of wages	3	1.9%
False and misleading conduct	1	0.6%
Failure to keep systems in place to ensure compliance with workplace laws	1	0.6%
Sham contracting	2	1.2%
Discrimination	1	0.6%
Unlawful penalty imposed in the employee	2	1.2%
Failed to lodge workplace agreement	1	0.6%
<b>Total</b>	<b>164</b>	<b>100%</b>

**Table 14: Alleged Offences leading to EU with the FWO**



Type of Alleged Offences Resulting and an EU	Numbers	Percentages
False/ Misleading/ Deceptive Conduct	76	51.3%
Non-Compliance with Safety Standards	6	4.1%
Disclosure attached to negotiating an unsolicited consumer agreement	9	6.1%
Supplying consumer goods covered by ban	4	2.7%
Wrongly accepting payment	10	6.7%
EUs regarding property agents/motor dealers/ debt collectors and process servers	38	25.7%
Miscellaneous	5	3.4%
<b>Total</b>	<b>148</b>	<b>100%</b>

**Table 15: Alleged Offences leading to EU with the OFT Qld from 2012-2017 only**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Breach of environmental protection licence	3	10.3%
Prohibition of pollution of water (some of which include breach of licence)	22	75.9%
Miscellaneous	4	13.8%
<b>Total</b>	<b>29</b>	<b>100%</b>

**Table 16: Alleged Offences leading to EU with the EPA NSW**

Note: Some of the EUs relate to more than one breach. The main one is registered in the above table.

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Breach of environmental protection licence	4	44.5%
Offences relating to industrial waste	3	33.3%
Miscellaneous	2	22.2%
<b>Total</b>	<b>9</b>	<b>100%</b>

**Table 17: Alleged Offences leading to EU with the EPA Vic**

Note: Some of the EUs relate to more than one breach. The main one is registered in the above table.

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Failed to Comply with Health and Safety Obligations	31	96.9%
Miscellaneous	1	3.1%
<b>Total</b>	<b>32</b>	<b>100%</b>

**Table 18: Alleged Offences leading to EU with the WorkCover Qld**

Type of Alleged Offences Resulting and an EU	Numbers	Percentages
Non-compliance of employers with their duty to provide and maintain for employees of the employer a working environment that is safe and without risks to health.	26	66.7%
Non-compliance of an employer with their obligation not to expose persons other than employees of the employer to risks to their health or safety arising from the conduct of the undertaking of the employer.	7	17.9%
Non-compliance with obligation to ensure, so far as is reasonably practicable, that the workplace and the means of entering and leaving it are safe and without risks to health.	3	7.7%
Miscellaneous	3	7.7%
<b>Total</b>	<b>39</b>	<b>100%</b>

**Table 19: Alleged Offences leading to EU with the WorkSafe Vic**

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- <sup>1</sup> See for example, *Australian Securities and Investments Commission Act 2001* (Cth), ss 93AA and 93A.
- <sup>2</sup> ALRC, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 38.
- <sup>3</sup> Explanatory Memorandum, *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006*, 196.
- <sup>4</sup> Government of Victoria, 'Independent Inquiry Into the Environment Protection Authority' <[http://www.epa-inquiry.vic.gov.au/\\_\\_data/assets/file/0008/336698/Inquiry-report-EPA\\_June.pdf](http://www.epa-inquiry.vic.gov.au/__data/assets/file/0008/336698/Inquiry-report-EPA_June.pdf)>.
- <sup>5</sup> Christine Parker, "Restorative Justice in the Business Regulation? The Australian Competition and Consumer Commissions' Use of Enforceable Undertakings" (2004) 67 *The Modern Law Review* 209, 214.
- <sup>6</sup> Australia, *Parliamentary Debates*, House of Representatives, 3 November 1992, 2405 (Hon Michael Duffy, Trade Practices Legislation Amendments Bill 1992, Second Reading Speech).
- <sup>7</sup> Karen Yeung, *The Public Enforcement of Australia Competition Law* (Dickson, 2001), 20.
- <sup>8</sup> *Bills Digest No. 164 1999-2000 Aviation Legislation Amendment Bill (No 2) 2000*,
- <sup>9</sup> Karen Yeung, *The Public Enforcement of Australian Competition Law* (ACCC, 2001) 19.
- <sup>10</sup> Christine Parker, *Arm-Twisting, Auditing and Accountability: What regulators and compliance professionals should know about the use of enforceable undertakings to promote compliance*, (Presentation to the Compliance Institute, Wednesday 28 May 2003, Melbourne), 7, <[http://www.cccp.anu.edu.au/Parker\\_ACI\\_2805031.pdf](http://www.cccp.anu.edu.au/Parker_ACI_2805031.pdf)>.
- <sup>11</sup> *Financial Sector Reform (Amendments and transitional Provisions) Act 1998* (Cth), amending of the *Australian Securities Commission Act 1989* (Cth), Item 11.
- <sup>12</sup> Explanatory Memorandum, *Financial Sector Reform (Amendments and transitional Provisions) Bill 1998* (Cth).
- <sup>13</sup> *ASIC Act 2001* (Cth), s 93AA and 93A.
- <sup>14</sup> *Financial Sector Legislation Amendment Act (No.1) 2000*, amending *Superannuation Industry (Supervision) Act 1993* (Cth).
- <sup>15</sup> *Superannuation Industry (Supervision) Act 1993* (Cth), s 262A.
- <sup>16</sup> The Parliament Of The Commonwealth Of Australia, The Senate, *Notice Paper*, No. 122, Wednesday, 3 December 2003, 53, <[http://www.aph.gov.au/Senate/work/notice/2003/snpf\\_122.pdf](http://www.aph.gov.au/Senate/work/notice/2003/snpf_122.pdf)> at 31 December 2004.
- <sup>17</sup> *Civil Aviation Amendment Act 2003*, amending *Civil Aviation Act 1988* (Cth).
- <sup>18</sup> Explanatory memorandum, *Civil Aviation Amendment Act 2003*.
- <sup>19</sup> Toller, "Scandalously Competent", (Paper presented at National Press Club Speech, 21 February 2001), <[http://www.iasa.com.au/folders/Safety\\_Issues/FAA\\_Inaction/scandalouslycompetent.html](http://www.iasa.com.au/folders/Safety_Issues/FAA_Inaction/scandalouslycompetent.html)> at 7 January 2005.
- <sup>20</sup> Explanatory Memorandum, *Spam Bill 2003*, 100
- <sup>21</sup> *Spam Act 2003* (Cth), s 2.
- <sup>22</sup> This provision has been extended to allow the Attorney General to accept EU in addition to the ACMA: Explanatory Memorandum, *Telecommunications and Other Legislation Amendment Bill 2017*.
- <sup>23</sup> Explanatory Memorandum, *Spam Bill 2003*, 100
- <sup>24</sup> Explanatory Memorandum of *Therapeutic Goods Amendment Bill 2005*, 46.
- <sup>25</sup> *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), s 197.
- <sup>26</sup> Explanatory Memorandum *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006* (Cth), 179.
- <sup>27</sup> Supplementary Explanatory Memorandum of the *Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002*, 4-5.
- <sup>28</sup> Explanatory Memorandum to the *Fair Work Bill 2008* (Cth), 386.
- <sup>29</sup> *Ibid*, 393.
- <sup>30</sup> *Fair Work Act 2009* (Cth), s 715(5).
- <sup>31</sup> *Parliamentary Debates*, Legislative Assembly, 29 April 1998, Brian Langton, 4085-6
- <sup>32</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 4 September 1996, Denver Beanland, 2424-5
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