WORKING PAPER

ENFORCEABLE UNDERTAKINGS IN ACTION – REPORT OF A ROUNDTABLE DISCUSSION WITH AUSTRALIAN REGULATORS

February 2010

Richard Johnstone

Christine Parker

ENFORCEABLE UNDERTAKINGS IN ACTION – REPORT OF A ROUNDTABLE DISCUSSION WITH AUSTRALIAN REGULATORS

Richard Johnstone[*] and Christine Parker[**]

Abstract

Enforceable undertakings are an Australian invention. They are promises enforceable in court 'offered' by an individual or firm who has allegedly breached the law, and accepted by a regulator. The enforceable undertaking serves as a substitute for, or augmentation of, other regulatory enforcement methods such as civil, administrative, or even criminal action. In June 2009 Melbourne Law School and the Socio-Legal Research Centre, Griffith Law School jointly organised a roundtable at the Melbourne Law School for regulators with the power to accept enforceable undertakings to compare experiences. The purpose of this roundtable was to share insights and experience about how best to use the power to accept enforceable undertakings, and what issues need to be addressed in doing so. This working paper is a report of the discussion.

Part 2 of the paper outlines the legislative provisions giving regulators the power to accept enforceable undertakings, and provide an overview of the number of undertakings accepted by each regulator. Part 3 introduces four major issues with the way regulators use enforceable undertakings, and how the regulators who participated in the roundtable respond to these issues. The issues are (1) the decision-making process for entering into enforceable undertakings, (2) the proper content of enforceable undertakings, (3) issues of accountability, transparency and inclusion of stakeholders in the negotiation and content of enforceable undertakings, and (4) evaluating the effectiveness of regulators' use of enforceable undertakings. Part 4 contains a summary transcript of the discussion.

---

[*] Professor, Griffith Law School, Griffith University, Nathan 4111, Adjunct Professor, National Research Centre for Occupational Health and Safety Regulation, Australian National University; Honorary Professor, Department of Ageing, Work and Health, The University of Sydney.

[**] Associate Professor and Reader, Melbourne Law School, University of Melbourne, Victoria 3010. Email: c.parker@unimelb.edu.au

The authors would like to thank the Environmental Protection Authority Victoria for sponsoring the roundtable on which this paper was based. We would also like to thank the Centre for Employment and Labour Relations Law, the Centre for Corporate Law and Securities Regulation at the University of Melbourne and the Socio-Legal Research Centre at Griffith University for co-sponsoring the roundtable. The authors are also grateful to Leilani Ujvani for research assistance in preparing this paper, and to Tessa Dermody for administrative assistance.

PART 1: INTRODUCTION

ENFORCEABLE UNDERTAKINGS AND THEIR POLICY RATIONALE

Enforceable undertakings are promises enforceable in court[1], and are usually 'offered' by an individual or firm[2] who has allegedly breached the law, and accepted by a regulator. They operate as an agreement between the individual or firm and the regulator, in which the former undertakes to do or refrain from doing certain activities. If contravened, the undertaking is enforceable in court, often with additional penalties for the contravention of the undertaking.[3] The enforceable undertaking serves as a substitute for, or augmentation of, other regulatory enforcement methods such as civil, administrative, or even criminal action. [4]

Enforceable undertakings are designed to secure quick and effective remedies for contraventions of regulatory provisions without the need for court proceedings, and have enormous potential to provide non-adversarial and constructive solutions to regulatory compliance issues.[5] At their most ambitious, enforceable undertakings can be seen as a regulator-controlled model of how to 'build' a compliant organisation by promoting management commitment, inducing firms to 'learn how to comply' and to institutionalise compliance; and inculcating long term change within the organisational culture itself. [6] For example, the Australian Securities and Investments Commission (ASIC) states that:

> We see enforceable undertakings as an important component in our array of enforcement remedies to influence behaviour and encourage a culture of compliance for the benefit of all participants in the market we regulate. [7]

---

1 Australian Law Reform Commission (ALRC), *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Commonwealth of Australia, Sydney, 2002, Part A, 2; and ALRC, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation, Discussion Paper 65*, Commonwealth of Australia, Sydney, April 2002, 100-101 provide a well grounded legal definition.

2 But as the discussion in Part 3 shows, this is not always the case.

3 In some enforceable undertakings regimes, the original offence can also be prosecuted.

4 ALRC, *Report 95: Principled Regulation*, above n 1, Part A, 2; and ALRC, *Securing Compliance*, above n 1, 100-101.

5 Parker, C. 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 (2) *Modern Law Review* 209–246.

6 Johnstone, R and King, M, 'A Responsive Sanction to Promote Systematic Compliance?: Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *Australian Journal of Labour Law* 280-315, drawing on Parker, C, *The Open Corporation: Effective Self-regulation and Democracy*, Cambridge University Press, Cambridge, 2002, at 43-61, and Hutter, B, *Regulation and Risk: Occupational Health and Safety on the Railways*, Oxford University Press, Oxford, 2001, 301-303.

7 ASIC, *Enforceable Undertakings: An ASIC Guide*, March 2007 (Commonwealth of Australia), at 4, online at http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/EU_guide.pdf/$file/EU_guide.pdf, accessed 10 December 2009.

Enforceable undertakings can also be understood within the developing theory of 'responsive' enforcement. Responsive regulatory enforcement seeks to give regulators a framework to react appropriately and effectively, with a mix of 'persuasive', reforming and 'deterrent' sanctions, to the 'motivational diversity' demonstrated by firms faced with regulatory requirements.[8] As Macrory noted in his extensive review of the United Kingdom's system of regulatory sanctions, enforceable undertakings

> represent a powerful alternative to traditional coercive, regulatory enforcement action, and have the potential of imposing fit-for-purpose sanctions which are more satisfying for both offender and the victims of non-compliance. [9]

Enforceable undertakings can achieve outcomes that cannot generally be achieved in court, or using other sanctions available to regulators, such as administrative sanctions. The major limitations on prosecution are, first, the limited array of sanctions available to the court, which restricts its ability to tailor penalties to best serve both punitive, rehabilitative or restorative goals and the individual case before it. Second, prosecution is expensive and adversarial and precludes the kind of 'cooperative' negotiation that best achieves the desired organisational cultural change required.

Enforceable undertakings are responsive in two senses.[10] First, they can provide regulators with an enforcement method in a responsive hierarchy of sanctions, tailored to address the level of non-compliance by the offending organization. In the hierarchy of sanctions available to regulators, enforceable undertakings might operate as an intermediate method of enforcement, usually 'above' informal measures and administrative sanctions, and 'below' prosecution. As the discussion in Part 3 shows, however, regulators can differ in what they envisage to be the place of enforceable undertakings in their enforcement armoury. Part of the responsive nature of enforceable undertakings lies in their potential for dynamic deterrence, because enforceable undertakings internalise the costs of contraventions at two stages: the costs of the measures undertaken by the firm, and the cost of the sanctions that will be imposed upon the firm if the undertaking itself is broken.

Second, enforceable undertakings also represent a responsive stage *within* a hierarchy of sanctions. They allow regulators to tailor enforcement methods to the firm, providing a specific and systematic response particularised to the circumstances of the firm, as well as to the alleged contravention. Because undertakings are usually initiated by the alleged offender, and negotiated with the regulator, they can be built around, and from the outset tailored to, the circumstances of the firm.

Enforceable undertakings also contribute to the goals of rehabilitation and restorative justice. Restorative justice emphasises a collaborative approach where those with a

---

8 For discussions of responsive regulation and restorative justice see Braithwaite, J., *Restorative Justice and Responsive Regulation*, Oxford University Press, Oxford, 2002; and Ayres, I. and Braithwaite, J. *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992). See also Parker, 'Restorative Justice in Business Regulation?' above n 5, with regard to enforceable undertakings in particular.

9 Macrory, R. *Regulatory Justice: Making Sanctions Effective*, Cabinet Office: Better Regulation Executive, UK, November 2006, para 4.18.

10 Johnstone and King, 'A Responsive Sanction?', above n 6, at 286.

'stake' in the offence come together to resolve collectively a negotiated response.[11] Restorative justice seeks to address harms done (restoration), repair relationships, and reduce recidivism.[12] Restorative Justice involves three possible stages:[13]

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

> Restorative justice requires that all parties (the regulator, regulated entity and those affected by the breach) should be empowered together to make innovative, flexible and expansive undertakings that go beyond what a court would order with the purpose of identifying, correcting and preventing the original breach and its underlying causes.[14]

Enforceable undertakings are an Australian invention. The concept was developed by the Australian Competition and Consumer Commission (ACCC) and legislated for the first time in 1993 in the *Trade Practices Act 1974* (Cth). Section 87B of the Trade Practices Act formalised the ACCC's practice of accepting 'administrative resolutions,' or deeds of settlement, from parties in lieu of, or in addition to, prosecution. The Australian Securities and Investments Commission received the legislative power to accept enforceable undertakings in 1998. In more recent years, many other federal and state regulatory agencies have been given the power to accept enforceable undertakings.[15] Some have used this power quite extensively and creatively. Others have not used it at all yet, or have only just received the power.

How do Australian regulators with the power to accept enforceable undertakings use that power? In particular, what sorts of decision-making processes do they follow? Do they require particular matters to be addressed in the content of enforceable undertakings? How do they ensure accountability and transparency in the process? How effective are enforceable undertakings?

To address these issues, in June 2009 Melbourne Law School and the Socio-Legal Research Centre, Griffith Law School jointly organised a roundtable at the Melbourne Law School for regulators with the power to accept enforceable undertakings to compare experiences. The purpose of this roundtable was to share insights and experience about how best to use the power to accept enforceable undertakings, and what issues need to be addressed in doing so. This working paper is a report of the discussion.

In Part 2 of this paper we outline the legislative provisions giving regulators the power to accept enforceable undertakings, and provide an overview of the number of undertakings accepted by each regulator, where that data is publicly available. In part

---

11 Braithwaite, *Restorative Justice and Responsive Regulation*, above n 8.

12 Ibid.

13 See Parker, *The Open Corporation*, above n 6, at 43-61 and 253 ff.

14 Parker, 'Restorative Justice in Business Regulation?', above n 5.

15 See Part 2 for details.

3 we introduce the issues and main responses discussed at the roundtable. Part 4 contains a summary transcript of the discussion. Parts 5 to 7 contain additional material: a list of key academic writings on enforceable undertakings; details of where to find regulators' public registers of enforceable undertakings and policies on enforceable undertaking, and the key recommendation of the Australian Law Reform Commission in relation to enforceable undertakings.

PART 2: SETTING THE SCENE

LEGAL FRAMEWORK AND OVERVIEW OF USEAGE OF ENFORCEABLE UNDERTAKINGS

Since their introduction by the ACCC in 1993 and ASIC in 1998, enforceable undertakings have been adopted by other federal and state agencies, including, at Commonwealth level:

- the Civil Aviation Safety Authority (CASA),
- the Australian Communications and Media Authority (ACMA),
- the Australian Transaction Reports and Analysis Centre (AUSTRAC),
- the Therapeutic Goods Administration (TGA),
- the Private Health Insurance Administration Council (PHIAC),
- Comcare, and, very recently,
- the Workplace Ombudsman;

and, at State level:

- the Office of Fair Trading (in both New South Wales and Queensland),
- Consumer Affairs Victoria (CAV)
- the Environmental Protection Authority (Victoria) (EPA(Vic)
- occupational health and safety (OHS) regulators (Australian Capital Territory, Queensland, Tasmania, and Victoria); and
- the Electrical Health and Safety Office, Queensland.

Table 1 outlines the statutes which give each regulator the power to accept enforceable undertakings, and summarises (as far as is possible from publicly available data from regulators' annual reports and websites) the number of undertakings accepted annually. Table 1 shows that there is considerable variation in the use of undertakings both across regulators, and by regulators themselves from year to year. This is not unexpected, given that in most regimes the undertaking is initiated by the firm, not the regulator (but see the discussion of this in Part 4).

For example, the ACCC's initial use of undertakings rose over the first four years, then wavered, and then rose to reach a peak in 2000 with 81 undertakings accepted. Later, acceptance of undertakings fell to a low of 32 undertakings in 2003. Since 2004, the ACCC has shown renewed interest in enforceable undertakings, and the rates of undertakings accepted rose to reach an all time peak of 103 in 2007, before falling again. ASIC's acceptance of undertakings also shows peaks and troughs, with a maximum of 67 in 2000, and as few as 6 in 2007. Consumer Affairs Victoria, which is unusual amongst regulators in that it initiates enforceable undertakings, also shows varying levels of usage of undertakings (48 in 2007, 30 in 2008). The Queensland Office of Fair Trading accepted 190 enforceable undertakings in the 2004/05 reporting period in relation to independent contractors in the real estate industry. It does not appear to have accepted nearly as many undertakings in other years.

Table 1: Summary of Australian Regulator's Enforceable Undertakings Powers and Usage

Regulator	Legislative Provision	Year Enforceable Undertakings Power Received	Number of EUs Accepted Each Year (since power received)[16]	
Commonwealth Regulators				
Australian Competition and Consumer Commission (ACCC)	Trade Practices Act (1974), s.87B	1993	2009: 82 2008: 92 2007: 103 2006: 68 2005: 90 2004: 53 2003: 32 2002: 45 2001: 65	2000: 81 1999: 55 1998: 30 1997: 54 1996: 63 1995: 39 1994: 35 1993: 14 TOTAL: 1001
Australian Communications and Media Authority (ACMA)	Spam Act (2003), s.38 Broadcasting Services Act (1992), s.205W Telecom-munications Act (1997), s.572B (Do Not Call Register)	2004 and 2006	Spam Act: 2009: 4 2008: 2 2007: 2 2006: 1 2005: 3 2004: 1 Broadcasting Services Act: 2009: 6 2008: 6 2007: 8	Telecomm. Act: 2009: 7 2008: 5 TOTAL: 45
Australian Securities and Investments Commission (ASIC)	Australian Securities and Investments Commission Act (1989 and 2001), s.93AA and s93A	1998	2009: 8 2008: 11 2007: 6 2006: 14 2005: 27 2004: 20	2003: 25 2002: 33 2001: 31 2000: 67 1999: 38 1998: 14 TOTAL: 294
Australian Transaction Reports and Analysis Centre (AUSTRAC)	Anti-Money Laundering and Counter-Terrorism Financing Act (2006), ss197-8	2006	2009: 3 TOTAL: 3	
Australian Prudential Regulation Authority (APRA)	Superannuation Industry (Supervision) Act 1993 (Cth) s 262A Insurance Act 1973 (Cth) s 126	2001	2009: 3 2008: 2 2007: 0 2006: 165 2005: 3 2004: 27 2003: 9 2001-2: not available[17]	

16 Information from Annual Reports and registers of enforceable undertakings published on regulators' websites as at December 2009.

17 For 2001 and 2002 APRA Annual Reports do not separately report the numbers of enforceable undertakings. It has been reported that APRA entered into 60 between 2001 and 2005: Adams, M., Young, A., and Nehme, M. 'Preliminary Review of Over-

			TOTAL: 209+
Civil Aviation Safety Authority (CASA)	Civil Aviation Act (1988), s.30DK	2004	2009:0 2008: 0 2007:2[18] TOTAL: 2
Comcare	Occupational Health and Safety Act (1991), Schedule 2, clause16	2004	2009: 3 2008:0 2007: 2 2005: 1 2004: 1 TOTAL: 7
Therapeutic Goods Administration (TGA)	Therapeutic Goods Act (1989), s.42YL	2006	No information about EUs made available on website or in annual reports
Private Health Insurance Administration Council (PHIAC)	Private Health Insurance Act (2007), s.197	2007	No information about EUs made available on website or in annual reports
Workplace Ombudsman	Work Fair Act (2009), s.715	2009	2009: 3 TOTAL: 3
State Regulators			
Consumer protection			
Consumer Affairs Victoria (CAV)	Fair Trading Act (1999), s.146	1999	2009: 19 2008: 30 2007: 48 2006: 55 2005: 16 2004: 20 2003: 77 2002: 127 2001: 50+ 1999-2000: unknown[19] TOTAL: 442+
Office of Fair Trading (NSW) (OFT NSW)	Fair Trading Act (1987), s73A	2002	Information not available.[20]
Office of Fair Trading (Qld) (OFT Qld)	Fair Trading Act (1989), ss91H – 91L	1998	No information about EUs made available on website or in annual reports.[21]

Regulation in Australian Financial Services,' (2006) 20 *Australian Journal of Corporate Law*, 1-24 at 19.

18 Data reported here from CASA (2007) 'Enforceable Voluntary Undertakings,' online at http://www.casa.gov.au/rules/action/evu/index.htm, accessed 15 May 2007. Past EVUs are not recorded on the website, or in annual reports.

19 Details are available on the physical enforceable undertakings register at the CAV.

20 The NSW OFT does report on whether it has accepted undertakings in relation to each matter in its 6 monthly enforcement reports. But it does not report the overall number of undertakings accepted or provide any other specific information about undertakings.

21 Undertakings are kept on a hard copy Register, which is not available online. See Queensland Office of Fair Trading, 'Enforceable Undertakings Register,' updated 29 January 2007, online at

Environmental and healthy and safety regulation			
Environmental Protection Authority (NSW) (EPA NSW)	Protection of the Environment Operations Act (1997), s253A	2005	2009: 3 2008:2 2007: 1 2005-2006: information not available Total: 6
Environmental Protection Authority Victoria (EPA Vic)	Environment Protection Act (1970), s.67D	2006	No EUs yet
WorkCover ACT	Occupational Health and Safety Act (1989), s.169	2004	2008-2009: Information not available 2007-2008: Information not available 2006-2007: 3 2005-2006: 1 2004-2005: 7 TOTAL: 11
Workplace Health and Safety Queensland (WHSQ)	Workplace Health and Safety Act (1995), s.42D	2003	2008-2009: 19 2007-2008: 8 2006-2007: 12 2005-2006: 10 2004-2005: 10 2003-2004: 5 TOTAL: 62
Electrical Safety Office Queensland (ESO Qld)	Electrical Safety Act (2002), s.49	2002	Included in WHSQ numbers
Workplace Standards Tasmania (WST)	Workplace Health and Safety Act (1995), s.55A	2002	Information not available
WorkSafe Victoria	Occupational Health and Safety Act (2004), s.16	2004	2009: 1 2008: 4 2007: 3 TOTAL: 8

Table 2 summarises the legislative powers given to each of the regulators to 'accept', or, in the case of the Victorian EPA, 'enter into' undertakings. Most of the statutory provisions (especially those of the Commonwealth Acts) appear to be based on the original provisions inserted into the Commonwealth *Trade Practices Act* in 1993, although there are variations. Some of the State statutes, particularly the Queensland OHS and electrical safety provisions, are more detailed than the other statutes.

Broadly speaking the power in the Commonwealth Acts (apart from the *Fair Work Act* 2009) and under the Victorian *Fair Trading Act* and the Tasmanian *Workplace Health and Safety Act* is available in relation to any matters in relation to which the regulator has a power or function under the Acts. Some of the statutes emphasise the role of undertakings in promoting compliance. The power in the other State and Territory provisions, and the *Fair Work Act*, is generally contingent on there being an alleged contravention of the statute. With one exception, each of the statutes empowers the regulator to 'accept' an undertaking. The exception is the Victorian

http://www.fairtrading.qld.gov.au/oft/oftweb.nsf/Web+Pages/0F4437F6B059AA314A256E5900129628?OpenDocument, accessed 30 May 2007.

Environment Protection Act which authorises the regulator to 'enter' into an undertaking.

Most of the powers do not require particular content, or restrict the contents of undertakings. Some require the undertaking to be expressed to be an enforceable undertaking under the statute. The Commonwealth *Civil Aviation Act* limits undertakings to 12 months, and precludes undertakings from having the effect of requiring a person to pay money to CASA. The Queensland and ACT OHS statutes specify that the undertaking must recognise that the regulator alleges a contravention; must identify facts and circumstances of the alleged contravention; and must include an assurance from the identified person about the person's future behaviour in the case of the Queensland provisions, or include one or more undertakings in relation to the alleged contravention in the case of the ACT. All of the statutes permit an undertaking to be varied or withdrawn with the agreement of the regulator.

Some of the statutes provide that proceedings may not be taken for a contravention of the statute if the regulator has accepted an undertaking in relation to that alleged contravention, but most of the statutes are silent on this and this is discussed further in Part 3. Where an undertaking has been breached and the regulator seeks to have it enforced, the statutes generally provide a court with broad powers to make relevant orders. Most of the statutes are silent as to whether the regulator can bring a prosecution for the original offence if the undertaking is breached – the Commonwealth OHS Act provides that if an undertaking is breached, or varied or withdrawn, without the consent of the regulator, the court may revive any proceedings for an offence against the provision.

As Table 2 shows, only the Victorian Environment Protection Act requires the regulator to publish guidelines governing the use of undertakings, and most statutes do not require the regulator to keep a public register of accepted undertakings. Nevertheless most regulators that use enforceable undertakings regularly do both.

Australian regulators experiences with these provisions are examined in the next two parts of this paper. Part 3 introduces the issues that were discussed at the roundtable.

Table 2: Analysis of Legislative Provisions Giving Regulators Power to Accept Enforceable Undertakings

Regulator & legislative provision	When does the power apply?	Power to "accept" or "enter" EU?	Any required terms or restrictions on EU?	Any restriction on laying charges in addition to EU?	Requirement to make & publish guidelines for use of EUs?	Requirement to keep a public register of EUs?
Commonwealth Regulators						
ACCC Trade Practices Act (1974), s.87B	In connection with a matter in relation to which the Regulator has a power or function under the TPA.	May accept a written EU.	Nil	Nil	No	No
ACMA Spam Act (2003), s.38 Telecommunications Act (1997), s.572B Broadcasting Services Act (1992), s.205W	Spam Act: In relation to commercial electronic messages or address harvesting software. Telecomm Act/ BSA: Ensure compliance with the Acts. Cease or prevent contraventions of the Acts.	May accept a written EU.	TA / BSA: The EU must be expressed to be an EU under the section. BSA: Extends EU's to cover compliance with/non-contravention of registered codes of practice.	Nil	No	May publish on internet site
APRA Superan-nuation Industry (Supervision) Act 1993 (Cth) s 262A, and Insurance Act 1973 (Cth) s 126	In connection with a matter in relation to which the regulator has a power or function under either Act.	May accept a written undertaking.	Nil	Nil	No	No
ASIC Australian Securities and Investments Commission Act (1989 and 2001), s.93AA and s93A	S93AA: In connection with a matter in relation to which ASIC has a function or power under this Act. S93A: In connection with a matter concerning a registered scheme and in relation to which ASIC has a power or function under the corp's legislation	May accept a written EU.	Nil	Nil	No	S93AA: No S93A: ASIC must keep a record of full text of EU and make it publicly available (except for details that are commercial in confidence, against public interest to disclose or personal details of an individual).

AUSTRAC Anti-Money Laundering and Counter-Terrorism Financing Act (2006), s.197	To comply with this Act. Ensure person does not contravene this Act or regulations.	May accept a written EU.	TA / BSA: The EU must be expressed to be an EU under the section.	Nil	No	AUSTRAC may publish copy of EU on its internet site. Must delete certain information (where CEO is satisfied it is commercial in confidence, against public interest to disclose or personal details of an individual); but must include note stating information has been deleted.
CASA Civil Aviation Act (1988), s.30DK	In relation to a matter arising under the CAA and to which the Regulator has a power or function under the CAA or regulations.	May accept a written EU.	EU period must not exceed 12 months. Must not require or have effect of requiring person to pay money to CASA.	Nil	No	Must publish details of the EU on the internet.
ComCare Occupational Health and Safety Act (1991), s.16	Relating to fulfillment of an obligation under this Act.	May accept a written EU.	Nil	Where proceedings are already under way, the Regulator may request the court to adjourn the proceedings if it considers an appropriate EU is in force. If an undertaking is breached, or varied or withdrawn without the consent of the regulator, the court may revive any proceedings for an offence against the provision.	No	No
TGA Therapeutic Goods Act (1989), s.42YL	In relation to a matter to which the Regulator has a power or function under the TGA or reg's.	May accept a written EU.	Nil	Nil	No	Must publish details of the EU on the internet.

PHIAC Private Health Insurance Act (2007), s.197	If likely to Improve performance of the insurer; or, if insurer has contravened an enforceable obligation and EU likely to ensure insurer will cease contravention of EU; or if compliance with EU likely to improve the insurer's operations in relation to its Council supervised obligations.	Minister/ Council may accept a written EU given by a private health insurer at the Minister/ Council's request.	Nil	Nil	No	No
Workplace Ombudsman Fair Work Act (2009), s.715	Where Regulator reasonably believes a person has contravened a civil remedy provision	May accept a written EU.	WO cannot accept written EU where notice has been give under s.716 (ie compliance notice issued by inspector).	Inspector must not apply for an order under Div 2 of Part 4.1 (ie civil remedies and pecuniary penalties) if there is an EU in place in relation to the contravention. But any other person can.	No	No
State Regulators						
Consumer protection						
CAV Fair Trading Act (1999) Vic, s.146	In connection with a matter in relation to which the Director has a power or function under this Act; or a matter relating to a contravention of any other Consumer Act.	May accept a written EU.	Nil	Nil	No	No
OFT (NSW) Fair Trading Act (1987) NSW, s73A	In connection with a matter in relation to which the Director has a function under this Act.	May accept a written EU.	Nil	Nil	No	No
OFT (Qld) Fair Trading Act (1989) Qld, ss91H-91L	In relation to any matter in relation to which the office or the commissioner has function or power. Also: If the Commissioner reasonably believes a person has contravened this Act or a code of practice.	May accept an undertaking. Where Commissioner reasonably believes there is a contravention, may ask the person to give a written undertaking.	Nil	If there is accepted EU in relation to a contravention and person stops the conduct, the commissioner cannot start an offence proceeding for the contravention unless first withdraws the undertaking.	No	Must keep a register available to the public for a fee and may publish the information on website

Environment and health and safety						
EPA NSW Protection of the Environment Operations Act (1997) NSW, s253A	In connection with a matter in relation to which the EPA has a function under this Act.	May accept a written undertaking.	Nil	Nil	No	No
EPA Vic Environment Protection Act (1970) Vic, s.67D	If a person has contravened or allegedly contravened a provision of any Act or regulations in respect of the regulator may take proceedings and the regulator believes an EU is an appropriate enforcement mechanism.	May enter into a written EU.	Regulator must have regard to the criteria specified in guidelines made under s67F (ie concerning use of EUs)	While an EU is in force, proceedings may not be brought for an offence constituted by the contravention in respect of which the EU is given. If an EU is withdrawn prior to being fulfilled, proceedings can be brought in relation to the offence subject of the EU. If a person complies with the EU, no further proceedings may be brought in relation to the contravention.	The Regulator may produce guidelines, and if it does then it must publish these in the government gazette and put a notice in a widely circulated Vic newspaper.	The Regulator must maintain a register of EUs (including copies of the EUs) and allow for inspection at any reasonable time without charge.
WorkCover ACT Occupational Health and Safety Act (1989), s.169	In relation to any alleged contravention of the OHSA (including reg's and statutory instruments).	May accept the EU.	Must state that it is an EU under this Act; acknowledge the regulator alleges a contravention; identify the facts and circumstances of the alleged contravention; and include one or more undertakings relating to the alleged contravention.	Giving of an EU (or proposed EU) is not an express or implied admission of fault or liability; and is not relevant to deciding fault or liability in relation to the alleged contravention.	No	No

ESO Qld Electrical Safety Act (2002) Qld, s.49	In relation to any alleged contravention of an obligation offence provision or of an executive officer offence provision.	May accept EU.	The EU must be received by the regulator within the timeframe prescribed in the reg's. The EU must recognize that the regulators alleges a contravention; must identify facts and circumstances of the alleged contravention; and include an assurance from the identified person about the person's future behaviour.	No action may be brought for an offence that is the subject of an EU, and if an action has already commenced the Regulator must take the necessary steps to bring the proceeding to an end. Prosecution for the offence of contravening the EU may be granted concurrently with an order in relation to the same events. Contravention of the EU incurs a maximum penalty of 1000 units.	No	The Regulator may publish details of the EU.
WHSQ Workplace Health and Safety Act (1995) Qld, s.42D	In relation to any alleged contravention of s.24(1) or of s.167.	May accept EU.	Same as for ESO Qld	Same as for ESO Qld	No	The Regulator may publish details of the EU.
WorkSafe Vic Occupational Health and Safety Act (2004) Vic, s.16, 17	In connection with a matter relating to a contravention or alleged contraventions of this Act or regulations.	May accept a written EU.	Nil	Neither the Regulator nor an inspector may bring a proceeding for an offence against this Act or regulations constituted by the contravention to which the EU relates..	No	No
WST Workplace Health and Safety Act (1995) Tas, s.55A	In connection with a matter in respect of which Secretary has a power or function under this Act.	May accept a written EU.	Nil	Nil	No	No

PART 3: ISSUES WITH ENFORCEABLE UNDERTAKINGS: SUMMARY OF ROUNDTABLE DISCUSSION

3.1 Introduction

The purpose of the roundtable was to share insights and experience about how best to use the power to accept enforceable undertakings, and what issues need to be addressed in doing so. Discussion was organized around four issues that raise questions for policy-makers and regulators about the use of enforceable undertakings:

- The decision-making process about use of enforceable undertakings in particular cases;
- The content of enforceable undertakings;
- Accountability, transparency and inclusion of stakeholders in the negotiation and content of enforceable undertakings;
- Effectiveness of enforceable undertakings.

This section of the paper provides a brief introduction to each issue and the main themes raised in discussion around those issues. The fourth part of this paper contains an edited transcript of the whole discussion.

3.2 The Decision-Making Process

Developing a decision-making process for enforceable undertakings raise challenges for regulators, faced with the tension between the need to act in a consistent, predictable way and the opportunity to use the enforceable undertakings power to negotiate tailored, individual, forward-looking solutions to idiosyncratic problems.

There are two aspects to decision-making about entering into any enforceable undertaking: the *regulators' internal policies and processes* for deciding whether and when it will countenance an enforceable undertaking in the circumstances of each case; and the way *the regulator handles the negotiation with the entity under investigation* about the possibility and the terms of the enforceable undertaking.

Regulator's Internal Policies and Processes

The roundtable discussion began with the various regulators being invited to briefly outline what internal policies, processes and practices they have developed about the factors to be taken into account in deciding whether to accept an enforceable undertaking and the process for weighing those factors and coming to a decision. They were invited to outline the types of matter in which they would typically see an enforceable undertaking as the best outcome, and any circumstances in which they would not accept an enforceable undertaking. They were also asked to describe the processes they use for making the decision to accept an enforceable undertaking, including whether stakeholders are represented in decision-making, whether they have a formal way of setting out factors for and against, and whether there are certain preconditions that must be met before an undertaking is considered.

The Australian Law Reform Commission had recommended in its 2003 review of federal civil and administrative penalties in Australia that all regulators that have

authority to accept enforceable undertakings should develop and publish guidelines about how they will be used.[22] Many regulators have engaged in quite extensive policy development and consultation as to the factors they will take into account in deciding whether to accept an enforceable undertaking and the process they will use in making that decision. Table 3 in Part 5 provides a list of all the regulators that have enforceable undertakings power, and indicates whether they have a policy about how they use enforceable undertakings and, if so, where it can be found. Most regulators with the power to accept enforceable undertakings have developed an explicit publicly available policy about how they use this power – although the development and publication of a policy is only explicitly required by the legislative provision for enforceable undertakings for one regulator (the Victorian Environment Protection Authority – see Table 2 in Part 2).

There is a diversity of different internal processes by which regulators decide on accepting or rejecting an enforceable undertaking. The ACCC uses a weekly enforcement committee at the highest level for all enforcement decisions, including whether an enforceable undertaking will be an acceptable outcome for a matter. CAV has a similar system. At the ACCC and CAV the head of the agency must sign off on all enforceable undertakings. At the ACCC there are also some other checks once an enforceable undertaking is in final form: internal legal people have to check it to see that it is precise, enforceable and uses the ACCC's standard template provisions for enforceable undertakings appropriately. The ACCC's internal monitoring unit also has to check that it has sufficient reporting mechanisms for reliable monitoring. ASIC, on the other hand, has a range of senior people with delegated authority to accept an enforceable undertaking as individuals.

WHSQ have a separate team within the organization that deals with all offers of enforceable undertakings. Offers can only be made once a complaint and summons have been issued. Every proposed enforceable undertaking is also considered by a panel which includes the Director of the agency and two independent members (one representing employers, and one employees). The Director-General of the government department within which the agency is located makes the ultimate decision. WorkSafe Victoria has one senior person, the same person who can decide whether to prosecute or not, to decide on enforceable undertakings. Since this is effectively a decision not to prosecute and health and safety offences are indictable in Victoria, this decision is also reviewable by the Director of Public Prosecutions. The Victorian EPA is only just beginning with enforceable undertakings but has an internal enforcement panel that will make the decision. It is also in the process of setting up an external panel of independent experts to advise the Authority on entering into enforceable undertakings.

Some regulators' processes give a fairly early indication from the regulator (eg the ACCC's enforcement committee) as to whether an enforceable undertaking is going to be an appropriate and worthwhile outcome for an enforcement matter. Other regulators, such as WHSQ, wait until a prosecution is commenced and then invite or allow offers of an enforceable undertaking instead. Some regulators are clear that there are some types of matter for which they will almost certainly not accept an

---

[22] ALRC, *Report 95: Principled Regulation*, above n 1, Recommendation 16-3. The full recommendations made by the ALRC are included at the end of this working paper in Part 7.

enforceable undertaking in any circumstance: For example, WorkSafe Victoria does not as a rule consider enforceable undertakings for cases where a workplace fatality occurred, and the ACCC would very rarely settle a cartel case with an enforceable undertaking.

Finally, there is also some variation in whether enforceable undertakings are used solely as an alternative to prosecution, or whether they are sometimes used to augment or supplement court orders. The ACCC uses enforceable undertakings to augment court orders from time to time where the court might not have the appropriate powers to make a more creative order: the ACCC representative gave an example of such a case at the roundtable. On the other hand a number of regulators – WHSQ, WorkSafe Victoria and the EPA Victoria – all have explicit provisions in their legislation stating that they must not bring proceedings against a party in relation to the same matter as an enforceable undertaking. For them, a very clear choice must be made between court proceedings and enforceable undertaking. Most regulators' legislation is, however, silent on this issue (see Table 2 in Part 2). The difference may relate partly to whether the alternative prosecution would be for a civil or criminal offence. It would be considered particularly inappropriate to use an enforceable undertaking together with a criminal prosecution. It may also be particularly important to guarantee that entering into an enforceable undertaking closes off the possibility of prosecution where that prosecution would be criminal.

The Workplace Ombudsman's enforceable undertakings power differs to some extent from the other powers. It operates with a legislative provision that prevents an inspector from seeking a court order where there is an enforceable undertaking. However, it explicitly states that third parties may do so. Consequently, employees who do not receive adequate redress from an enforceable undertaking still have the option of proceeding against their employer, and the fact that the regulator has accepted an enforceable undertaking does not close off their rights. In practice, third parties who have suffered damage as the result of misconduct dealt with under the other regulatory regimes would still generally have their rights to bring actions for the damage at common law or under the relevant legislation. However, these other regulators generally said they were careful to ensure that entities offering enforceable undertakings did not seek to set up defences to third party actions in the terms of their undertakings.

Negotiation with Entity Offering Enforceable Undertaking

It has been suggested that enforceable undertakings are most effective when they represent a genuine negotiated resolution to a regulatory compliance problem. But producing effective and individually tailored undertakings is a time-intensive process. The roundtable discussion about the decision-making process for enforceable undertakings therefore raised questions about how regulators actually negotiate and agree the terms of enforceable undertakings: Does the regulator wait for the firm or individual to approach them, or do they actively seek out enforceable undertakings? Are enforceable undertakings negotiated face to face or by phone and letter? Are they negotiated via lawyers or with the managers of the business or those involved in the alleged misconduct? How long and protracted is the process? What have regulators learned about what works best?

Again, regulators at the roundtable reported a lot of diversity. Most tried to limit the number of times draft enforceable undertakings would go back and forth. Most would ask for a face to face meeting with the principals of the business (not just lawyers) once the draft was being finalized and especially if there was a danger that negotiations would be protracted beyond one or two rounds of revisions. Many regulators commented that face to face meetings with the business people offering the undertaking (not just lawyers) were very valuable in getting enforceable undertakings settled, and that most business people just wanted to settle.

As noted in Part 2, and as Table 2 shows, the legislative provisions governing regulators' enforceable undertakings powers all say (with one exception) that it is the regulator who 'accepts' the enforceable undertaking. This implies that it is the businesses' initiative to offer it in the first place. In practice, however, there was a range of practices in relation to the extent to which regulators invited, requested, or more strongly suggested to businesses that they should give an enforceable undertaking to the regulator. Some, like the ACCC and CAV, decide relatively early in the investigation and enforcement process that an enforceable undertaking would be the best way to resolve a matter and inform businesses of this. Others like the WHSQ and ASIC tend to wait for the business to raise it. However the discussion showed that in practice there needed to be a bit of both for enforceable undertakings to work as intended: the ACCC representative commented that as businesses and lawyers became more familiar with enforceable undertakings, they are more likely to initiate the offer of an enforceable undertaking. The WHSQ reported that they were becoming more proactive about inviting offers.

3.3 The Content of Enforceable Undertakings

There is a very real tension between consistency and creativity in determining the actual terms of enforceable undertakings. One of the main suggested advantages of enforceable undertakings is that the promises made in an undertaking can go beyond 'mere compliance' and the payment of financial penalties to actually address the issues underlying non-compliance. These solutions might go beyond traditional penalties and other court orders. On the other hand, regulators need to be seen to be acting consistently and not overreaching their power and discretion.

Roundtable participants were invited to share their policies and practices around what they generally expect as standard terms of enforceable undertakings, and whether there were certain terms they would never accept. They were also invited to provide examples where they felt they had been able to negotiate more creative terms in an enforceable undertaking in order to solve a regulatory problem or create a particular benefit for the relevant industry or community.

As noted in Part 2, some of the legislative provisions concerning enforceable undertakings recite some basic terms that must be included in an enforceable undertaking. For example, the legislation governing WHSQ and the ESO Qld states that the enforceable undertaking must recognize that the regulator alleges a contravention; must identify facts and circumstances of the alleged contravention; and include an assurance from the identified person about the person's future behaviour. The legislation governing WorkCover ACT has a similar provision.

Generally, however, regulators set out a brief description of the type of terms they do and do not expect to include in enforceable undertakings in the policies they publish on how they will use enforceable undertakings. Many also include at least a brief template of standard terms for enforceable undertakings. Indeed, some of the regulators that have been using enforceable undertakings for a longer time, such as the ACCC, have developed quite sophisticated templates and principles as to what they expect to see in an enforceable undertaking. The ACCC's standard terms include different sets of clauses describing the requirement for compliance systems the business must implement depending on the size of the business.[23]

The terms will generally relate to remedying the specific harm caused by the alleged breach (eg providing compensation to those damaged); and making ongoing improvements to compliance in the firm giving the enforceable undertaking that will at least prevent breaches occurring again. Generally regulators are looking to use enforceable undertakings to help create some positive compliance improvement that goes beyond what might occur with a court order or simple financial penalty. For example, the ACCC expects firms to implement, assess and improve their trade practices compliance systems as a part of any enforceable undertaking. The WHSQ expects to see firms develop and implement occupational health and safety management systems.

In addition to these firm-level improvements in compliance, some enforceable undertakings include elements that attempt to improve compliance by educating the broader industry and the community. For example the WHSQ stated that they see enforceable undertakings as addressing three components: workers (by remedying and preventing the harm), the industry and the community. Ways of addressing the industry and community might include funding an industry compliance education program, safety advertisements in suitable magazines or funding for research into how to prevent accidents in the future.

A number of regulators at the roundtable gave examples of creative terms in enforceable undertakings in which businesses agreed to fund education campaigns or other community activities to promote compliance or solve underlying issues leading to non-compliance. For example, an egg company that had dishonestly sold eggs labeled as organically certified (which were not organic) agreed in an enforceable undertaking with the ACCC to pay money to two community organizations: the certifying body whose certification had been dishonestly applied to the eggs sold and an organic industry body that was trying to develop a national organic standard. These payments to these organizations had the effect of contributing to developing better, clearer, and more consistent standards of what counted as 'organic' eggs. It also provided money for greater monitoring to ensure that accreditation standards were being met. These terms of the enforceable undertaking were therefore aimed at contributing to greater compliance by the firm itself and the whole industry Another business that caused a workplace injury agreed in an enforceable undertaking with WHSQ to donate money to a university research program aimed at developing technology that would make sure that the particular health and safety issue would not occur again.

In 2005 the Australian Law Reform Commission recommended that terms of an

[23] Table 3 in Part 5 of this paper sets out where regulators' policies on enforceable undertakings can be accessed.

enforceable undertaking

> not require the payment of money to the regulator other than in recompense to those affected by the alleged breach or in payment of the regulator's costs (if these are otherwise recoverable at law)… This Recommendation is not intended to prevent an enforceable undertaking requiring a regulated party to perform work or undertake prescribed activities at its expense.[24]

This was a very controversial issue at the time of the Commission's report. It also sparked quite a lot of debate and discussion at the roundtable. Regulators like the WHSQ that have included creative terms in which firms have agreed to pay money to third parties did not see those terms as requiring a de facto penalty being paid to the regulator in the terms suggested by the Australian Law Reform Commission. Rather they saw them very much as the firm supporting an activity that was aimed at building up compliance and addressing the causes of non-compliance. All regulators agreed that a term in an enforceable undertaking requiring a payment to a regulator that was not referable to compensating or otherwise remedying the harm caused by the breach was not an appropriate use of the power. As noted in Part 2, only one regulator, CASA, has a legislative provision actually prohibiting it from receiving money under the terms of an enforceable undertaking (see Table 2).

One of the academics participating in the roundtable, Helen Bird, commented that some of the more creative terms that regulators have used in enforceable undertakings may be very positive and forward-looking, but may be quite difficult to enforce. She mentioned, for example, that certain ASIC enforceable undertakings essentially place obligations on third parties who are not necessarily bound by the enforceable undertaking. This occurs when the enforceable undertaking requires that someone like a financial advisor (who is the person giving the enforceable undertaking) work only under certain supervision arrangements: here the employer of the person giving the undertaking purportedly has certain obligations but is not a party to the undertaking. The same issue arises where a party giving an undertaking agrees to make payments to a third party for a specific purpose, such as industry education. The ACCC representative commented that they had foreseen this problem and addressed it: when a firm agreed in an ACCC undertaking to pay money to third parties to be used in a certain way, the ACCC made sure to obtain deeds of undertaking from the third parties as well about the use of the funds to support the enforceable undertaking.

The Australian Law Reform Commission had also recommended that the terms of the enforceable undertaking must bear a clear or direct relationship with the alleged breach and be proportionate to the breach. Terms that are 'too' creative might be criticized for breaching this principle. However the main guidance that regulators have in relation to the permissible breadth of content of enforceable undertakings is in the terms of the legislative grant of power to accept enforceable undertakings. The relevant legislative provisions are all summarised in Table 2, Part 2 of this paper. They range from quite broad powers to accept enforceable undertakings in connection with any matter in relation to which the regulator has a power or function to slightly more circumscribed powers to accept enforceable undertakings in relation to alleged contraventions. ACMA's power to accept enforceable undertakings in relation to the SPAM Act is notable for its breadth. The Act simply states that ACMA can accept enforceable undertakings 'in relation to commercial electronic messages or address

---

[24] ALRC, *Report 95: Principled Regulation*, above n 1, Recommendation 16-2.

harvesting software'.

Most of the regulators commented that they do not allow denials of misconduct in enforceable undertakings. At the roundtable, however, Helen Bird commented that in ASIC enforceable undertakings, she had found some denials and also a number that included statements that the entity offering the undertaking 'does not admit' the misconduct. She commented that the inclusion of these terms showed that denial terms in enforceable undertakings can be a complex and vexed issue. Many regulators also commented that they do not allow terms that seek to positively advertise the entity offering the enforceable undertaking or are aimed solely to preventing reputational damage. Regulators' policies about the use of enforceable undertakings usually set out that these two sorts of provisions will not be contemplated.

Discussion at the roundtable made clear that some regulators already had quite flexible and wide-ranging tools and powers available to them apart from the enforceable undertakings power. These might include the power to issue infringement notices and penalty orders. Other regulators do not have these sort of powers available and have therefore used enforceable undertakings quite extensively to get all sorts of remedies that were not available otherwise or would have required a court order. This may help explain some of the differences in the numbers of enforceable undertakings accepted by different regulators shown in Table 1, Part 2: Some regulators might not need to use enforceable undertakings as much as other regulators depending on the other powers and remedies available to them.

3.4 Accountability, Transparency and Inclusion of Stakeholders in Negotiation and Content of Enforceable Undertakings.

There is a tension between flexibility and accountability. On the one hand, the whole point of giving regulators the power to accept enforceable undertakings is that there are situations where it is appropriate to trust regulators and firms to work together to negotiate an appropriate resolution where there has been a breach, without it having to go to court. On the other hand, a degree of accountability and transparency is always necessary for both regulators and firms. It might also be appropriate to include stakeholders in the process, content and accountability mechanisms for enforceable undertakings at various stages. Issues of accountability, transparency and inclusion arise at two different stages: the stage of *making a decision about whether to accept or reject an enforceable undertaking* and then the stage of *monitoring compliance with an enforceable undertaking once it has been accepted*. In order for enforceable undertakings to be effective enforcement mechanisms, there needs to be public confidence in each regulator's process for negotiating and deciding whether to accept or reject applications for undertakings. The firms and individuals giving enforceable undertakings also need to be monitored to ensure compliance and take enforcement action in relation to breaches.

The Decision-Making Stage: Holding Regulators Accountable

Regulators at the roundtable were asked to discuss what formal accountability mechanisms existed at the decision-making stage for enforceable undertakings. For example, is judicial review available, and if so, has it been used? Regulators were also asked about the transparency of the process and content of enforceable undertakings. For example, are enforceable undertakings published on a public register available via

a website? Do regulators ever get any feedback from industry or the wider public about the terms of enforceable undertakings they have negotiated? Regulators were also asked about the inclusion of stakeholders in the process of negotiating an enforceable undertaking, or commenting on the content either before or after an enforceable undertaking is accepted.

There was a diversity of practice in relation to accountability at the decision-making stage:

Judicial review: Regulators differed as to whether they even believed that judicial review was applicable to the decision to accept or reject enforceable undertakings under the relevant law. For example, the Queensland and Victorian health and safety regulators' powers worked differently and therefore judicial review would apply differently. There have been cases of judicial review of decisions by the ACCC, ASIC and WHSQ about accepting or rejecting certain enforceable undertakings.[25] Generally the applicant for judicial review is a party who is unhappy that their offer of an enforceable undertaking has been rejected.

Stakeholder involvement and opinion: As mentioned above, some regulators have a specific panel including external parties to give an outside view to the regulator beforehand about whether or not each proposed enforceable undertaking is appropriate. Other regulators include discussion of their use of enforceable undertakings into their more general reports to stakeholder advisory groups about their enforcement and compliance activities. Some reported that they often received comments from these panels about enforceable undertakings while others did not receive any comments. There was also some spirited discussion at the roundtable about whether regulators should consult with the victims/complainants in relation to a proposed enforceable undertaking. In some cases it is, of course, the victims who have complained in the first place and started the whole process. This is generally the case for ASIC and ACCC. Some regulators make a point of expecting the firm giving the undertaking to consult with employees and/or the victims of the conduct. This tends to be the case more for the health and safety regulators.

Publication: Almost all regulators publish the full content of all their enforceable undertakings (apart from commercial in confidence material in rare circumstances) on the web. Perusal of the different regulators' websites, however, shows that some are a lot easier to find than others. Regulators commented that in some cases people giving undertakings had been disappointed that an enforceable undertaking had been made public – they had hoped it would be a private way to settle the matter. One regulator (CAV) had decided to include enforceable undertakings on the web only for a limited time while they are current. Others keep them available in perpetuity. There was some discussion at the roundtable of the competing merits of these two approaches: privacy and reputational damage to the person giving the undertaking even after it is

---

[25] Eg *BBC Hardware Limited v Henneken & Anor* [2006] QSC 149, (noted by Richardson, K., 'Judicial Review of Enforceable Undertakings under the Workplace Health and Safety Act 1995' [2007] 27 *Qld Lawyer* 250); Australian Petroleum Pty Ltd v ACCCC (1997) 73 FCR 75; [1997] ATPR 41-555. For discussion of this issue see also Nehme, M. 'Enforceable Undertakings and the Court System' (2008) 28 *Company and Securities Law Journal* 147-171 at 153-160; and Nehme, M. 'Expansion of the Powers of the Administrative Appeals Tribunal in Relation to Enforceable Undertakings,' (2007) 25 *Company & Securities Law Journal* 116-121.

completed versus transparency and accountability of the regulatory process and the value of enforceable undertakings as precedents.

As Table 2 in Part 2 shows, there is a diversity in the legislative provisions as to whether regulators are explicitly required or enabled to publish undertakings: some are explicitly injuncted to publish a register of enforceable undertakings, others are enabled to do so – but in most cases the legislation is silent. General expectations of accountability and transparency of regulators, however, would suggest that regulators should generally publish undertakings in full – and occasionally with commercial in confidence or otherwise very sensitive material deleted.[26] Some regulators expect entities giving undertakings to explicitly agree that they will be made public in the undertaking itself in order to prevent misunderstanding.

Rights of third parties outside the enforceable undertakings process: There was some discussion of the effect of enforceable undertakings on the rights of 'victims' to receive further compensation beyond any provided for in the terms of the enforceable undertaking. One of the things that the Australian Law Reform Commission recommended that regulators should address in their published guidelines on the use of enforceable undertakings was:

> when and how third party interests will be taken into consideration, having regard to such factors as the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator.[27]

All regulators agreed that they try to make sure that the enforceable undertaking does not preclude the rights of third parties. However there are complex and unsettled issues around whether the enforceable undertaking can be used as evidence of wrongdoing in any further litigation between third parties and the entity giving the undertaking in relation to the same conduct. In general it seems that the enforceable undertaking cannot operate as evidence – and so there may be cases in which third parties might have preferred to have a court decision rather than an enforceable undertaking.[28]

The Compliance Stage: Holding Firms that Give Enforceable Undertakings Accountable

It is crucial that the regulator should be able to enforce compliance with the undertaking. Accountability at the compliance stage, however, is more than the legal capacity to enforce an undertaking. Undertakings must be monitored and where compliance with the terms of the undertaking is inadequate, the undertaking must be

---

[26] Note that some legislative provisions in Table 2 explicitly make reference to this exception and one states that if material is deleted there should be a note saying this has occurred. This appears to be the practice of many regulators anyway even without explicit legislative provision.

[27] ALRC, *Report 95: Principled Regulation*, above n 1, Recommendation 16-3.

[28] See Nehme, M. 'Enforceable Undertaking and its Impact on Private Lawsuit' (2008) 22 *Australian Journal of Corporate Law* 275-292.

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

At the roundtable regulators were asked to discuss how they monitored compliance with enforceable undertakings. That is, how do they know whether the firm has complied with the terms of the enforceable undertaking or not? They were asked specifically about whether they required firms to hire independent experts or reviewers to report on the firm's implementation of the terms of the enforceable undertaking, and if so, what conditions they put around this process. The regulators were also asked about what they do if they discover non-compliance with an enforceable undertaking or a problem with implementation of enforceable undertakings.

Again, there is a variety of practice and experience:

Note firstly that the various pieces of legislation differ as to whether once the regulator has accepted an enforceable undertaking, they can only enforce the undertaking or whether enforcement action for the original breach is still available. In the past, typically the ACCC has taken enforcement action for the original breach where there is a breach of the enforceable undertaking. On the other hand newer statutes giving regulators the power to accept enforceable undertakings have specifically precluded the regulator from taking action for the original breach, as mentioned above and shown in Table 2, Part 2.

Some regulators have much more developed capacities for monitoring compliance with enforceable undertakings than other regulators. The ACCC and WHSQ probably have the most developed capacities – but their approaches are different. The ACCC has a specific unit for monitoring compliance (investigatory staff are responsible for starting the enforceable undertaking process and getting them agreed and through the enforcement committee) and policies around independent reviews. WHSQ has a separate unit that deals with all aspects of enforceable undertakings (not just monitoring). WHSQ did use independent reviewers originally – but have now brought that function inhouse. This means that WHSQ inspectors go and check compliance with occupational health and safety management system requirements as well as any specific remedial actions. The ACCC's special enforceable undertakings unit focuses only on monitoring the requirements to implement a compliance program – but relies on external reviewers to report to it on this. ACCC investigators monitor the other aspects of compliance with the enforceable undertakings through a diary system. WHSQ's special enforceable undertaking unit deals with monitoring compliance with all aspects of the enforceable undertaking.

3.5 Effectiveness

Ultimately, it is important to know whether using an enforceable undertaking in a particular case provides better outcomes than other ways in which the same situation could have been dealt with – and whether, overall, adding enforceable undertakings to a regulator's toolkit means that a regulator is more effectively able to ensure compliance and achieve the policy goals of their regulatory regime.

The experience of using enforceable undertakings in some of the jurisdictions where they have been available for a long time (especially the ACCC) suggests that undertakings show a great deal of promise as a more effective and efficient way to solve regulatory problems and to promote compliance than court proceedings and financial penalties in particular cases. This is why the power to accept enforceable

undertakings has spread from the ACCC and ASIC to almost every other federal business regulator in Australia and many state regulators, and has also been adopted in the UK.

Nevertheless, there is not a lot of systematic evaluations and evidence about the effectiveness of enforceable undertakings. There have been a few academic papers seeking to evaluate the effectiveness of enforceable undertakings by looking at the terms of the enforceable undertakings and conducting stakeholder interviews.[29] These have been mainly implementation studies, that is studies of the way in which enforceable undertaking powers have been implemented and whether the actual implementation fits with the goals and policies set for enforceable undertakings. There has been little study of the ultimate effectiveness of enforceable undertakings, that is firms' compliance outcomes and achievement of policy goals after the use of enforceable undertakings compared with other regulatory tools, or how the availability and use of enforceable undertakings contributes to the overall compliance and policy outcomes of a regulatory regime. An implementation study has to be done before an effectiveness study since proper implementation is a precondition to effectively achieving the goals of any tool.

At the roundtable regulators were therefore invited to share any experiences they had with reviewing and evaluating the effectiveness of enforceable undertakings in particular cases and overall as a part of the regulatory toolkit. Participants in the roundtable were also invited to join in brainstorming about how the effectiveness of enforceable undertakings might be evaluated. What should be the criteria for evaluation of enforceable undertakings? What opportunities and possibilities are there for research and evaluation?

Regulators at the roundtable emphasized that it did not make sense to evaluate enforceable undertakings as if they were a completely independent enforcement action that could be said to be effective or not. Rather regulators saw them as one option sitting within a suite of options for dealing with any particular case. They should be considered and evaluated in the context of those options. That is, the issues for evaluation are: In what situations are enforceable undertakings most appropriately used? And, how do enforceable undertakings contribute to the overall profile and impact of the regulator?

Regulators also pointed out that the effectiveness of enforceable undertakings must also be evaluated in terms of how they interact with other enforcement tools the regulator has available to it. For example, enforceable undertakings might be very useful in particular cases, but if a regulator resolves everything via enforceable undertakings then there might be insufficient deterrence. It might be important that a regulator use a combination of enforceable undertakings and court cases. A number of regulators were very interested in further research to test the deterrent impact of enforceable undertakings versus court litigation. They hypothesized that court litigation would probably have a greater general deterrent effect on the whole

[29] Johnstone and King, 'A Responsive Sanction?', above n 6; Nehme, M. 'Monitoring Compliance with Enforceable Undertakings' (2009) 24 *Australian Journal of Corporate Law* 76-102; Parker, 'Restorative Justice in Business Regulation?' above n 5; Parker, C. 'Regulator-Required Corporate Compliance Program Audits' (2003) 25 *Law & Policy* 221-244.

industry, but that enforceable undertakings might have a greater specific deterrent impact on the particular firm subject to enforcement action.

The preliminary remarks to this part of the discussion distinguished between implementation and effectiveness studies. In the discussion another distinction emerged between systematic evaluations of implementation and effectiveness of a regulatory tool like an enforceable undertaking, and more intuitive evaluation. Systematic evaluations are conducted as separate, systematic pieces of research. But many regulators and their processes institutionalize a certain amount of intuitive insight and experience about what works for what purpose. Some regulators pointed out that in practice most of the time they do not have the luxury of time and resources to conduct more systematic evaluations and therefore need to rely more on intuitive evaluation.

There was a lot of discussion around the different sorts of criteria or measures of implementation and effectiveness that might be relevant in looking at enforceable undertakings: including timeliness of the process for negotiating enforceable undertakings; firm or stakeholder satisfaction; the dollar value of promises made; whether firms comply with their undertakings; improvements in overall compliance; injury data; inspection data; and self-reports on culture change. This is a topic for further discussion and experimentation.

PART 4: EDITED TRANSCRIPT OF ROUNDTABLE DISCUSSION[30]

4.1 The Decision-Making Process

Issues for Discussion

Many regulators have engaged in extensive policy development and consultation as to the factors they will take into account in deciding whether to accept an enforceable undertaking and the process they will use in making that decision.

Roundtable participants were invited to briefly outline what policies and practices they have developed about the factors to be taken into account in deciding whether to accept an EU and the process for weighing those factors and coming to a decision:

- What is the type of matter in which you would typically see an EU as the best outcome?
- In what conditions will you not accept an EU?
- What sort of process do you use for making the decision? (Eg How far up the agency is the decision made? Is there a formal way of setting out the factors for and against? Are there certain preconditions that must be met before an EU is considered? What sort of review is there before the EU is signed off?)

It has been suggested that enforceable undertakings are most effective when they represent a genuine negotiated resolution to a regulatory compliance problem. But producing effective and individually tailored undertakings is a time-intensive process. In some situations either the regulator or the firm might largely determine the terms of the EU. Roundtable participants were therefore invited to discuss the following questions

- How do you actually negotiate and agree the terms of the EU? (Face to face? Via lawyers? Do you have a suggested template?)
- To what extent do you find that you negotiate the terms of EUs back and forth?
- In your experience, what sort of negotiation process works best ?

Discussion

Chair (Richard Johnstone): In this part we are looking at the decision making process: the factors you take into account, and the factors that should be taken into account, when accepting or rejecting an enforceable undertaking; and the processes that you use to balance up the various factors and to make a decision.

Because negotiation is such an important part of the process, we are interested in discussing what is your experience with the negotiation process specifically: How do you do it? Is it a face to face exercise? Are lawyers involved? Do you have a

[30] The Roundtable was held at Melbourne Law School on 23 June 2009. The Roundtable was audio recorded, transcribed and edited. All participants have had a chance to review and edit the transcript before publication. A list of the participants in the Roundtable is shown at the end of the transcript in section 4.5.

suggested template? If so, how does it work? How protracted or labour intensive is the process? What's the best way of going about it?

Would the ACCC representatives like to kick off first? Let's talk about the decision making process to begin with.

Australian Competition and Consumer Commission (ACCC): Firstly, when I talk about enforceable undertakings today I'm talking about those that are taken by the ACCC in relation to Part IV and Part V of the Trade Practices Act 1974, in other words they're enforcement against a business as opposed to the mergers/acquisitions area. We use the same Section 87B provisions when dealing with potential problematic mergers and, whilst they're the same provision, they're a very different animal in that context. So I just want to put them aside for a minute.

It's important to recognise that the Commission is an independent statutory body and none of the powers of the Commission have been delegated to staff in the sense of making decisions on prosecution, or a decision to accept or not to accept undertakings. So it's the chairman who formally accepts the undertaking and signs off on it, but prior to that it's our enforcement committee that makes the decision about accepting an undertaking as the appropriate method of resolution. There is a preliminary step where staff will go to the enforcement committee saying, "Here's the conduct, here's the circumstances and here's our recommendations – the matter *could* be resolved in an enforceable undertaking." And that gets signed off by the enforcement committee made up of commissioners.

In terms of what are the elements that influence that decision making process, the answer is if a trader denies the conduct we won't accept an 87B undertaking. We used to have a fuzzy idea that "as long as you didn't deny you could probably get into the 87B area". The commissioners' position is moving very close to you need to admit that you're in breach of the law. You certainly need to admit the facts (the conduct) that went towards the breach.

We rarely accept an enforceable undertaking as a resolution for competition issues under the Trade Practices Act, that is the Part IV areas like cartels etc. Undertakings tend to be in the area of consumer protection law although some relatively small competition issues have been dealt with via undertakings.

The process is a judgment call and we ask, "What's the risk equation?". What can be delivered through an undertaking that may not be able to be delivered through a Court case? There are time considerations, and just the extent to which the company is genuinely solving the problem in the marketplace and the problem has stopped, some redress has been offered to those in the market, and the company is making a full commitment to ongoing compliance. So if a company is ticking those boxes, it's quite a compelling story to put to commissioners that an undertaking will deliver a result. Of course that will be influenced from time to time by the Commission making public statements about our determination to get rid of certain conduct in a sector (and at the moment we've been quite public about our determination to get improved accuracy in the Telco sector) and that might swing something into a Court environment that otherwise might have been dealt with by an undertaking. But it's not a science, it's an art. The art form is going to change if the government proceeds with proposals to amend the Act and introduce infringement notices, civil penalties, substantiation notice powers, redress for unnamed consumers, as anticipated this year. The whole decision making process about undertakings will then have to be

completely reviewed as the options available in the Court room will have been completely recast.

The other factors sometimes that you look at is the history of any past ACCC actions: Is an undertaking appropriate or should the Commission lift the game up to the next sort of area of options eg civil action? We have acceptable minimum terms that need to be in those undertakings otherwise they're not really negotiable.

The Commission has a very clear policy position right now, that we won't begin negations on an 87B unless we're prepared to go to Court. So, whilst it's a negotiation, it's a negotiation in the knowledge that failed negotiation will result in us taking Court proceedings. So staff in going to the Commission need to have sufficient basis to be able to put a proposal to go to Court in the event that negotiations don't deliver a result.

Chair: Do you want to say a bit more about your experience with negotiations?

ACCC: You do try to avoid protracted negotiations because obviously time is being wasted if it does look like the matter is not going to resolve. We don't want to be affecting the ACCC being able to pursue litigation against the company. So where they do get perhaps a little bit protracted or, for example, when the lawyer is not facilitating the process, we go around the lawyer and to the trader direct. Usually we find that clearly the trader is quite interested in wanting to finalise the matter, and quite quickly actually. So we'll engage in one set of exchange of documents. After one set of exchange I want a face to face - with the expectation that we will either reach agreement or there is no agreement to reach. In that face to face meeting it's always my desire to have the trader representative there themselves. If they want lawyers, by all means. But I'm not interested in just meeting with the lawyers for that final settlement. That seems to work well.

Chair: Can we go to ASIC?

Australian Securities and Investment Commission (ASIC): ASIC does EUs where it satisfies itself that they are a more effective regulatory outcome than would be the case with civil or administrative action. We won't do them where they're criminal. I won't do it if I don't believe they will comply. In determining whether or not something has been an effective regulatory outcome, I have regard to a regulatory guide on our website which talks about things like the position of consumers and investors' interests, the effect on the regulated person's future conduct, the effect it would have on regulated populations, the community benefit, promoting integrity for various markets. Those are the kinds of things that we take into account.

There are senior people within ASIC who have delegations to accept them; it doesn't have to go to the chairman.

Chair: We should ask Helen Bird and Marina Nehme [academics with research experience in relation to enforceable undertakings] if they have any comments

Marina Nehme: Yes, there has been at least one enforceable undertaking enforced in Court, one of them was an undertaking that was accepted in 1998 and successfully enforced in court.

Chair: We might talk about that later.

Helen Bird: Based on some data analysis on the undertakings that ASIC has accepted in the last five years (2003-2008), the data suggests that ASIC's practices in this regard are neither uniform nor consistent.

To assist the discussion, I have produced a table of the results of my analysis. I looked, inter alia, at the extent to which parties do actually expressly admit, as a term of their undertaking, liability for a contravention of the Act. I've just picked five years as a snapshot. There seemed to be three types of responses evident in the undertakings surveyed (see Heading C in circulated document, entitled *Content of Enforceable Undertakings*, part entitled *Admissions made in Enforceable Undertakings presented by ASIC*):[31]

First, those where the undertaking contains an express admission of contravention of the Act and facts that have occurred that led to the contravention.

Second, those where the undertaking contains a denial of any contravention of the Act. This denial might take a number of forms. It might be an express denial of contravention. Alternately, it might state that the relevant party "does not admit" that it contravened any laws. It is interesting to speculate what "do not admit" means in this context. Is it in effect a denial of liability or something less? In any event, these "denial" terms were common in the undertakings I examined.

Third, in every almost every single undertaking examined - and I'm not sure how it sits with the previous categories – there is an express acknowledgment that ASIC has a reason to be concerned about a possible contravention of the Act. This does not appear to prevent undertakings from going on to include a denial or "do not admit" term as now discussed.

The terminology used in this context is very vague and demonstrates that this is a very vexed issue.

Chair: Go to ACMA next.

Australian Communications and Media Authority (ACMA): We first got enforceable undertaking powers in 2003 in relation to the *Spam Act* and the *Spam Act* power is a bit different from our other powers. Our other powers are all enforceable undertakings to do or refrain from actions in order to comply with legislation. The *Spam Act* power is a power to accept undertakings just in relation to commercial electronic messages, and it's a bit broader in that the action to be taken doesn't need to be directed to comply with the relevant legislation.

We got powers in relation to the *Telecommunications Act* in 2005 and under the *Broadcasting Services Act*, the *Do Not Call Register Act* and *Radio Communications Act* in 2007. Again, the power in the *Broadcasting Services Act* is slightly different - where a person has applied for temporary approval of a breach of the ownership control provisions in Part 5, we can accept an undertaking that they will divest themselves of such licenses so as to get them out of the position of breach. That's probably quite a distinct isolated power that isn't appropriate for discussion here.

Most of our enforceable undertakings are in relation to the *Spam Act* and *Do Not Call Register Acts*. We have 20 investigations in relation to each of the Spam and Do Not

[31] Available from Helen Bird (University of Melbourne) contactable at email: hlbird@bigpond.com

Call Registers on foot at any one time, so it's not practical for the decisions about enforceable undertakings to go to the Authority on every occasion. We also have the power to give infringement notices. We view them not necessarily as competing powers but complementary. We might say "we have the power to give you an infringement notice of say $100,000 but if you give us an acceptable enforceable undertaking we might also give you an infringement notice just for $20,000".

Usually we suggest that they draft up something and offer it to us but we're happy to help them prepare something based on the undertaking policy published on our website. We will accept two or three exchanges of comments, changes and mark-ups. But beyond that we generally have a sit down meeting and say, "This is our position. Are you willing to offer us any more, or anything different to what you've put forward so far?" Usually at that point they either offer something we accept, or they don't offer anything.

It can be more difficult when the entity is smaller and they can't afford the time to work out what they're prepared to offer. In that case, a lot more work falls to us to actually work out what they can offer and then draft something appropriate. Slightly bigger entities or entities that can afford legal representation do a better job of just working it out themselves and offer us something that we're more likely to accept. We'll always have a sit down meeting at some point.

They always state in the recitals that ACMA has concerns about compliance. We're very cautious to prevent people using their recitals to advertise themselves - some people try to say they're the best or biggest or greatest operator of their kind.

We don't mind if lawyers are involved but we have had the experience where there are lawyers who are a little bit obstructionist and then we speak directly to the entity involved - we find that they actually just like to settle the matter.

We will accept an enforceable undertaking, or an offer of an enforceable undertaking, at any point in an investigation. We don't necessarily have to come to a breach finding. If we commence an investigation, and someone offers an enforceable undertaking that we find acceptable, we may well accept it at that point at either end of the investigation or continue it. But it will affect any enforcement action we take at the end of the investigation.

Chair: I think we might go to Consumer Affairs Victoria.

Consumer Affairs Victoria (CAV): A lot of our comments are very similar to the ACCC. Enforceable undertaking powers were granted in the 1999 *Fair Trading Act*. We've gone through a learning process where initially the undertaking was an enforcement tool. But it became the practice that team leaders would consider the option and they would then go to the director saying, "We think the undertaking's the right way to go". That caused problems because some of those decisions weren't probably good enforcement decisions. The policy developed (our enforcement policy and enforcement guidelines) is that undertakings are considered quite high in our enforcement pyramid and in fact they would be just below prosecution. As with the ACCC, if we've got a case (and we have to have evidence)the question is do we deal with it through a prosecution or a civil enforcement action? Or do the circumstances justify a slightly more benign enforcement option like an EU? If it's serious conduct, you're not going to offer an undertaking or an infringement notice or warning. If it's

repeat conduct, if somebody's had an undertaking previously, they're not going to get a second undertaking. So there's all those indicia that we look to decide.

The decision is made at enforcement committee, which is comprised of the director, deputy director and a number of senior officers. An enforcement report is put up and the investigator might say "I believe this should be an undertaking because …" But the power to make the decision and also the format of the document is with the enforcement committee. The investigator puts a recommendation and a draft document - that document is internal, it hasn't been offered before and it shouldn't have been raised before with the trader or entity. So the enforcement committee will decide (a) on the appropriateness of the outcome being the undertaking and also (b) more importantly the form of the undertaking.

If you analyse our undertakings back in 2000/2001, they were a bit more generous than they are now. And I think in our early days we even did allow denial. We don't anymore. Our form of undertaking is very similar to the ACCC because we have based our approach on the ACCC. The undertakings are horses for courses. What the enforcement committee is looking for is not a simple "Okay, you've been caught, you agree to abide by the law" - there's hopefully a positive compliance aspect where there will be ongoing expectations on the entity. For example, if you get an unregistered builder, you might have a requirement that you won't breach the *Domestic Building Contract Act* and you won't do domestic building work unless you apply for registration. With the more significant undertakings we've got with some of the larger service or goods providers, there is embedded in the document the ongoing rectification compliance modules and also reporting back. They're the ones that have been the most effective tool.

In the opening you [the chairs] noted that it's not adversarial and it's collaborative, but it's not as collaborative in our process. The offer is definitely made by the director. I've got no experience of a company coming to us and saying, "We will offer you an undertaking". We've had experience of entities coming to us and saying "Look, we have discovered we've breached, tell us what you'll do about it." But, certainly, the offer is made by the director. There might be some negotiation in that the draft undertaking will be sent to the person. There is always an opportunity of either the person or their legal representatives coming back and saying, "Well look, we'll tweak this, we'll tweak that". But effectively the offer is made with an accompanied letter saying, "We believe there's a breach. In the circumstances we're prepared to forego our right to prosecute upon you agreeing to enter into an undertaking. Of course if you don't enter the undertaking, which is your right, we reserve the right to prosecute." We're very careful at all points to say, "It's up to you what you want to offer and whether you agree to offer anything at all." So, I believe it's less collaborative than suggested in the introduction – but other regulators seem to be a bit more collaborative.

ACCC: I think over time we've found that there are more instances now that there are more people genuinely offering an undertaking to resolve the problem. And we've sought information about the alleged conduct, and sometimes part of the response is "We've recognised X, Y, Z and we're willing to offer a Section 87B undertaking to resolve the Commission's concerns." And it might be as simple as that. Then we go through our process: Would we be willing and what would it look like? So there is a level of offer. Some of the more professional organisations do genuinely collaborate on how this 87B might be structured. With our history they can see what we're

looking for and they know from a business model what they're looking for, so there is, dare I say a "win/win". If people go to our website to look at our 87B register, there's probably three "win/win" 87Bs that I invite you to have a look at. For example, the Dodo EU earlier in 2009 reflected a collaborative effort to try and produce something useful for us and useful for the trader. General Motors Holden about three years ago had a useful undertaking that delivered good outcomes for consumers. And a company called iSelect are in the business of brokering health insurance, was a similar collaborative example.

David Counsins (Monash University): I'll just emphasise a couple of points in relation to the CAV:

The ACCC mentioned discipline, and I think that's really important. Enforceable undertakings in the early days perhaps weren't subject to as much discipline as we would have liked. Case officers did have a fair degree of discretion to even suggest and propose I think to parties. In my view that was often not a good call in the sense that enforceable undertakings were a pretty soft option whereas the matter might have actually warranted much more serious response. Consumer Affairs as an organisation is essentially a unit in a government department headed up by an individual and the Act does talk about the director accepting the undertaking. So as the first Director, I didn't delegate that power and we did set up within the organisation an enforcement committee that ran its eye over undertaking proposals and also developed the policy around undertaking. I think it's very important to have a clearly stated policy. We made it a rule that if in fact we didn't believe that there was a breach and an option to go to Court, then an undertaking would be unsuitable.

The undertaking power now also applies across a whole suite of Consumer Affairs legislation and the range of offences varies and the seriousness of those offences varies greatly. As first Director at the time I didn't quite see an enforceable undertaking as perhaps as high on the pyramid. I considered that this was a tool that was satisfactory for relatively minor offences. For example, we had a problem with product safety, a lot of inspections in the marketplace, a lot of breaches of bans occurring with illegally supplied goods and we took a view that often it was the retailers who would be approached by wholesalers and the retailers had no clue whether these products were banned or not. So we proposed (as noted, this is not a negotiation thing) that in this case we would accept an enforceable undertaking if the retailer fingered the wholesaler. So we were really after the bigger players in this game and the retailer was a source to build upon, and we would take more serious action when we identified the wholesalers involved.

Chair: Let's now turn to the occupational health and safety regulators.

Workplace Health and Safety, Queensland (WHSQ): In terms of the types of matters that we typically see EUs as the best outcome, I think any situation where we think sustaining compliance will be achieved. Ours are very much an offer made by the actual obligation holder. So we can't dictate who might be seeking an EU. Our practice at the moment is only to accept an offer of an EU once the complaint and summons has been made.

In considering an offer of an EU, we look at the objective gravity of the offence in deciding whether or not an EU is an appropriate response for the circumstances. So we look at the compliance history, the culpability etc of the obligation holder.

We generally don't accept them where there's been a fatality - we will still allow the obligation holder to offer it but they need to convince us why an EU would be appropriate in the circumstances. An EU very much has to "go beyond compliance" to the alleged contravention. So we're looking for it to be a much "bigger picture" response to the alleged contravention than just "we're going to fix what was wrong in the first place".

In terms of the cost to the obligation holder, the costs are significantly higher than any outcome that we would get from a prosecution. Probably 95% of our prosecution actions are actually finalised through a guilty plea and generally it's a cheaper option for the obligation holder.

Again, similar to some of the other agencies, we won't accept a denial of liability. They can't promote themselves in their EU. They do need to at least acknowledge the alleged contravention. They don't need to admit guilt but they do need to at least acknowledge that we believe that they've contravened our legislation.

The way that we actually manage our process is it's "offered" to us. We have recently instituted a practice where the EU team will actually meet with the obligation holder before they submit that first offer. That's because we found that the quality of the EUs was very low and there was a lot of argy bargy between us. We've been able to give them examples of EUs that are published on our website that help them to get some sense of what might be acceptable to the Department.

The EU is considered by a panel which has our executive director and two independent panel members. They review the EU and then they provide advice back to the obligation holder. The EU panel then makes a recommendation to our chief executive. But it is the chief executive that makes the decision. The chief executive gets independent advice from the legal area of our department on the matter. There have been occasions where our chief executive hasn't agreed with the panel's recommendations. But they're fairly few and far between. We use a matrix to help identify whether all of the basic factors of what we expected in the EU have been addressed.

We are dealing with a lot of small businesses and it's very difficult for them to get their head around what an EU might need to look like. The challenge though is when they do engage the lawyers. If the lawyers haven't actually been involved with EUs, they tend to also struggle to the same extent as the obligation holder does. But we're starting to get a bit of a pool of lawyers who are actually starting to understand the process a bit more. It can be very protracted with us sort of to-ing and fro-ing.

When we have our face to face, generally it depends on who contacts us - 50% of the time it will be a law firm representing a particular person who may have just received their summons in the mail. They go, "I've heard about an EU, can you tell me what it's all about?" So first of all we have to educate the solicitor to get them to understand that this a bit different and that they might look up what the ACCC have been doing for a while, and look at our guidelines, and try to work it out. We found very early that if you don't have a face to face you're pushing uphill really. It's the face to face that allows them to understand and to be able to brief their clients and say, "Yes, this is perhaps a suitable option for you"; or, "No, let's just cop it, cop a plea and we'll be out of here and pay the penalty and go."

You made the comment some see it as a soft option. I'd go the other way with ours - I think ours are the opposite. If you want a soft option, you go cop a plea. I'm interested by an earlier comment about it being a less burdensome sort of response compared with other enforcement options because we actually go through the full investigation process. In our case I wouldn't actually see that it is the case that it is a softer option.

Since early 2004 (our power was given in 2003) we've done about 150 of these now. In the first couple of years we found that only about 50% were actually going through the whole negotiation process and being accepted. So it was a lot of effort in those days to go through the hoops to get a 50% result. In some respects that kept our numbers down in the first few years because they realised that just because they were going to apply for one, it wasn't necessarily going to be the outcome and they could find themself back in Court. We moved from that point to now where something like 90% would be approved by the Director-General. That's simply I think because we're getting better at doing them. We are better at ensuring that we get from the wrongdoer the sorts of outcomes that we as a regulator want to deliver.

In terms of content, we have three components: one addressing workers, one addressing industry and one addressing the community. We are looking at how the community one can be some financial contribution into a sort of a central fund but again, it would be very much at the discretion of the obligation holder in terms of what they would offer. That may be things like communication campaigns on safety and those sorts of things. It wouldn't just be handing over an amount of money; it would be a contribution towards an activity.

The panel considering EUs is a tri-partite panel and usually it's someone nominated by unions and then someone nominated by employers. The reason we did this was for transparency. We needed to satisfy ourselves, our director general and more particularly our political masters that the process that we were going through was robust and was in line with community attitudes. I know when we first introduced them in 2003, I had lots of discussions with the Minister about how these things can be disenfranchised from community values and attitudes and so on and that was his biggest concern.

Chair: We now turn to the Electrical Safety Office Queensland:

Electrical Safety Office Queensland (ESO): ESO follow the same process that Workplace Health and Safety in Queensland use, under the 2002 Electrical Safety Act. ESO have had two EUs approved with the director general signing off on both. There was one that wasn't approved through that same process. One of the EUs that was approved is currently running now. It started in 2008 and ESO conducted a progress audit at the six month interval. With the other one that was approved, the wrongdoer withdrew the application and went to Court. It may have worked out a much cheaper option to go to Court. Some factors that may come into whether they apply for an EU is the negative publicity that they could receive in the press if they went to Court, which might no doubt damage their corporate image, or if there's going to be a conviction recorded. ESO is reasonably new to the area of EUs.

ACMA: We have had people who are concerned about the publicity that comes with the enforceable undertaking because they do view it as a kind of enforcement action against them. We try to sell it, not as a promotional thing but as a positive news story

if they want to spin it that way. But we have had people very concerned about EUs being public.

WHSQ: That's a really interesting point because one of the things that I was looking at recently was whether we could, as an agency, do some sort of joint media release in relation to EUs so that it was seen as both of us working together and actually trying to emphasise the good things that were actually going to come about as a result of that EU. I thought that perhaps that might actually help with some of those issues, being able to say to prospective EU applicants, "Look, this is one way that you can minimise that damage if you wanted to go down that track".

ACMA: Certainly where the entity really wants to improve its processes, then that kind of approach works.

WHSQ: One of the aspects to the industry benefit element of the EUs is that they can offer to do a case study and publish it in an appropriate industry magazine. In doing these we make sure that it's about promoting the lesson that they learnt from it, the experience rather than promoting their business. The text of this has to be approved by our executive director before it's published so you get some good stories, good information and it's good health and safety promotion rather than the company promotion.

Chair: We might go to WorkSafe Victoria.

WorkSafe Victoria. We borrowed, in setting up our model, heavily from both the ACCC and our Queensland colleagues. We've had EUs since 2005 and we've only accepted about a dozen and again, consistent with other regulators we've become more sophisticated as we've learnt more about the process. It is a little bit different to Queensland in that our safety offences in Victoria are indictable, which effectively means that EUS are really a true alternative to prosecution.

The decision on whether to prosecute or not is a decision made by delegation from the WorkCover Authority, an independent statutory authority, and we have the same person accept an enforceable undertaking as would make a decision on whether to prosecute or not. That's also a decision that's reviewable ultimately by the Director of Public Prosecutions in this state so we take that into account and in some cases we will consult with the DPP about their attitude. The DPP and his Office have been quite supportive of EUs. There's an internal enforcement review panel that gives the executive director advice.

Unless there's exceptional circumstances (there haven't been any so far), we would not accept an enforceable undertaking in a fatality because we think that you're either going to prosecute that or you're not. If you are, then we think because of the severity and the consequence that it deserves the scrutiny of a Court. One of the principles that we adopt is proportionality. So we try and equate the value of the undertaking to the potential outcome of the fine because obviously we want them to be seen as serious as a prosecution. Quantifying the actual undertakings is the most difficult aspect of that.

We don't accept denials of liability and we've accepted, on a continuum, everything from admissions to acknowledging the allegations, but certainly not a denial.

We're certainly encouraging EUs. In some cases we will actually go out and say, "You might want to consider an enforceable undertaking as an alternative either

before we issue charges or after", predominately in the less serious offences. Because the general duty offences are indictable offences, after charges have been issued there's very little incentive for practitioners to advise their clients to accept an undertaking until the regulator shows its hand. We have been trying to promote EUs for use earlier on in the investigation because it's certainly in our interest to look at more expedient outcomes in cases that deserve it (and we're probably not talking about the most serious of offences). That in itself is a challenge because we're promoting enforceable undertakings as a constructive enforcement outcome. But on the other hand we think prosecution is a really effective and appropriate enforcement tool; and so ensuring consistency in outcomes where offences appear on the face to be the same has been a bit of a challenge.

Also in the decision making process, we don't use an external panel; we don't use stakeholders because we don't open up the decision making on prosecutions.

In Victoria there's been a very slow movement for practitioners to accept them because they see prosecution ironically as being a lesser outcome because it's quick, they can plead guilty, they can pay the fine and there's no sort of lingering consequence. The spectre of having a subsequent incident during the term of an enforceable undertaking and then the prospect of a prosecution or a breach of the EU has influenced people not to offer them in the first place.

We've also found that face to face meetings are critical because we're generally dealing with practitioners who are not experienced or sophisticated in terms of what conditions they would put. One of the things that we really want to achieve is safety management systems as the benchmark for an EU other than in very minor offences.

Chair: We might hear from the Workplace Ombudsman.

Workplace Ombudsman. We've been operating nationally for about three years now. This week we don't have any capacity for enforceable undertakings, our legislation will be up next week and then we will. However we are taking forward things that we call "enforceable undertakings" - and the motivation for that is the sort of things which we talked about this morning which is to wrap up the matter with an acceptable outcome for both the community, workforce and the offender. Under our legislation these kinds of offences are simple litigation offences. It's a case where we think that it's a more beneficial outcome.

Usually the sort of thing we're talking about is a failure to take some act in respect to agreement making or to not pay people properly. We always insist on the payment being remedied to the exact calculation that we make. But the motivation for moving forward is effectively that if we take them to Court where the underpayment is quite low,. that would mean the penalty is quite low as well. So often it's the sum of what we can leverage to a better, more robust outcome for the particular workplace.

We will be expecting to continue with enforceable undertakings under the legislation and to ramp them up pretty considerably. We take roughly about 80 litigations per year nationally. I can see a role for about the same number of enforceable undertakings in the future. Because we deal with a very large number of offences each year (around 26,000 matters); and the simple reality is that very, very few can ever be considered for litigation. There has to be something very unusual before we'd consider the matter to be in the litigation queue anyway. An enforceable undertaking is usually put forward by our legal staff as a solution to a particular problem and to

circumvent quite possibly 9 or 12 months of litigation and a lot of cost on the part of both the agency and the employer.

At the moment we have two cases involving million dollar underrpayments in particular workplaces, many hundreds of employees on a national basis. One of them probably will be considered for an enforceable undertaking and that company is distinguished from the other because of the fact that they would be prepared to cooperate very fully with us to make the admissions that are necessary; whereas in contrast the other company, pretty similar industry, pretty similar outcome, is simply not prepared to make those kind of admissions in the way that we would expect.

Our objective is to be able to use EUs as a demonstration of compliance. It's something which we will always expect to be transparently available. I objected to signing the first EU I was asked to consider, but after a day or two was persuaded to sign. I think the policy that's evolved since is that we simply won't consider matters which are not going to be public. It needs to be transparent as part of the agency. We're a statutory authority. The capacity to commence litigations is held fairly tightly with myself and a few SES officers and it's the same with enforceable undertakings. We expect to continue that, but it is certainly something that we see as very much a vital part of our business in the future.

Chair: Now for the Environment Protection Authority Victoria.

Environment Protection Authority Victoria (EPA): We're quite new to this process. Our legislation was changed a couple of years ago and we've recently published our guidelines. We see EUs as fairly high up in the enforcement pyramid. We have an internal enforcement panel to provide advice to our chairman who's an independent person. We also have an independent external EU panel that the chairman will take advice from (not yet appointed). The panel is advisory only. The Chairman makes the final decision on whether to enter into an EU. We are already generating a fair bit of interest from the legal community about entering into enforceable undertakings. We have a number of investigations on the run and we have been approached for EUs – but we have not agreed one yet.

Chair: Energy Services Victoria?

Energy Services Victoria (ESV): We're a statutory authority responsible for gas, electricity and pipeline safety in Victoria. We don't yet have the ability to offer or accept EUs and in fact there's not even any such proposal on the table at the moment. Our director wants to know more about what's involved with EUs with a view to their possible introduction at Energy Services. If ESV had the ability to issue EUs, EUs would not be accepted in the case of a fatality - they'd inevitably almost result in a prosecution either by ESV or by WorkSafe. I can see we have to think long and hard about the circumstances in which we'd offer an EU, if we had the power to do so. Most of our prosecutions and infringement notices involve things like unsafe wiring work, non-compliant wiring work, unlicensed and unregistered wiring work, do it yourself-ers, and that forms the great majority of our enforcement activity. So we have to be very wary of EUs not being seen as a soft option and make sure that electricians, registered electrical contractors, and others who approach us with regard to an EU see that there be a suitable level of sanction - that it would actually be meaningful and not seen as a soft option. We already have the ability to issue warning notices, and infringement notices too, which are 10% of the maximum.

Chair: Time for five minutes of questions or comments.

ACMA: It seems that a lot of the organisations around here have a panel that reviews all enforceable undertakings before they go to the decision maker for acceptance or refusal. We don't. In the Spam, Do Not Call Register context we have 12 months in which to give an infringement notice for a contravention although we'll consider accepting an enforceable undertaking at any point during the investigation. We usually have a discussion just before we make the decision whether or not to give the infringement notice. Do you find that the panel process or the committee process takes too long or might take an unreasonable amount of time out?

ACCC: Not in the case of the ACCC, no. Initially the option of whether that type of matter warrants consideration, a possible resolution by 87B in our case, it's an in principle agreement. The Commission will say that it will be offered. Then it's up to staff to negotiate. It makes it a little bit easier because we do need to stick to those minimum terms that we have, and then of course it's just ensuring that the corporation address the wrong, and include forward looking compliance through compliance programs to ensure that future contraventions don't occur. These are the things that staff negotiate. Once staff feel comfortable enough that the offered undertaking by the corporation addresses the Act and what the Commission is wanting to achieve in the matter, it's then up to our chairman for his consideration. Our Enforcement Panel meets weekly and our whole enforcement regime is geared around that timetable. We all know the panel is meeting on a Thursday afternoon, all of our papers have to be settled by the Friday beforehand.

CAV: Our approach can save resources. The decision for an EU comes from an enforcement committee at a relatively early stage in the investigation. So, unlike Workplace Health and Safety Queensland and WorkSafe Victoria, the brief isn't finished, the charges haven't been issued. So at a fairly early point of time the investigator can get the word from the director either yes it's available or no, it's not. If it's yes, it may mean that it can be offered and a full brief is not prepared. So it's a resource issue as well for us and the later you leave it, I think there's more resources spent.

WHSQ: We don't have an infringement notices setup in the way you do, but we certainly have a stay on any continued proceedings while an EU is in negotiation. But the EU process doesn't limit our ability to revive those proceedings if there's a withdrawal of the offer etc. Most of our issues with EUs is the time it takes just getting the EU into a state that we would want to put to the panel. I don't see that the panel itself is such a burden in terms of time. The negotiations involve a lot of to-ing and fro-ing to settle the documents so that the applicant is satisfied that that's what they're going to offer, because they generally won't get a second bite at it if the decision maker decides to reject it. There's no coming back and saying "well, I'll change this" - so we have to get it right, they have to be satisfied. The role of the enforceable undertakings unit is to ensure that what goes to the panel is close to final. The panel may have a comment - they may wish to, for example, suggest that some elements need to be changed around a little bit and that feedback goes back to the applicant who can reject it of course.

At the end of the day it's still the obligation holder's decision as to what the final thing looks like when it goes to the decision maker. Generally speaking most will take the view of the panel because the panel is recommending it for a reason. The panel

doesn't really kick in until the settling of the document, the draft. So an initial crude draft will come in from the obligation holder, and some of them haven't been of a very high standard. But the more they're published on the websites, applicants can actually see copies of what's been before; and that has improved the quality of EUs offered. And that will continue to improve. So if we can spend more time getting the initial application to be of reasonably good standard and quality, you don't have to spend a lot of time with the subsequent argy bargy getting it to the point where at the end of the day, two guys are going to sign off on it.

Any EU that is submitted must go all the way through to our chief executive who decides on the merits of the EU that's presented. There is no decision whether or not we will consider the EU at the organisational level. It's all consolidated through one unit. We purposely separated our enforceable undertakings group from our prosecution officers who have been involved in the actual investigation. So the submission actually comes through the EU unit who then prepares it. We have guidelines that are published on the website, and that's part of the information that's shared with applicants at that very early meeting. Those guidelines guide the EU unit, the panel and the Director-General.

We still have had a few applications where there has been a fatality involved but they have to demonstrate exceptional circumstances and in all cases to date (3 or 4) they haven't been able to demonstrate sufficiently to get that over the line.

ACCC: A couple of years ago when Graeme Samuel came on board as chairman of the ACCC, there was some public criticism that he was going soft and that we were accepting all of the enforceable undertakings rather than prosecutions. That criticism has not resulted in a change – just fired up our resolve to ensure a discipline exits to make sure that the content of our EU is precise, that it is enforceable and that it's got elements in it that allow us to monitor compliance. So, in the last few years we've brought a much more disciplined regime on those steps in terms of signing off on the content. So we get the in principle decision that yes, an EU is a goer. Then our staff negotiate the content. Then our internal legal people sign off that it's precise and enforceable, and our internal monitoring unit will sign off that it has sufficient reporting mechanisms in it that will allow them to monitor compliance going forward.

So that's the decision making process before it goes to the chairman, and I would say that's absolutely critical. If the currency of the 87B is diminished, I don't know how you get it back - particularly for all of us who publish our accepted EUs on the internet. You can't afford to get a sloppy one up on the internet. That's your precedent and it will bring you down from there forever. So that would be my final message; that as much as you get the in principle decision, the detailed decision has to have those elements of consistency and enforceability otherwise you could do yourself a problem forever.

CAV: That to some extent raises the question you asked about templates. I think, like the ACCC, certainly CAV has used a pretty clear template in terms of the way it sees an undertaking looking. That will include a range of things: not only the background, details of investigation, the admission of the offence alleged and so on. It will also include things like an acceptance that this will be published and an acceptance that the party is giving consent to this undertaking being taken to Court by CAV to be enforced should the circumstances require it. So there are a series of "clearing systems" you'll see across the undertakings on our website.

WHSQ: We're keen to try and get a greater standardisation of ours as well. In terms of the template, do you actually mandate its use or is it voluntary for the person submitting the EU?

CAV: Well again it gets back to the nature of the process here. It's seen as a compliance enforcement tool - it's offered by the agency more so than the person who's in breach of the Act coming forward with the proposal. But having said that, there is a very large volume of enforcement activity happening in the CAV context and the nature of the cases are quite varied; whereas with those small product safety retailers, it's pretty directive and it's pretty simple.

4.2 The Content of Enforceable Undertakings

Issues for Discussion

One of the main suggested advantages of EUs is that the promises made in an EU can go beyond "mere compliance" and the payment of financial penalties. The terms will generally relate to remedying the harm caused by the alleged breach (eg providing compensation to those damaged) and improvements to the firm giving the EU in terms of how it ensures compliance with the law and achievement of the overarching goals of regulation (eg implementation of compliance systems, health and safety management systems etc). EUs might also include terms that seek to benefit the broader industry or community (eg an industry compliance education program or funding for research into how to prevent pollution accidents in the future).

Roundtable participants are invited to share their policies and practice around what they generally expect as standard terms of EUs, and also to provide examples where they feel they have been able to negotiate more creative terms in an EU that have solved a regulatory problem or created a particular benefit for the industry or a community.

- Do you have certain standard terms that you always expect to see in an EU? Why do you see these as important? What has been your experience with them?
- Do you have certain things that you would never accept in an EU?
- Do you always require firms to implement some sort of compliance management system (or health and safety, environmental management system as appropriate)? If so, how do you require this to be worded? Is it tailored to the particular firm or a more standard sort of requirement?
- Are there any examples where you have been able to use an EU particularly creatively to solve a problem in an individual firm or in an industry, or to provide some broader community benefit?

Discussion

Chair: Let's turn now to talk about content. This morning we already had a lot of discussion of content, so now can we look at two specific things. The first is

standard terms: what's the norm? What do you expect as standard terms? How do they work? And where do they come from? Are there things that you would never allow or never accept in an EU? Second, are enforceable undertakings used creatively, and what sort of creative terms and provisions have you negotiated and accepted? So to start, can you talk about the kinds of standard terms you expect to find in an EU, and why.

WHSQ: We want to see businesses develop OHS management systems: So that's a standard requirement in our EUs. We require the applicant to address what they are going to do at a workplace level, an industry level, and a community level, and the panel and our Director General's office evaluates the quantum of those benefits.

Another standard thing that we do require is a statement of regret. Now the wording in a statement of regret can be a two liner, or it can be something a bit more sincere. They do vary of course.

Another is the cost structure for the recovery of departmental expenses. Through our EU process we do recover our investigation costs, and we recover consideration costs for the panel. We can recover money that we spend in advertising or promoting the undertaking in the public arena. So there is a cost clause if you like. It's a structured clause and it's the same in each of our undertakings.

Similarly, we have an inbuilt monitoring schedule in every undertaking now and those clauses are now fairly consistent. The number of actual audits that would be done might vary but the layout is very similar.

We're talking about improving the quality and consistency of our applications and to find as many of those common clauses as we can to standardise them. The applicants also appreciate that. They don't have to reinvent it. We give them advice as to what we want them to look like. So we try and get as much as we can in standard clauses.

Chair: What is the experience of other regulators?

ACMA: We find that in the Do Not Call and Spam context a lot of people end up breaching the legislation because they don't completely understand how to comply. So we usually suggest training programs to be run in the entity and for its contractors and perhaps directors as well. This is so that everyone within the organisation responsible for sending messages or making telemarketing calls has an understanding of what is required and what they might need to comply with. Because they're continuing to send out messages and make telemarketing calls, we do usually ask for an auditing of what they do over a period of couple of years, more frequently to start off with, and then becoming less frequent. And we require them to provide the reports of the audits to the ACMA. This is so that we can see that if they've sent out 100,000 messages in the first month after they've offered the enforceable undertaking, they'll audit a couple of hundred and they'll see if those messages complied with the Act and they'll report to us.

WHSQ: Does that then work back to business re-engineering? So if they're not understanding what's required of them to comply, they're using the EU process to drive business change? So you're putting out more information on how people should comply, for example?

ACMA: Not always, but sometimes where it's a common misunderstanding. Certainly in the telecommunications industry we're getting a lot of complaints in

relation to the Do Not Call Register. So we're using those EUs to go back to industry to show that a lot of their competitors are making mistakes about what they need to do to comply and they should also look at their own operations to see if they're complying or not.

CAV: There's two parts in our undertakings. Our undertakings follow the same form as the ACCC where there's standard clauses in every undertaking. The bit which is free text is the undertaking itself and that's the important bit because what we try to do is, especially in systematic breaches of a large service provider or a goods provider, throw the onus back on them by saying: "Okay, fix up the problem. But now you will monitor. You will become Consumer Affairs for yourself. We don't want to get your complaints. You receive your complaints and address them. Or, you will monitor your production or service to the extent that you will find out the problems first and you will agree to fix them without coming back to us". We try to put the onus back on them. On a couple of those we've been very successful in getting positive feedback from the service provider. We've effectively made their business better. So that's where the art of the undertaking comes in.

Chair: Are there any other experiences with standard clauses?

ACCC: We certainly won't accept denials of liability and we won't accept terms that are trying to impose obligations on the ACCC. Believe me they do try; not often, but I think they do try sometimes.

Helen Bird: How do you handle the clause that says that you won't take further action in relation to that matter? In a sense that's a reverse obligation.

ACCC: Well that's just not allowed. We won't be constrained not to take future action or proceedings on the same subject matter

Workplace Ombudsman: That's an interesting question because our new legislation that starts next week actually prohibits us once we've accepted an undertaking from taking action. I actually was working on the basis that all agencies had the same limit, but we're the only one that does.

Christine Parker: No, the newer pieces of legislation say that - the EPA and OHS legislation. But the ACCC and ASIC ones don't say that**.**

CAV: You don't know everything necessarily at the time. There may have been information that wasn't available but which may come to light later and you may decide it is appropriate to take ….

WHSQ: But that's the difficulty in process in terms of whether negotiations commence at a point where the investigation is complete as it is in our case. Or, for example, in the Victorian consumer affairs model, where it can come in at any point in the process. So WHSQ would be satisfied that no new information is going to come to light at the point at which we start the EU process.

CAV: I wouldn't overstate that. A fair degree of investigation is undertaken at CAV to the point where the view has been taken there's a breach of the law. But even if you have an extensive investigation to the point where you think you've done enough, the fact is you don't know what you don't know at that point.

Helen Bird: ASIC has a very good example in the GE Money undertaking that it concluded in March 2006 where exactly what you're describing happened. An

undertaking was arranged, it was signed. And, during the process of the compliance, it became apparent that the extent of contravention was much greater than had previously been ascertained. So ASIC, by discussion but essentially of its own initiative, simply withdrew the undertaking and announced that it would be proceeding with further action.

ASIC: In the EU it will have something akin to a release clause. That is, a clause that will say that "No further action will be taken in respect of the conduct that is the subject of this EU, but we reserve the right to take action in respect of any future conduct or conduct not covered by the EU". That's why it's so important in the EU to detail the conduct. So therefore A, B and C is the conduct which you won't take any action in respect of. If you discovered D, E and F, then you are fully at liberty to take action. It's like any release in a contract but normally we would not accept an EU until such time as the investigation is as concluded as possible.

If the regulator is going to be contemplating an ongoing compliance process, then I guess that it has to reserve to itself the right to take action in respect of anything that falls out of that process. But a compliance system type of thing is going to be more resource intensive to monitor and deal with than, for example, a corrective notice which can be done next week, or a formula for compensation to consumers which can be fulfilled within a matter of months. The ongoing compliance for us may be very expensive to monitor.

WHSQ: In the workplace health and safety area, it would be limited by our statute of limitations anyway in terms of any subsequent information that arose from enforcement responses. But in our recent amendments, where things that come out of a coronial inquest can lead to subsequent initiation of a prosecution, it extends that period. I think our EUs would tend to be very much focused on the particular circumstances of the incident that led to the alleged contravention so that ongoing non-compliance broader than that we would factor into it anyway.

ACCC: Some other things that we wouldn't accept would include a statement that the EU is not an admission for the purposes of third party action. Also, we wouldn't allow terms that would help set up any defences for possible non-compliance or statements that the conduct was accidental. We also avoid inclusion of self serving statements by the corporation in any attempt by it to minimise its public damage.

ASIC: We don't allow non publication clauses because it's in our Act that we can't do that; but often a lawyer will say, "We'll do this as long as there's no publicity or that there'll be joint publicity." That's something that we've said "no" to. Joint publicity is dangerous. If you've got a long protracted argument about what's in an undertaking, you'll have a longer argument about what's in the publicity. So they're two no no's.

WHSQ: We have done that once before. With the XXX EU there was a release which was a joint effort and was being released from the Minister's office. In that particular case, it worked quite well. I think we were pretty happy with the outcome that we got in terms of providing information out there, and of course it did rely on the obligation holder being on board with what we were trying to achieve.

We don't get huge fines in Queensland - we're not talking hundreds of thousands of dollars for fines - so our ability to get things in the press is difficult. So anything that

helps us to perhaps get it out there and create some mechanism for deterrence is to our benefit.

That's one of the reasons I asked about business re-engineering: Because if you're looking at the effectiveness of EUs, a critical factor is what else in business did they influence? Do they, in our case health and safety, drive a prevention message and how can you link that to ensure that occurs?

Chair: Let's switch to the creative examples.

ACCC: We see undertakings as an extremely powerful tool able to address any number of issues. Staff are not discouraged against the use of creative solutions encompassed in an undertaking when addressing the problems or concerns raised under the Trade Practices Act.

One interesting matter that involved the use of undertakings was G.O. Drew Pty Ltd. This matter involved a substitution of organic eggs with free range eggs. As part of G.O. Drew's self reported admissions to the ACCC at the time it indicated a willingness to pay $270,000 as a form of penalty for engaging in the substitution and as a form of contrition for loss or damage caused with respect to the organics industry and the particular organic certifying body that was involved and whose name appeared on the organic egg cartons that housed the substituted eggs. This offer of money from G.O.Drew was still coupled with civil proceedings that were instituted by the ACCC given the blatancy of the conduct.

In relation to the offer of the $270,000 by G.O. Drew, the ACCC saw the best way to secure this offer was by the use of undertakings pursuant to section 87B of the *Trade Practices Act 1974*. Pursuant to the undertaking the money was secured in G.O. Drew lawyer's trust account; that way the money would not be lost over time and it remained clear that the money was offered by G.O. Drew and not issued by the ACCC, albeit the release of the money to the two beneficiaries nominated by G.O. Drew in the undertaking would occur upon the instruction of the ACCC. Those were specific terms in the undertaking. I note G.O. Drew also elected the specific amounts of money that were to be paid to the two nominated beneficiaries from the fund pool of $270,000. In this case it was NASAA (National Association for Sustainable Agriculture Australia), the certifying body whose certified eggs had been substituted, that was to receive $54,000 from the fund pool; and, secondly, an emerging peak organic body in the industry, the Organic Federation of Australia (OFA) which was to receive the remaining $216,000 as the second named beneficiary. The OFA had already been actively pursuing attempts at creating a national organic standard for Australia at about the time G.O. Drew's conduct came to light. The benefit of a national standard would have acted as a benchmark to the industry on what qualifies as organic produce and what the term 'organic' means. With the absence of a standard, it proved to be a very difficult issue for the ACCC in establishing the definition of 'organic' to the Court in the civil proceedings aspect of the matter.

With respect to the Court proceedings, the Court was made aware of the actual undertaking's existence. However, also as a sign of respect to the Court - as the ACCC did not wish to pre-empt the Court's decision in its proceedings, the ACCC held off in instructing for the release of the money to the nominated beneficiaries whilst those proceedings remained on foot.

In the end the civil litigation was finalised by way of consent orders for declarations and injunctions, with the section 87B undertaking having been attached to the parties' Agreed Statement of Facts filed with the Court in the course of the civil proceedings. I note from interest that on the day of the actual final hearing, counsel for the ACCC noted with the Court the yet pending release of money to the beneficiaries under the undertaking. There had been quite a time lapse since the execution of the undertaking securing the pool of funds and the final hearing day. The Court indicated its surprise and instructed that the ACCC to go ahead with its instruction for the release of funds to the beneficiaries whilst awaiting the Court's judgment in the civil proceedings.

In the furtherance of maintaining accountability, NASAA and the OFT's respective share of money paid by G.O. Drew has been put to use towards designated improvements identified by NASA and the OFA and detailed in individual Deeds of Agreement held between each beneficiary and the ACCC. NASAA has made use of its money for new hardware, software and procedures for improved monitoring of organic produce certified by it. The OFA has put all its money towards developing and implementing the Australian national organic standard.

A second interesting matter for the ACCC involving undertakings was the Dodo Australia Pty Ltd matter, finalised in May of this year. It concerned misleading 'Free' offers for those consumers who signed up to three certain mobile cap plans - 'Free $29.90 Mobility Cap Plan'; Free Fuel' and 'Cash Offer' 24 month mobile cap plans (the "Free Offer Plans") that included representations to the effect that consumers would receive specified goods or cash for free or at no cost when signing up to the relevant Free Offer Plan. The ACCC investigation revealed that the various 'free' offers were not necessarily free.

There were a couple points of interest concerning the Dodo undertaking and its resolution by this means. First, trying to encompass the evidence as would have been required in Court to prove that the goods were not free would have actually been quite difficult, because in some cases it hinged on the cap. Some people were not receiving some of these things for free and for others maybe a component of it was free; the ACCC would have had to demonstrate this to the Court. In this case, the 87B undertaking offered simply avoided this whole argument because Dodo agreed to issue refunds to all of the affected persons - persons that could establish that they signed up to the relevant Free Offer Plans. And instead of Dodo having to write away to the various affected parties, Dodo went for a very quick automated account handling system where refunds were issued fairly quickly. So those features allowed the ACCC to get a resolution in a matter very quickly and efficiently for all affected consumers.

A third case example which demonstrated the ACCC does not see the option of an undertaking being light was that of the Ausia Australia Pty Ltd matter. This case concerned non-compliant baby walkers in contravention of a mandatory product safety standard. The matters resolution by undertakings included a voluntary product recall that cost the company about $120,000 for a nationwide recall. It also involved the trader spending in the vicinity of about $40,000 in the placement of information notices, on the importance of buying products that do comply with mandatory standards, in popular expectant mother magazines. The result allowed for a targeted message aimed at the most appropriate audience in this case – expectant mothers. All up this action cost the trader over $160,000 and proved that undertakings should not be considered a cheap option.

Chair: Has anybody else an example of a creative undertaking?

CAV: Can I comment about the financial aspect? There's many undertakings from CAV that include a financial extract where a wrong has been identified and we can show that there were 50 consumers ripped off for $100 each, and it's a condition of the undertaking that you refund $500 to these people. My advice to the previous directors has been to steer away from financial penalties. There was one where a Telco came to us saying, "Look, we'll enter in an undertaking. We're willing to pay $15,000 to a charity of your choice." To me, the risk there was that there was not a quantifiable amount of compensation. We identified a large systemic wrongdoing but we couldn't identify who should get what, and the risk is they offered $15,000 - and it would be a nice little headline. But the risk is that it can be seen as a big business paying off a regulator indirectly to defeat the risk of going to Court. So to bring it back to your first example, that $250,000, how was that quantified?

ACCC: That was just the figure – $270,000 - that was offered by G.O. Drew. Organic eggs demand a premium price. A good component of the figure would have been what they would have made in having sold those eggs over the period of time that the substitution was occurring. In this one it's interesting that it didn't stop us going to Court with what would have been the normal transaction.

CAV: I can see that this is removing the risk and saying this is tantamount to a Court sanction. But if somebody came back to my director and said, "Well, why did you accept $15,000? Why not $30,000 or why not more?", that's where that is a risk and to this point in time we haven't accepted a direct financial contribution unless we can identify going to a certain place.

ACCC: The ACCC has dabbled in a few of those, and the current Commission is not supportive of donations to charities, so I don't think we'll see any more. But one of my staff is very proud of the fact that not only did he force someone to offer a contribution, but he'd also done all of his tax calculations and worked out what their tax benefit was going to be by making a donation to a charity, and added that back in. But I can certainly say the current Commission doesn't see that as an appropriate remedy for all of the reasons mentioned.

WorkSafe Victoria: We take the same position.

Workplace Ombudsman: Is there a distinction to be drawn between making a contribution that protects the integrity of the system we're regulating - as in developing a national standard to stop it happening again? We have one undertaking where the company has made a contribution to our employment law centre in the particular state. So there's another resource to assist employees to maintain integrity. I think there's that distinction between that sort of a payment and one to just a general charity where there's no nexus.

Helen Bird: I just wonder about the enforceability of some of these things. I wonder how, if ultimately the money wasn't paid, how you would actually be able to enforce payment? You would have to show that the regulator had the requisite power to enforce payment. There might also be problems where the undertaking imposes obligations on a third party who doesn't sign up to the undertaking but who nevertheless is given obligations by the undertaking - there's no way of enforcing it. In the case of ASIC, for example, the regulator has the power to accept a cancellation of registration or license under the Act of an auditor, liquidator, etc. Now, it might be

a complete ban, or alternatively it might say, "Come back in so many years and we'll re-register your license. And, when we do, we will require you to have made arrangements with your future employer under which you will be adequately supervised and monitored, and there will be reports to ASIC about your performance, and whether you've complied with the law." And there are a list of obligations on an employer in the future who doesn't actually exist yet but who is part of the undertaking. So it's a great idea because it's dealing with the future. But the difficulty is whether or not it's enforceable.

ACCC: With respect to the G.O Drew matter, those were the points that were on our mind and with respect to that $270,000 it was available there and then. We knew that we were most likely going to be looking at civil action still as a hybrid with it, so we didn't know what the timeline would be there. We wanted to avoid that situation where several months or a year down the track they said, "Well look, we just don't have the money anymore." So that's the reason why we immediately secured the money in the trust account of their lawyers - so that it remained there and could not be accessed.

I certainly take your point about how would we ever be challenged about the enforceability. We signed up deeds with the two recipients between the ACCC and them as to what their obligations were in terms of accounting for their use of the money.

Helen Bird: All the time when you're doing these things it's got to be referable back to some power in the Act. When it's a direct response to the contravention, that's very easy to establish; but the more creative we get, the harder it is to tie it to the contravention. You have to also wonder about who would be the party to take action if they are not complied with.

ACCC: But I think it comes back to the issue that we have to do everything in our power to retain the value of these things and ensure that they don't become sloppy instruments tossed around as an easy way out, or so creative that they no longer have any relevance to the fundamental power of your agency. There is a real risk for any agency who starts to get too carried away with their creativity, the golden goose will be destroyed.

David Cousins: One of CAV's experiences is that with undertakings, there were two things that we couldn't achieve with the other powers we have in the Act, where an EU helped. The first was in product safety, where we seize banned goods that are dangerous to the public. Our practice was instead to seek through an undertaking an acknowledgement that the CAV would destroy those goods. There'd be no comeback from the party in relation to that. Subsequently the Act has been changed to allow that to occur without using an undertaking. Similar situations would apply in respect of adverse publicity orders or notices where we didn't actually have the power under the Act to do that, but we were able to do that through undertakings. Again, subsequently the law's been amended.

Chair: Any other examples of exciting, interesting and creative EUs?

WHSQ: I'll just talk briefly about one we did after the XXX incident. I'm not sure whether people remember the jet ski incident in 2005. The jet ski had a malfunction and lost its ability to pull up. and it lost its rider and careened off and injured three people in the crowd. We ended up doing an undertaking with XXX. The total value

of it was about $335,000 and it involved a whole range of things including some of the mandatory ones that we have in terms of our standard auditing of their systems etc. We tried to make a point about having the nexus between the incident that occurred and the benefits and where they come from. I'll just give you an example: XXX from that did a 30 second TV commercial on boating safety on the Gold Coast and that was also followed by a series of colour classy boating magazines that all the boaties used to read, going on to promote the story about being safe on the water. We had a problem with the actual isolation switch which was the key cause of the incident in the first place. It led to the development in cooperation with Griffith University of a research program under the terms of the undertaking to try to identify a way of coming up with a radio frequency isolation switch that was suitable for jet skis. It would revolutionise that. In the early days they were talking about the benefits that there might have been in translating that into fire trucks where you actually don't need to have a key to lock it up or go back to it in a bushfire scene.

Question: Does anyone have a general condition in the undertakings that there is a requirement there be compliance with the law during the period of the undertaking? So that if there was a breach of the law whilst the undertaking was in force, we could go back to Court and say "well you breached your undertaking".

Everyone: No, no, no. No way.

ASIC: Because there are likely to be difficulties enforcing it, because it would be going to Court saying "you must comply with the law".

CAV: There wouldn't be any problem in my view having part of the undertaking that you will not breach a specific section. But that's different from you won't breach the law. Otherwise it becomes too generic. So, specific: yes. General: no.

Workplace Ombudsman: We have the standard one in our undertakings that you'll comply with the agreement-making provisions of the Act in the future. I assume we have that in there for the same reason. The issue is that it actually gives us access to a broader range of remedies - because for breaching an undertaking the Court can issue any order, whereas if we're just prosecuting for a breach of the Act, we're only going to get a monetary penalty.

Vic EPA: We have circumstances where companies might have offensive odours beyond the boundaries on their premises, and they might come to us and talk about an enforceable undertaking and say let's include a prohibition of offensive odours over a period of time.

WHSQ: But wouldn't that just be another breach?

So you know if it was a tannery, you may deal with setting up some community networks and then some better equipment to isolate the nuisances. But at the same time if something goes wrong again and their systems are found to have failed there clearly is a prosecutable offence. But I guess you're trying to prevent getting to that point, yeah.

Chair: Do we have one more example?

ACMA: We had one just quickly, we received a number of complaints last year about the first series of Underbelly and some Gordon Ramsay programs. After an investigation, the ACMA came to the view that they had been incorrectly rated as 'M'

rather than ‘MA’ which had the effect that they were shown at an earlier timeslot than they should have been. We accepted an undertaking from Channel 9 as to their classification and training processes, but one of the things that can result from a breach is an account of profits being ordered by the Court. Channel 9 included in a confidential appendix the formula by which we could calculate what profits they would get from incorrectly classifying an ‘MA’ program as ‘M’ and showing it at the 8.30pm timeslot instead of the 9.30pm timeslot - which was helpful but it’s a very complicated formula and it’s not available on the website. But that’s the most creative we’ve come across.

WHSQ: So were there any concerns about accepting a confidential schedule?

ACMA: It’s our policy to make everything public, but we were willing to accept confidentiality in this case.

4.3 Accountability, Transparency and Inclusion of Stakeholders in Negotiation and Content of Enforceable Undertakings

Issues for Discussion

Accountability is central to the successful operation of EUs and operates at two key stages: decision-making and performance.

Accountability, transparency and inclusion in *decision-making* about accepting or rejecting applications for EUs:

- What formal accountability and transparency mechanisms govern your decision-making about EUs? Eg is judicial review available? Has it been used? Are EUs published on a public register? Do you ever get any feedback from industry or the wider public about the terms of EUs you have negotiated?
- Do you do anything to get the opinion of affected parties (or their representatives) before deciding whether to accept or reject an EU? Have they ever been included in the actual negotiation of the terms of the EU with the firm? What about independent experts? How is this done? Do you think this has been effective?
- Have there been any situations where people have been unhappy with the terms of an EU? What happened?

Accountability, transparency and inclusion in *performance* (monitoring implementation by firms and enforcement) of EUs:

- How do you monitor compliance with EUs? How do you know whether the firm has complied with the terms of the EU or not?
- Do you require the firm to hire independent experts or reviewers to report on their implementation of the terms of the EU? If so, what conditions do you put around this process? Eg do you have to agree as to who is appointed? The form which their report will take and so on?
- Have you ever required the firm to consult with affected parties as part of the implementation of the terms of the EU? How has this worked?
- What do you do if you discover non-compliance with an EU or a problem with implementation of EUs?
- Have there been any situations where you have needed to enforce an EU?

Discussion

Chair (Christine Parker): We'd like to hear now about how panels with external people who advise on EUs before they are accepted work; and also any other ways in which you as organisations feel that you have been made accountable or transparent on the way you've made decisions about EUs. We're also interested in the ways that you're proactively making yourselves accountable through publicising EUs and so on. Let's start with Workplace Health and Safety Queensland. You have a panel that you use: Do you want to say a little bit about the external transparency aspect of that?

WHSQ: For the EU panel we use non-departmental people. That was decided right from the start of our managing these undertakings. So we have a couple of representatives who represent the employee side of life and a couple from the employer side.

All the information that's provided by the applicant forms part of the package that will go eventually through the panel to the decision maker. None of the information that comes in is withheld. It has to all be put down, and we use a matrix document to analyse all the information that's provided and break it down into manageable chunks for the panel to consider. I think documentation is one of the things that is very important. You have to ensure you capture all the evidence that comes in and the reasons for the decision have to be well documented.

In terms of transparency, we have a process where all our undertakings are published on our website. They're published in full now as well as a summary. There's also a notice of acceptance which goes into the public notices section of relevant newspapers.

Chair: At what stage does the proposed EU go to the panel and does it go to whole panel or is it just one member looks at each EU?

WHSQ: It goes to the whole panel. The paperwork is done at the EU unit. Their role is to settle the draft undertaking with the obligation holder. When the obligation holder and the EU unit believes that it's settled, then it will go to the panel. We try to avoid doing too much argy bargy before it would go to the panel – only two revisions perhaps. Then of course the panel will often also want to contribute to some element. There could for example have been a lot of money spent in a particular area at the expense of something that they perceive as more of a priority. They might certainly reject some clauses out of hand as being too close to compliance rather than above compliance. So the panel do have quite some involvement. They're very active players.

Chair: So does the panel have an actual face-to-face meeting?

WHSQ: Yes, although we have one member who often might come in by teleconference.

Question: Do you get in principle approval for the EU from the Chief Executive first or do you go to the panel first? And what happens if the panel's not happy with the EU that has been offered? Do you go back to negotiations with the obligation holder or is that the end of the matter?

WHSQ: No, we don't have any in principle approval before we go to the panel. So once it's gone through the panel then it goes to the chief executive who can "yay" or "nay".

If the panel's not happy with the undertaking that's been offered, there are two choices. The panel can either see that the application is worth salvaging. They may request I go back and have a further discussion with the applicant. Or they could say that this is just totally off the mark and put forward a recommendation that it be rejected, in which case the decision maker obviously takes it on board.

Question: If you have differing views on your panel, how is that managed?

WHSQ: They sort it out. They just take one recommendation forward as a panel. And it's a very robust discussion.

Question: And in terms of broad policy of EUs, do they have a role in that or do they just deal with individual EUs?

WHSQ: No, they just deal with the individual applications. But that discussion is very broad. They're often very interested in the time that it's taken for matters to progress through the process. It's not something they necessarily have any direct management over. But they'll often ask for reports on those sorts of things.

Question: What is the timeframe roughly?

WHSQ: In reality, they probably take three months to do them. However, there's probably a lot of lag time initially before we can actually get into them. Some of them come to us quite late in the procedure in court. You might have a matter that's on its fourth mention in court before they decide, "Oh, let's throw an EU in." So there's a bit more pressure on us to try to be quick because the Magistrate's already getting a bit toey about how many times he's seen this.

We don't at the moment have any service standards around the timeframe. We've actually been working on that and have set them both for us as well as the obligation holder. As long as we're keeping up our side of the bargain then we can insist that we need something back within a certain period of time. We have identified that it would take a minimum of 12 weeks.

Chair: Do others have thoughts or experiences about transparency and accountability in the decision making process?

WHSQ: WorkSafe Victoria and ourselves have very similar models for EUs. But we deal with the transparency and accountability issue through the tri-partite panel, whereas Worksafe Victoria very clearly said this morning that they don't see the stakeholders having a role in the prosecution or enforcement process. So, I'm really interested to find out how Worksafe Victoria deals with some of the issues that we use the tri-partied panel to deal with?

WorkSafe Victoria: There's a couple of things from our perspective on transparency. One is that we publish all of the outcomes on the web. There's also generally a press release that's issued at the time that we accept an EU, and we've got a register that's on the web as well. All of the guidelines on how to apply for one, the templates, all of that is available on the web and our lawyers will assist people who are coming up with an offer so that it maximises the chance that it will accepted. Every written offer from a duty holder is logged but it's not open to judicial review.

Question: Is that specifically legislated about no judicial review?

Worksafe Victoria: No, there's an accountability mechanism hardwired into the legislation though which the DPP gets to review any decision not to prosecute. For that reason we say that that would be the accountability that's required. Now, that's not been tested. In Queensland there was a judicial review under a very similar provision. The Supreme Court in that case accepted that it was an exercise of administrative decision making.

But it's for that reason that we felt that there shouldn't be a tri-partied body. There's been a review of all of the OHS Acts around the country in the last year. That review

recommended a tri-partied panel on all of the EUs and recommended that it be amenable to judicial review. So we're clearly one out on that.

As part of our criteria we insist that the duty holder actually undertake those consultations with their workforce, with any onsite unions, that sort of thing. And then come back to us as part of their application with that position, rather than us having those negotiations or discussions with stakeholders.

The only time, we've had a couple of issues where our decision-making is called into question is where there are co-defendants and we've accepted an EU in one case but not in another on the basis of differentiating culpability. That's the scenario that led to the judicial review in Queensland. In another case we've had an injured worker who's effectively a victim of an OHS offence unhappy with accepting an EU for one co-defendant and not the other. Now, that person has a right to have the decision reviewed but ultimately didn't. We took that into account but we felt that the EU was a much better and more constructive way of dealing with that breach than a prosecution.

Question: How does ASIC do its decision making in this regard?

ASIC: It depends, if it was something that was very high profile then no EU would be executed without Commission approval. If it was more the usual type matter it would be decided at the senior executive level. We may consider entering into negotiations about an EU in response to an offer where we can determine that it is an appropriate regulatory outcome and we can detail the relevant conduct. It would usually be reviewed by the chief legal office before being submitted to the person being delegated responsibility for executing it. There are some strict protocols and internal manuals about lines of authority and the process by which it occurs.

We can't be accountable to external stakeholders if to do so would require us to divulge confidential information. So if an EU is coming off the back of an investigation, it's not really open for us to engage with the consumers or investors about whether they thought what we were doing was appropriate. But we would not want to accept an EU that precluded third party rights. So for example, if an EU was proposing payment of a certain figure on account of third payment claims pursuant to some kind of a formula set out in it, it couldn't have the effect of barring any third party from proceeding to pursue the balance of their claim elsewhere.

Question: Does consultation with relevant consumer bodies ever go on?

ASIC: I don't know from firsthand experience. Typically if we had an investigation it would come from a referral and the referral would often be a complaint. The complaint would often be from a consumer organisation so in determining the extent of what was wrong about a contravention we would probably have the heads up via that route rather than at the backend.

ACCC: The ACCC's mechanism for testing how valid these solutions are is not on a case by case basis. But we have a Consumer Consultative Committee with whom we meet on a quarterly basis. At every one of those meetings there is a presentation on the various enforcement outcomes. It will be in that forum that we look for a more general sense of whether we got it right or wrong.

CAV: Similarly, at Consumer Affairs there's a Working Together Forum and it would be normal for the director to do a report to the members going through the outcomes of cases.

Chair: I was interested that WorkSafe Victoria has made it a practice to require the obligation holder to consult with unions and employees. I was wondering whether any of the other regulators around the table have that as a sort of formal policy or had required it on a case by case basis?

CAV: Just in thinking of some of the ones where consumers were affected by a matter, how many consumers know the onus was put on the organisation to in fact contact consumers? In one case 65,000 people had to be contacted to ascertain whether or not they'd been you know forced to lose supply basically without proper and formal consent. But that is slightly different to what you're asking.

WHSQ: In our case I think the way in which the panel was selected was really to take people that weren't representing groups but were representative of sectors of industry. They're not there on behalf of anyone else; they're there as a barometer for us. I think that there is probably scope for us to perhaps even build in something like the Victorian approach in terms of advising our panel about what level of consultation has occurred.

Worksafe Victoria: There's a duty to consult your workforce in relation to any health and safety matter in Victoria and so hanging off the back of that we would say the success of any measures in the EU depends on the employees and responsible managers being engaged and so we do it on that basis.

ACMA: A lot of the conversation about accountability, transparency, inclusion it's all been about peak bodies. We might be different but most of our transparency and inclusion actually comes from the complainants themselves. To what level do different regulators include the "victim" in the process. Or do they just get given a copy of the EU at the end?

Worksafe Victoria: We consult directly with the injured worker but we don't feel bound by that in the same way we're not bound to prosecute or not prosecute depending on the victim's views. But we always take into account because they've got a right. Also when we decide not to prosecute and we accept the EU, we tell them about their right to challenge that decision ultimately to the DPP.

CAV: A matter relating to transparency with the undertakings themselves comes to mind. A number of firms that we've taken undertakings against have complained that these undertakings were still hanging around on the website four or five years after they'd been undertaken. So after much consideration the decision was made that we would only maintain the undertaking on the website for three years after they were accepted. Of course you can't erase the annual report which lists all these undertakings as well. But that response was made because these were generally low level breaches and often companies have done really good things to address the problem and move forward.

We also put it in the undertakings to say: "The Director of Consumer Affairs will register this undertaking in the register of undertaking on the Consumer Affairs website". So it's being transparent to people in our undertakings. We tell them exactly

what the Act says we're going to do. But hopefully we make it even clearer that in the age of the internet, publication means publication on the web.

ACCC: Another clause that we have goes an extra step. It says "the party further acknowledges that the ACCC will from time to time publicly refer to this undertaking."

Chair: Let's move onto the transparency of the firms who are giving the EUs. How are regulators monitoring compliance with the EUs? I understand there are a variety of practices around the use of third party auditors or reviewers to check compliance, or whether it's a regulatory agency inspector or just the firms themselves self-certifying.

ACCC: We have a compliance monitoring unit that deals with just the compliance program that's attached to the undertaking. So the undertaking is signed, that unit is made immediately aware of that undertaking. Straight away the compliance monitoring unit send off a letter to the actual trader advising that they have a contact person, and they monitor the obligations under that compliance program. We've got four different compliance program templates and all of these templates are available on the internet. From Level 2 and above they do require reviews or audits to be done and the reports are sent to the compliance monitoring unit. Traders are free to use the services of compliance professionals of course in the initial and ongoing implementation of the compliance program. The ACCC obviously doesn't recommend any specific parties.

The other (non compliance program) obligations in the EU are the responsibility of the project officer to ensure that those obligations are complied with. We do tend to incorporate reporting mechanisms into the terms of the EU to assist us. So sometimes it could just be very simple. For example, if letters are to be sent out within 28 days of the acceptance of the EU, then we'll require the trader to send us a list a few days later detailing all the people they sent the letter to. I think we're getting a little bit more elaborate in trying to get professional mechanisms so that we can check. But with some of these things it just depends on what the obligations are.

Now, if there is non-compliance with an EU that allows us to take a matter to court. That is not that common. There was one that occurred that probably was a little bit more interesting – this was the 'StoresOnline' matter.[32]

The only other thing of significance is where we have a compliance program and a requirement that there be a review, our position is that that review be performed by an independent reviewer. Sometimes there is some contention about what amounts to an independent reviewer, particularly if a company on first being contacted by the ACCC rapidly goes out and engages someone to say, "Well, you come on our team as a compliance professional and help us comply". We might go through a couple of months of argy bargy, and we come up with an undertaking, and then we say we want an independent review. But that person they hired is not independent, because they're already on the company's team. So a company can quite often find themselves engaging two compliance professionals: one who they engage to fix the problem and

[32] Information on the matter can be accessed from the ACCC's website at www.accc.gov.au in the 'news release' titled, 'ACCC commences proceedings against StoresOnline for alleged breaches of s.87B undertakings' release # MR 270/07, issued: 5th October 2007.

help them design a solution; and then another one to independently review that one. That's our stance. For smaller companies sometimes we won't insist on the independent reviewer (the second one), if there's evidence they've gone out and got a professional. But certainly for the big end of town we require independence and give some specific guidelines as to what that review is. It's not just a tick and flick audit. We want some evidence, and the report of that review comes to us as well as them.

Chair: What do other regulators do?

ASIC: We normally have an independent expert paid for by them.

Chair: And so do you have any standards around that either formally or informally?

ASIC: In relation to financial services licence holders, there are various required standards like accounting standards, audit standards and so on. So that would normally be set standards. And the reports would be, to be completed by particular times. If those reports were unsatisfactory, then there'd be a process whereby there'd be a provision for a second report over a longer period of time. So they're sort of self executing in the sense that there'd be provision as to what was occur in the event that things weren't satisfactory.

WHSQ: We have a monitoring regime not unlike the ACCC's where we have a compliance officer whose sole job is to ensure that none of the one's that we've accepted go off the rails, and, if they do, we know about it fairly quickly. The terms of the monitoring are actually scheduled into the EU and it might lay down a series of six or seven periodic audits.

We used to allow third party auditors. We now use our inspectors. They do all the compliance monitoring and it's all cost recoverable [that is, we charge the firm for the monitoring]. We work out how many times the compliance auditing is going to be required over the term of the undertaking and a price is agreed in a clause that they pay upfront for. So our inspectors usually do an audit about every six months. We can do additional audits if we see fit [and we pay for those]. There were issues with some third party reviewers being too close to the obligation holder. We got to the point where we felt it was far more appropriate for the regulator to have a more hands on role in the monitoring.

Our compliance officer issues a monitoring schedule to the obligation holder which spells out very clearly what they are supposed to deliver and when, and how much it's supposed to cost. Because all these sorts of things, including the cost of the activities promised, is subject to compliance monitoring. So if they say something is going to cost them $20,000 then we're expecting our auditor to see receipts for that sort of amount of money. In the early days, it used to be based on best guess. Now we've built in a minimum spend clause whereby there is an agreement that the value of the undertaking is Y and that the company will spend a minimum of X on the undertaking. If the deliverables come in under X, then the EU says that the balance will be spent on certain things.

We did have an element of non-compliance with one EU and it was a significant one for us and we could have taken the matter to Court. However on that particular occasion it was felt by the chief executive that it was generally best to bring them back into line. We generally don't find a lot of non compliance. There will be some

who let timescales slip a little bit. Sometimes it's a little bit beyond their control if you've got a requirement for certain activities to be done and that specialist who was going to deliver it isn't available for whatever reason. You've got to be flexible in your timing that you put into your terms of your undertaking. So I think it's a case of spending a little bit of time making sure that our undertakings can be and are complied with rather than try to catch them and making them do it.

The other thing we do is right upfront as soon as the EU is signed, the monitoring officer develops the audit tool for the obligation holder. The monitoring officer goes in himself, has a face to face where possible and sits down and explains what his expectations are in terms of them delivering on their terms. So by providing them a copy of the audit tool, they use that as a tool to keep themselves online. So for example they can write down in the evidence column what the cheque number was that paid for that particular service relevant to that particular clause and so on. The auditor then really just has to go through and verify things. It also keeps the time you need on site as minimal as possible.

CAV: The question for us is that it's easy to monitor terms that have got specific date requirements such as, "You must conduct a review by the 1st of July". Where we don't do as good a job are the individual ones such as the unlicensed builder or unregistered builder with the term, "You will not build unless registered". We just don't have the resources to go out and do a monitoring exercise in six months time to put in surveillance or see if a contract is floating around with this bloke's name on it. It's only if we get further complaints that we'll know about the breach.

But with product safety and retail outlets who have given us undertakings, for example in relation to taking down no refund signs and so on, they are always seen as high risk in terms of inspection activity.

ASIC: If individuals are going to breach EUs, they are going to do so at their own risk and there's not much you can do about that. If what they were involved in justified imprisonment, then we wouldn't have accepted an EU in the first place. So normally you wouldn't accept an EU from someone who you didn't trust.

ACCC: A fascinating characteristic of people who have signed up to an EU and promised to be compliant is that they become disciples and are willing to report any competitors. And that suits us nicely because it shows there's a bit of competition in the marketplace. But it is something that we are trying to systematically capture a little bit better. We are putting in place a process to make sure that it's an automated process that if someone has signed up to an EU and there is any form of contact to our info centre about that trader it will automatically trigger an alert within the EU unit. We did find we were inefficient at recognising not necessarily a breach of the EU but some conduct that you wouldn't expect from somebody who had just been through that process. And we were equally deficient in recognising perhaps the added weight which you give to a complaint from a trader who had just been through the process and you would expect to be pretty alert to the law.

ACMA: We generally only investigate where there are a substantial amount of contraventions and complaints over a long period of time. So if after someone's offered an EU and we've accepted it, the complaints drop off markedly then, whether or not there is actual compliance with the EU, the outcome we want which is compliance with the Act has been obtained. So we're not going to pay too much close

attention to that entity. But if complaints are still consistently at a high level, then we will monitor it more closely.

ASIC: When we're dealing with someone who is in the financial services sector, then if the conditions are not met under the undertaking, at the end of the EU, we will also amend the terms of their licence. Because the license has got this long-term thing about it. If you can't get it right within the three or four year period of the EU, then it's time to start again.

Chair: I was just wondering whether anybody had actually had any experience with there being an EU and then there being some kind of private action seeking some kind of compensation or something else afterwards?

Workplace Ombudsman: In the Fair Work Act the employee or the union can actually lodge exactly the same proceeding that we could have initiated. So we extinguish the Ombudsman's right to enforce the penalty provision when we accept an EU. But if the employee doesn't agree with the outcome they can take it to Court themselves.

4.4 Effectiveness

Issues for Discussion

EUs show a great deal of promise as a more effective and efficient way to solve regulatory problems and to promote compliance than court proceedings and financial penalties. There have been a few academic papers seeking to evaluate the effectiveness of EUs by looking at the terms of the EUs and conducting stakeholder interviews. But ultimately, regulators will probably need to conduct their own reviews of the costs and benefits of EUs in order to judge whether they meet their promise or not. Roundtable participants are invited to share any experiences they have with evaluating the effectiveness of the EUs and to brainstorm about ideas for further evaluation in the future:

- What happens after the EU is agreed? (Eg are there reviews? Further meetings? How do you review whether they have worked well or not?)
- What experiences have you had with evaluating EUs? What were the criteria for evaluation? How was the evaluation undertaken?
- What should be the criteria for evaluation of EUs? (Eg timeliness of the process for negotiating EUs; firm or stakeholder satisfaction; the dollar value of promises made; whether firms comply with their undertakings; improvements in overall compliance…?)
- What might be useful ways forward for evaluating EUs?

Discussion

Chair (Christine Parker, University of Melbourne): The last thing that we will discuss is effectiveness: How do we know whether EUs actually work or not? The monitoring and review of individual EUs that we have just been discussing is obviously relevant to this. Regulators might also reflect on individual cases to

determine whether an EU was in hindsight the best way to deal with the matter. And obviously this is always as compared to with the other available enforcement tools.

But we might also want to more broadly evaluate the effectiveness of EUs. Quite a lot of the studies that have been carried out to date might be described as implementation studies rather than effectiveness studies. They examine whether the regulator has gone through the policy process, whether they've entered into EUs it in a fair, consistent, creative way, and whether the firm or the individual has done what they said they would do. But that's all about the implementation. How do we measure whether there's a better outcome at the end of it?

I found it really interesting that Workplace Health and Safety Queensland are quantifying what the dollar value is of the EU. So when Richard Johnstone did his study, he was able to compare the dollar value of the promises with what the penalties would have been. So that's obviously one way to try and get something that's at least a bit measurable about an outcome.

We might start by asking what, if anything, regulators are doing about reviewing either individual EUs or the program as a whole. Then we might throw some ideas around about what else we might do to try and measure these things.

CAV: I would have said that our EUs are seen as one of our compliance tools. So looking at any particular problem area, EUs are just part of a broader strategy that is aiming to improve performance in that industry. So the question is should you look at them in isolation or should you look at them as part of a whole enforcement strategy?

WHSQ: We give weight to that as well. While we do quantify our EUs I'm nervous about that being some sort of measure of the effectiveness of EUs. I think it goes back to the very question that you posed: when is an EU appropriate? I think as a regulator we need to be very clear about what it is we're trying to achieve with the EUs. If it is about behavioural change at the workplace then that's what our evaluation has to look at, not just the quantity. I think the quantity is an interesting thing for us to have. It helps us to justify when others are arguing why did you choose EUs over prosecutions. But in terms of it achieving that compliance strategy, I think we really need to understand what's the underlying purpose of EUs.

Workplace Ombudsman: What's the contribution to general deterrence in the community compared between an undertaking that gets press coverage and a court case that gets press coverage. You'd assume that the court case holds greater weight in the minds of the reader. But what is the differential between the two?

CAV: I'd challenge the first statement in your effectiveness blurb [above] that "EUs show a great deal of promise as a more effective and efficient way to solve regulatory problems and to promote compliance than court proceedings or financial penalties". I think I agree with the concept that it's really just another tool in our armoury which you use in some circumstances. It helps you to have a more robust framework as a regulator. But it's probably not more than that.

Helen Bird: It fascinates me that Richard Johnstone was saying that he sees EU as higher up on the pyramid of enforcement measures. I've always thought of them as being down the bottom because they're negotiation, and they have education and persuasion. I've been wanting to ask you all day why you thought that. I think the

debate about what an EU does depends on how we see its place in that framework. If you have a sense of that, then even if you say there's more value attaching to a court case in terms of deterrence, we know that we can harness the value of the deterrence from the Court case to use EUs strategically. But if we don't have a sense of where they fit in the pyramid, we don't use them strategically, and we're wasting the big guns up the top which can remain benign provided they're used effectively. That's the theory. So why do you see them as higher up the pyramid?

Richard Johnstone: It's partly because of the way they are used as an alternative to prosecution in the area I know, occupational health and safety. So particularly in Queensland's case you've got to be pretty far down the investigation track before they even get on the radar. Secondly because they are pretty extensive both in their systematic requirements and also in their monetary requirements.

Helen Bird: In the ASIC context, where EUs do have a fair degree of seriousness, to me it's basically a way of achieving a settlement. And a very effective settlement but it's a bit wishy washy. My understanding is in fact with an EU it causes a fair degree of work. So we don't want to go into one of those for something that doesn't need that kind of level of attention.

WHSQ: But we've got a range of tools at the lower level in terms of improvement notices, prohibition notices, infringement notices, the list goes on. So it's really systemic failure that gets you either to the courts or into the EU process. We can seek court orders to secure compliance but they're all about securing rectification as opposed to some penalty. We would see the EU, the infringement notices and prosecution as a penalty. So they're the sanctions, the others are about directing compliance.

That raises the issue for us of measuring effectiveness. We expect that if we issue the notice (for observed breaches) that they will get that remedied immediately within days or weeks, sometimes a couple of months. So that's one measure: was their compliance achieved? In 90% of cases they do. But with an EU, and indeed with prosecutions, we don't know how effective they are at implementing sustainable change and compliance. We know it's difficult to measure. In our case it's probably a bit easier because we can measure them by the rate of injury at a particular workplace.

Chair: So you know that a notice usually leads to rectification pretty quickly?

WHSQ: Of that breach. Because the inspector goes back and checks that the machine's guarded or the manual handling risk is fixed and so on.

Chair: But it will be narrow in scope.

WHSQ: Exactly. Has there been a sustainable change? Has that workplace culture changed? How do you measure that?

Workplace Ombudsman: In terms of the hierarchy, it seems to be implicit in the conversation that EUs are the mechanism we use to bind parties we couldn't normally get through a court order and often with prospective effect. As public officials I think you have to see that as almost a weapon of last resort up there with litigation. It's not something you'd go through before you've determined that there's a contravention of the Act. And at the same time as you say that, the fact is you don't have the resources to bring every case. It's recognising the reality by saying, "Look, we can't bring an action in every case, so we're going to have to settle some of them and one way we do

that is through EUs." You do then walk into the dilemma of not wanting to create the impression, "Oh, they're offering an undertaking. That means it's all too hard for them." Your prosecution and the EUs are the lever by which you get voluntary compliance for most matters. The only way you can do that is because there is an explicit threat as to what will occur if you don't comply. So you've got to create the environment.

ACCC: I think the Workplace Ombudsman's raised a critical issue. You can't deliver a regulatory model without some sharp end. In our circumstances prosecution is critical to the sharp end, and so are EUs. We have an internal battle to make sure that people recognise that although all of the other things we do are vital and important and valuable, they won't happen unless we've done some of the sharp bits. There's always this internal battle: Do you have to be in the sharp end to be important or do you have to be somewhere else? The answer is all of it's important. But it's inefficient trying to get everyone using your sharp end. And it's impossible to try and do your engagement with industry without some of the reminder of the ultimate consequences in court.

Chair: Workplace Health and Safety Queensland mentioned that they started off with only about 50% of proposed EUs actually being accepted, and then it improved. Did you have some process that put you on notice that there were more that could have been accepted and changed your processes? Is that something that just happens automatically or was there some measurement of your effectiveness occurring?

WHSQ: At the crudest level I guess we kept some statistics about how many applications we received and what the outcomes of those were - whether they'd been withdrawn or rejected or accepted. I think the change was really a matter of people getting more comfortable with it, not just in our OHS jurisdiction but also in other regulatory bodies doing more with them. Therefore the legal profession was becoming more familiar with them. Politically they also became a bit more palatable. Also we got better as we went along. We learnt our lessons probably the hard way in a lot of cases and so we finetuned.

Chair: And is that partly because you had a specific unit in your organisation that was responsible for EUs?

WHSQ: We actually report regularly to our chief executive and to our workplace health and safety board on the number of applications accepted, rejected, and withdrawn. So it would have been noticed regardless of whether there was an EU unit. But certainly I think having the unit with the responsibility meant that they could take very proactive action to respond to what they were seeing.

So we've had that process of meeting with the applicant upfront so that it was clear to them what we were expecting. So now some of them self select out. They realise that it's not going to be a cheap option for them and that they are going to be held to account to this undertaking. Some of them go, "This isn't for us, we'll go down the Court process, plead guilty and you know pay our $30,000, thank you very much and that will be the end of it." As opposed to others who actually see it as a real opportunity to change things in their workplace. Some have said, "This will actually provide us some leverage in the workplace because we'll actually be able to promote why we're doing this, and perhaps deal with some of the stakeholders in our workplace to try and bring about some change."

I think we became a little bit more upfront in our guidelines, the use of templates, all of those things. Also once we started to get some examples of EUs, they then became a point of reference for potential applicants.

Chair: I understand that the ACCC has a process of going back and looking at an enforcement action, whatever it was, and picking it apart and saying, "What did we learn from this, did it work, didn't it work?". I'm thinking of almost reverse engineering an enforcement and saying "Should this have actually been litigation? Should we have used a different strategy?" Do regulators actually do that? And if so, has it been used to learn any of the lessons that you've reported today about EUs? Or is it too resource intensive to go through this sort of process?

David Cousins: I think in my day at CAV we certainly talked a lot about post evaluation. But the reality is the resource issue just overruns you. As an agency you've got hundreds of matters potentially subject to investigation and the focus really has been on at that end. You'd like to be able to take more strategic views, stand back and evaluate. But unfortunately there's not enough done in that area.

Chair: But ultimately you don't know whether you're wasting your time unless you've done some of that.

David Cousins: But I think there's a lot of intuitiveness there that people have a good idea whether they've actually done something useful I think.

We prosecuted one chicken processor and we got $68,000 and that was effective and the big headline. We did another chicken mob and we did an EU and it brought about a significant change. The independent follow up on that showed that the short weights dropped from something like 48 per 1000 in 2006 to 1 per 1000 in June 2008. Now you can argue til the cows come home which was most effective. Certainly the most costly for the business was the EU. Certainly the complaints against the chicken manufacturers dropped but I couldn't tell you now who dropped the most. So it comes down to effective calls and maybe it becomes intuitive if you've got a body like our enforcement committee that's working well.

Chair: How would you actually measure that? You could measure whether a whether there's a big difference in perception of deterrence after prosecution or an EU. If you had the money you could just go out and survey all your chicken processors. You could go and inspect them all and see whether their weights matched what was on the packets. Or you could just survey them and ask them, "Have you heard about this court case? Have you heard about this EU?" Or you alluded to complaints dropping off after the prosecution. So you could just check is there a difference in complaints after a prosecution? Is there a difference in complaints after an EU? I would love it if somehow that kind of information could be made public and kind of aggregated in some ways so that we could say, "There were 15 EUs from Consumer Affairs Victoria and in half of them there was a large difference in behaviour at the end, and in half of them there wasn't. And there were 15 prosecutions and …". You might say "Oh yeah, we knew that all along, it was intuitive." But we'd know if it was true. Sometimes intuitions may be wrong.

WHSQ: Most people here know that Richard Johnstone and Michelle King did a review of our way of doing business when we got to the point where we needed to

validate what we were doing. We wanted some assurance that we were going down the right track. There was some criteria written up.

Richard Johnstone: Well, ours was largely an implementation study. My view is it's pointless going to the effectiveness study if you don't know whether the regulator's implemented a process as it's supposed to be. But even in the implementation studies some really interesting things came out and one of them was that face to face discussion leads to a greater acceptance of undertakings. It was really clear that whenever the EUs unit had early contact and repeated contact with the offerer of the undertaking that it was accepted.

The difficult problem is really the effectiveness study because we didn't really have enough time to do it. What we did was largely self reporting so we spoke to ten successful EU applicants and their endorsement of the process was overwhelming. So was analysis of the content of the EU which clearly showed structural and cultural changes. Now what I'd like to do is follow that up with a study in about two years time and just you know disguise myself as an inspector and go around doing inspections.

WHSQ: That's an offence Richard [laughing].

Richard Johnstone: But it's really about doing a bit more of the triangulating all that data about effectiveness and being able to look at injury rates although we know that that's not a completely satisfactory measure.

WHSQ: I think the self-reporting thing is something to explore more. If we do take the view that it's about behavioural change and sustained compliance and so on, and we make it clear to the EU participant that that is part of the goal. Then at the end of the process we could actually ask them specific questions that go to whether or not their workplace has actually delivered on that end. But we would have to address the issues that they might feel that disclosure would lead to us reaching a conclusion that they're now non compliant and us rushing out with greater scrutiny. That's something that we don't currently do that we would like to explore.

4.5 Participants in the Enforceable Undertakings Roundtable

Richard Johnstone, Professor, Law School, Griffith University (Facilitator)

Christine Parker, Associate Professor, Melbourne Law School, University Of Melbourne (Facilitator)

Australian Communications & Media Authority (ACMA)

Australian Competition And Consumer Commission (ACCC)

Australian Securities And Investments Commission (ASIC)

Consumer Affairs Victoria CAV)

Energy Services Victoria (ESV)

Environmental Protection Authority Victoria (EPA)

Electrical Safety Office Queensland (ESO)

Workplace Ombudsman

Workplace Health and Safety Queensland (WHSQ)

Worksafe Victoria

Helen Bird, Melbourne Law School, University Of Melbourne

David Cousins, Professor, Law School, Monash University

Marina Nehme, Lecturer, Law School, University of Western Sydney

Part 5: Published Works with Respect to Enforceable Undertakings in Australia

Australian Law Reform Commission, *Report 68: Compliance with the Trade Practices Act 1974* (1994), "Chapter 11: Administrative Powers: Enforceable Undertakings: s87B".

Australian Law Reform Commission, *Securing Compliance: Discussion Paper 65: Civil and Administrative Penalties in Australian Federal Regulation*, (2002) "Chapter 16: Fairness in Dealings with Regulators: Enforceable Undertakings".

Fels, Teresa, Joshua Gans and Stephen King, 'The Role of Undertakings in Regulatory Decision-making" (2000) 33 *The Australian Economic Review* 3-16.

Johnstone, Richard and Michelle King, 'A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *Australian Journal of Labour Law* 280-315.

Nehme, Marina, 'Enforceable Undertakings in Australia and Beyond' (2005) 18 *Australian Journal of Corporate Law* 1-20.

Nehme, Marina, Enforceable Undertakings: A New Form of Settlement to Resolve Alleged Breaches of the Law (2007) 11 *University of Western Sydney Law Review* 104-123

Nehme, Marina, 'Expansion of the Powers of the Administrative Appeals Tribunal in Relation to Enforceable Undertakings' (2007) 25 *Company and Securities Law Journal* 116-121

Nehme, Marina, 'Enforceable Undertaking and its Impact on Private Lawsuit' (2008) 22 *Australian Journal of Corporate Law* 275-292.

Nehme, Marina, Enforceable Undertakings and the Court System (2008) 26 *Company and Securities Law Journal* 147-171.

Nehme, Marina, 'Monitoring Compliance with Enforceable Undertakings' (2009) 24 *Australian Journal of Corporate Law* 76-102.

Parker, Christine, 'Restorative Justice in Business Regulation? The ACCC's Use of Enforceable Undertakings' (2004) 67 *Modern Law Review* 209-246.

Parker, Christine, 'Regulator-Required Corporate Compliance Program Audits' (2003) 25 *Law & Policy* 221-244.

Richardson, Kristy, 'Judicial Review of Enforceable Undertakings under the Workplace Health and Safety Act 1995' (2007) 27 *Queensland Lawyer* 250-256.

Streets, Sue, Petras Kruzas, and Mark Payton, 'Environmental Undertakings: Ownership and Obligations' (2002) 19 *Environmental and Planning Law Journal* 180-194.

Watt, Don, 'Evaluation of the Use of s.87B Undertakings' (1998) 13 *ACCC Journal* 7-13.

Yeung, Karen, 'Chapter 7: Administrative Undertakings in Australian Competition Law' in *Securing Compliance* (Hart Publishing, Oxford, 2004).

Zumbo, Frank, 'Section 87B Undertakings: There's no Accounting for Such Conduct!' (1997) 5 *Trade Practices Law Journal* 121-125.

Part 6: Public Registers of Enforceable Undertakings and Policies on Enforceable Undertakings

Table 3: Where to Find Regulators' Public Registers of Enforceable Undertakings and Policies on Enforceable Undertakings

Regulator	Web Address of Register of Enforceable Undertakings	Name of, and Web Address for, Policy Specifically Addressing Use of Enforceable Undertakings
Commonwealth Regulators		
ACCC	http://www.accc.gov.au → Public Registers → **Undertakings Register (s.87B)** http://www.accc.gov.au → Public Registers → **Undertakings Register (ASIC Act 1989 & ASIC Act 2001, s. 93AA)**	http://www.accc.gov.au → Publications → Browse by Topic → About Us → Enforcement Priorities → **Compliance and Enforcement Policy (2009)**
ACMA	http://www.acma.gov.au → For licensees & industry: Licensing & regulation → **The ACMAs enforceable undertakings**	http://www.acma.gov.au/ → About ACMA → Publications & research → Publications → ACMA Corporate publications → Corporate publications → Regulatory powers → **Reform of the broadcasting regulator's enforcement powers (2005)** **Enforceable undertakings: Guidelines for Accepting Enforceable Undertakings – Telecommunications Obligations (2006)**
APRA	Information about enforceable undertakings is only available in Annual Reports: http://www.apra.gov.au → About APRA → What We Do → Annual Reports	No specific policy available.
ASIC	http://www.asic.gov.au → Publications → Other Resources → Enforceable Undertakings → **Enforceable Undertakings Register**	http://www.asic.gov.au → Publications → Regulatory Guidelines → **Regulatory Guide 100: Enforceable Undertakings (2007)**
AUSTRAC	http://www.austrac.gov.au → AML/CTF Act obligations → **Enforceable Undertakings**	http://www.austrac.gov.au → Policies → **Enforcement Policy**
CASA	http://www.casa.gov.au → Regulations and Policy → Enforcement Action → **Enforceable Voluntary Undertakings**	http://www.casa.gov.au → Regulations and Policy → Enforcement Action → Enforceable Voluntary Undertakings → **Enforcement Manual, Chapter 5 – Enforceable Voluntary Undertakings**
Comcare	http://www.comcare.gov.au → Laws and Regulations → OHS Enforcement → **Current Actions**	http://www.comcare.gov.au → Forms and Publications → Publications → Laws and Regulations → **Comcare Enforcement Policy (OHS 50): Investigative and enforcement provisions of the *Occupational Health and Safety Act 1991*, (2007).**

PHIAC	www.phiac.gov.au No online register of enforceable undertakings and no information about them in Annual Reports.	No specific policy available.
TGA	www.tga.gov.au No online register of enforceable undertakings and no information about them in Annual Reports.	http://www.tga.gov.au/legis/enfguidelines.htm → Enforcement guidelines → **Therapeutic Goods Amendment Act (No. 1) 2006 Implementation - General Principles (2008)** (not specifically on EUs, but some mention)
Workplace Ombudsman	Fair Work Online Fair Work Ombudsman → Legal info & action → **Undertakings**	Fair Work Ombudsman → Legal info & action → Guidance notes → **FWO Guidance Note 1 – Litigation Policy** (not specifically on EUs, but some mention)
State Regulators		
Consumer Protection		
Consumer Affairs Vic	http://www.consumer.vic.gov.au/ → Resource Centre → **List of Enforceable Undertakings**	http://www.consumer.vic.gov.au/ → About Us → Policy & Strategy Papers → **Compliance and Enforcement Policy**
OFT NSW	There is no online register of enforceable undertakings. However some information about use of enforceable undertakings can be found at: http://www.fairtrading.nsw.gov.au → About us → Data and statistics → **Enforcement action**	No policy available.
OFT Qld	http://www.fairtrading.qld.gov.au There is no online register of enforceable undertakings.	No policy available.
Environment and Health and Safety		
EPA NSW	http://www.environment.nsw.gov.au → Environment protection licences → POEO Public Register → Enforceable undertakings	http://www.environment.nsw.gov.au → Environment protection licences → POEO Public Register → Enforceable undertakings → **Enforceable Undertakings Guidelines (2009)**
EPA Vic	No online register yet.	http://www.epa.vic.gov.au/projects/enforceable-undertakings.asp → Draft Guidelines → **Enforceable Undertakings: Draft Guidelines, Publication 1244, August 2008**
WorkCover ACT	There is no online register of enforceable undertakings	http://www.ors.act.gov.au/WorkCover/pdfs/WorkSafe/Guides/EnforcUndertaknqs.pdf → **Enforceable Undertakings: Information for applicants (2005)**
WHSQ	http://www.deir.qld.gov.au/workplace/index.htm > Laws and prosecutions > Enforceable undertakings > **Enforceable undertaking list**	http://www.deir.qld.gov.au/workplace/law/index.htm → Laws and prosecutions → **Enforceable Undertakings Process (updated 2009)**
ESO Qld	http://www.deir.qld.gov.au/electricalsafety/index.htm	http://www.deir.qld.gov.au/electricalsafety/index.htm → Law and penalties → Regulation and enforcement of the law → **Enforceable undertakings (updated 2009)**

Workplace Standards Tasmania	There is no online register of enforceable undertakings.	http://www.wst.tas.gov.au → Safety and Compliance → Policies and Procedures → Enforcement and Compliance → E**nforcement Policy (2009)**
WorkSafe Vic	http://www.worksafe.vic.gov.au → Laws and Regulations → Enforcement → **Enforceable Undertakings**	http://www.worksafe.vic.gov.au → Laws and Regulations → Enforcement → Enforceable Undertakings → **Supplementary Enforcement and Prosecution Policy (2006)**

PART 7: AUSTRALIAN LAW REFORM COMMISSION RECOMMENDATIONS FOR ENFORCEABLE UNDERTAKINGS

From ALRC 95 Principled Regulation: Federal Civil and Administrative Penalties in Australia (2003)

Recommendation 16–2. The Regulatory Contraventions Statute should provide that, in the absence of any clear, express statutory statement to the contrary, where legislation provides a regulator with authority to accept an enforceable undertaking, the terms of an enforceable undertaking must:

(a) bear a clear or direct relationship with the alleged breach;

(b) be proportionate to the breach;

(c) not require the payment of money to the regulator other than in recompense to those affected by the alleged breach or in payment of the regulator's costs (if these are otherwise recoverable at law); and

(d) stipulate a time period within which compliance with undertakings is required and not be otherwise open-ended.

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

Recommendation 16–3. When legislation provides a regulator with the authority to accept enforceable undertakings, regulators should develop and publish guidelines in accordance with Recommendations 6–2 to 6–4, 9–1 and 10–1 outlining:

(a) the circumstances in which the regulator will accept enforceable undertakings, including

> (i) whether they will be used as an alternative to criminal proceedings; and
>
> (ii) the stage of an investigation or civil enforcement proceedings or proceedings to impose a quasi-penalty that the regulator will accept enforceable undertakings;

(b) examples of acceptable and unacceptable terms in enforceable undertakings;

(c) what will happen if an enforceable undertaking is not complied with;

(d) the circumstances in which a regulator will consider a request to vary or withdraw an enforceable undertaking; and

(e) when and how third party interests will be taken into consideration, having regard to such factors as the standing of third parties to bring an action against the party from whom the regulator is considering accepting an enforceable undertaking, and the ability of third parties to access information acquired under compulsion by the regulator.