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THE GENERAL DETERRENCE EFFECTS OF ENFORCEABLE UNDERTAKINGS ON FINANCIAL SERVICES AND CREDIT PROVIDERS

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ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
AFS	Australian Financial Service
ANAO	Australian National Audit Office
ASIC	Australian Securities and Investment Commission
ASIC Act	Australian Securities and Investments Commission Act 2001 (Cth)
EU	Enforceable Undertaking
NCCPA	National Consumer Credit Protection Act 2009 (Cth)
Peer providers	Peer Credit and Financial Services Providers

I. EXECUTIVE SUMMARY

Following the Australian National Audit Office's report on the Administration of Enforceable Undertakings,¹ the research team was engaged by the Australian Securities and Investments Commission ('ASIC') to conduct a pilot study. This is to investigate whether an enforceable undertaking ('EU') agreed to by a Credit or Financial Services Provider changes, or has the potential to change, the way in which Peer Credit and Financial Providers ('peer providers') operate.

To evaluate the overall 'effectiveness' of EUs, the parameters of the pilot study, including the aims, methodology and limitations, were designed around general deterrence theory. There is currently a dearth of knowledge and research as to what effectively deters corporate crime. Most deterrence research focuses on crimes against the person and property, not financial services or regulated industries. As discussed below, even in relation to sanctions at the apex of the regulatory enforcement pyramid, empirical findings are mixed with any reported positive deterrent effects being highly contextual. Existing deterrence literature is therefore difficult to extrapolate meaningfully to EUs entered into by ASIC, which have varying purposes and are a civil enforcement mechanism. A further complicating factor in financial services is the presence of corporate providers alongside individual licence holders and authorised representatives. Individuals may engage in corporate crime to benefit an organisation, or solely for personal benefit² – or a combination of both.³

Our pilot study meaningfully contributes to deterrence literature through exploratory qualitative research, surveys and personal interviews. This report sets out these qualitative observations as to:

- the awareness of EUs agreed to by competitors of peer providers;
- the clarity of the terms and promises agreed to in an EU;
- the extent to which any deterrence effects were perceived by a peer provider as a result of an EU entered into by a competitor; and

- the extent to which any behavioural change was implemented by a peer provider as a result of an EU entered into by a competitor.

The qualitative findings allowed us to make observations as to the general deterrent effect of EUs on peer providers and the limits or barriers to deterrence. In particular, we find that peer providers do perceive deterrent effects of EUs entered into by competitors. Our interview evidence corroborates, to an even greater extent, perceptions that peer providers change their compliance practices (mostly to improve them) in response to EUs. This is despite a number of barriers to general deterrence by EUs which were recounted by respondents to the pilot and identified by the pilot researchers from research carried out by others and recorded in the literature. Finally, peer providers and other respondents to the pilot are mostly well aware of EUs. They also report they understand generally the purposes of and the promises agreed to in them.

"WE FIND THAT PEER PROVIDERS DO PERCEIVE DETERRENT EFFECTS OF EUS ENTERED INTO BY COMPETITORS."

1 Australian National Audit Office (Cth), Administration of Enforceable Undertakings, Report No 38 (2015).

2 Natalie Schell-Busey et al, 'What works? A systematic review of corporate crime deterrence' (2016) 15(2) Criminology and Public Policy 387, 389.

3 Ray Paternoster, 'Deterring Corporate Crime: Evidence and Outlook' (2016) 15(2) American Society of Criminology 383, 385.

II. BACKGROUND TO THE REPORT

In June 2014, the Senate Economics References Committee released a report on its inquiry into the performance of ASIC.⁴ In that report, the Committee raised a number of concerns about the performance of ASIC, including in relation to its use of EUs. An EU is an alternative to civil or administrative action where there has been a contravention of legislation administered by ASIC.⁵ EUs are generally considered a cost-effective alternative to deal with suspected non-compliant or unlawful conduct, rather than pursuing litigation.⁶

In summary, issues raised in submissions and highlighted by the Committee included: the use of EUs as a remedy for misconduct by large entities; the strength of promises included in EUs; the clarity of EUs in describing the alleged misconduct; and the transparency of the monitoring of compliance with EUs. The report included a recommendation that the Auditor-General undertake a performance audit of ASIC's use of EUs. The Auditor-General agreed to this request. The objective of the audit was to assess the effectiveness of ASIC's administration of EU's. Recommendation 1 of the Australian National Audit Office ('ANAO') report was:⁷

To assess the effectiveness of enforceable undertakings as an appropriate regulatory tool and their contribution to ASIC achieving its compliance objectives, the ANAO recommends that ASIC:⁸

a. develops appropriate performance measures to monitor the effectiveness of enforceable undertakings in addressing non-compliance, and regularly reports against these measures; and

b. periodically assesses, and reports on, the effectiveness of enforceable undertakings in contributing to improved levels of voluntary compliance.

A. AIMS OF THE PROJECT

The pilot study investigates the second recommendation suggested in the ANAO report by researching whether EUs change, or have the potential to change, the way in which peer providers operate their business. The pilot had two central aims:

to appraise the general deterrent effect of EUs (if any) in changing the behaviour of peer providers; and to report to ASIC on the 'efficiency' or 'effectiveness' of EUs in acting as a deterrent through observations drawn from qualitative empirical data, as collected.

A deterrence theory framework was used to inform this pilot study. Our decision to use general deterrence theory was based on ASIC's definition as to what factors contribute to make an EU effective.⁹ Section III provides an overview of deterrence theory and research and its application to EUs.

"OUR DECISION TO USE GENERAL DETERRENCE THEORY WAS BASED ON ASIC'S DEFINITION AS TO WHAT FACTORS CONTRIBUTE TO MAKE AN EU EFFECTIVE."

4. Senate Economics References Committee, Parliament of Australia, Performance of the Australian Securities and Investments Commission (2014).
5. Australian Securities Investment Commission, 'Regulatory Guide No 100: Enforceable Undertakings' (at February 2015) < <https://download.asic.gov.au/media/2976014/rg100-published-19-february-2015.pdf> >.
6. Ibid RG100.23; Helen Louise Bird et al, 'An empirical analysis of enforceable undertakings by the Australian Securities and Investments Commission between 1 July 1998 and 31 December 2015' (Working Paper No 106, Centre for International Finance and Regulation, 4 April 2016).
7. Australian National Audit Office, above n 1.
8. Ibid.
9. Australian Securities Investment Commission, above n 5, RG100.25.

B. ASIC: ROLE AND ENFORCEMENT POWERS

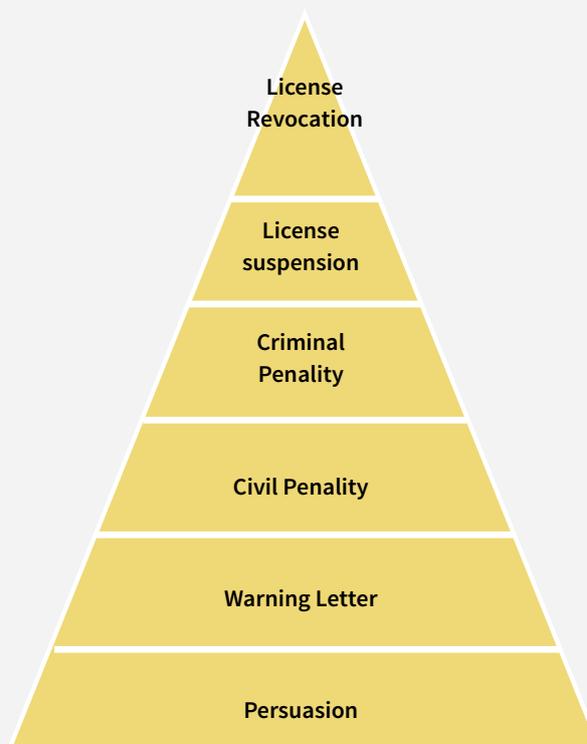
ASIC's roles and responsibilities were established by the *Australian Securities and Investments Commission Act 2001* ('ASIC Act'). ASIC administers legislation and relevant regulations from many different Acts.¹⁰ In doing so, it regulates a range of areas including companies, financial services and consumer credit.

Where there is non-compliance by a regulated entity ASIC has a range of options to address and deter the misconduct. This may involve conducting an investigation and: taking criminal action (such as seeking imprisonment); commencing civil proceedings (including seeking civil penalty orders); taking administrative action (such as banning orders and imposing licence conditions); or accepting a negotiated outcome (including an EU).

Since 1993 ASIC has had available a greater variety of enforcement powers¹¹ with more severe and less frequently used sanctions being employed for serious misconduct, and responses such as EUs being reserved for less serious misconduct.

This 'enforcement pyramid' model, shown in Figure 1, was developed as part of responsive regulation theory,¹² a theory of regulation which argues that regulators should employ more severe sanctions for more serious contraventions in a strategy of escalation and de-escalation of sanctions, depending on the responses of the regulated.¹³

The strategy follows from accepting that regulators cannot detect and punish every contravention and hence must encourage intrinsic compliance.¹⁴ As a negotiated outcome, ASIC's power to enter EUs sits in the region between civil penalties and warning letters.



Source: Ayres and Braithwaite (1992).

Figure 1

C. METHODOLOGY

Below we set out the methodology used to identify appropriate EUs against which to benchmark our surveys and interviews; how we designed the research; and the procedure implemented to reach our qualitative observations. The methodology is intended to be read in conjunction with the limitations to the pilot set out in section (D).

i. Choice of EUs

From 2010 to 2017, ASIC accepted 165 EUs. These EUs were entered pursuant to either s 93AA of the ASIC Act or s 322 of the National Consumer Credit Protection Act 2009 (Cth).

10 Australian Securities and Investments Commission (ASIC) Act 2001; Corporations Act 2001; Business Names Registration Act 2011; Business Names Registration (Transitional and Consequential Provisions) Act 2011; Insurance Contracts Act 1984; Superannuation (Resolution of Complaints) Act 1993; Superannuation Industry (Supervision) Act 1993; Retirement Savings Accounts Act 1997; Life Insurance Act 1995; National Consumer Credit Protection Act 2009; Medical Indemnity (Prudential Supervision and Product Standards) Act 2003. Australian Securities Investment Commission (ASIC), Laws we administer <<http://download.asic.gov.au/media/4058626/asic-annual-report-2015-2016-complete.pdf>>.

11 This variety of powers was augmented by the legislative provision of powers to conduct civil penalty proceedings in part 9.4B of the Corporations Act 2001 (Cth) and came into operation on 1 February 1993. This was an important addition, to 'extend' the pyramid of enforcement options available to ASIC. The power to enter an enforceable undertaking is one of ASIC's enforcement options, with empowerment from s 93AA of the ASIC Act.

12 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1st ed, 1992); George Gilligan, Helen Bird and Ian Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22 UNSW Law Journal 417, 419.

13 See Australian Law Reform Commission (ALRC), *Principled Regulation: Federal Civil and Administrative Penalties*, Report No 95 (2002) 76 [2.60].

14 Michelle Walsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and Practice' (2009) 33 MULR 908, 910.

Table 1 shows that 57.6% of EUs (95 out of a total of 165) relate to conduct in financial services and 15.1% of EUs (15 out of a total of 165) relate to conduct in consumer credit. The remaining 26.3% of EUs (45 out of a total of 165) mainly focus on disclosure obligations and non-compliance by auditors and liquidators with their duties.

YEAR	EUs IN THE FINANCIAL SERVICES AREA	EUs IN THE CONSUMER CREDIT PROTECTION AREA	OTHER EUs	TOTAL
2010	4	0	3	7
2011	20	0	6	26
2012	7	2	9	18
2013	17	7	3	27
2014	11	6	9	26
2015	7	2	6	15
2016	14	4	5	23
2017	15	4	4	23
TOTAL	95	25	45	165

Table 1

As Table 2 shows, the most common conduct leading to EUs in the financial services industry is ‘providing inappropriate advice and/or deficiencies in training/supervision of representatives’. In the consumer credit area, the most common conduct resulting in an EU is ‘not making reasonable inquiries when entering into consumer credit contracts and/or deficiencies in training/supervision’.

ALLEGED CONDUCT RESULTING IN AN EU IN THE FINANCIAL SERVICES AND CREDIT AREA ¹⁵	PROMISORS BY TYPE ¹⁶			TOTAL	PERCENTAGE
	INDIVIDUAL	PTY COMPANY	PUBLIC COMPANY		
PROVIDING INAPPROPRIATE ADVICE AND/OR DEFICIENCIES IN TRAINING/SUPERVISION SYSTEMS OF REPRESENTATIVES ¹⁷	30	19	5	54	36.2%
BREACHES OF S 912A EXCLUDING TRAINING AND SUPERVISION DEFICIENCIES ¹⁸	4	4	16	24	16.1%
BREACHES RELATING TO MANAGED INVESTMENT SCHEME RULES ¹⁹	10	1	1	12	8.1%
PROVIDING CONSUMER CREDIT WITH NO LICENCE	3	9	0	12	8.1%
NOT MAKING REASONABLE INQUIRIES WHEN ENTERING INTO CONSUMER CREDIT CONTRACTS AND /OR DEFICIENCIES IN TRAINING/ SUPERVISION SYSTEMS	0	11	4	15	10.1%
UNCONSCIONABLE CONDUCT AND/OR UNFAIR TERMS RELATING TO CONSUMER CREDIT	0	4	0	4	2.7%
MISLEADING AND DECEPTIVE CONDUCT ²⁰	4	4	2	10	6.7%
MISCELLANEOUS	5	3	10	18	12.1%

Table 2

15 In certain instances, the EU may relate to more than one alleged breach of the law. In those instances, the main breach is included in the classification in Table 2.

16 The number of EUs here may vary from Table 1 as Table 2 is considering the number of promisors who have entered into EUs in particular areas. Some of the EUs involve more than one person.

17 These two types of conduct have been considered together as, in the majority of instances where a company has been involved in the provision of inadequate advice, it has also breached s912A CA requirements attached to supervision and training.

18 This category includes a variety of conduct that may have led to a breach of subsections in 912A CA.

19 This category relates to possible breaches of Ch 5C CA and can range from breaches of responsible officers’ duties to running unregistered managed investment scheme.

20 These EUs relate to undertakings given in the area of financial services and consumer credit as conduct in both areas may lead to breaches of the misleading and deceptive conduct provisions in the ASIC Act.

Two EUs in each of the financial service and credit sectors were the focus of the pilot and helped identify the peer providers to be approached for interviews. In choosing the four EUs, we required the following criteria:

Date of entry to the EU: We chose EUs that were entered into in 2016 due to two main factors. The first was the likely availability of independent expert reports on the implementation of EUs. Until 2015 there was little reporting about the way an EU was implemented by a promisor. Since 2015 ASIC has required reporting on the compliance of the promisor with the EU they entered.²¹ Interviews conducted for the financial year 2017-2018, relating to an EU entered into in 2016, should have had one expert compliance report submitted or one close to submission. We hypothesised that this disclosure, along with prior media releases by ASIC announcing the EU, would be crucial to peer provider awareness of EUs and to deterrence.²² This approach also offered the possibility of a publicly reportable outcome which the ANAO suggested may raise awareness of the EU to the broader regulated population.²³

Institutional Memory: The second factor influencing our choice of timing or date of the EUs was institutional memory. Institutions may rely on past behaviour to legitimise current behaviour.²⁴ Consequently, organisational decision making is influenced by the recollection and interpretation of past events.²⁵ The strength of institutional memory (through records and those of people) necessarily fades with the passage of time.²⁶ We reasoned that EUs entered into in 2016 were publicised sufficiently recently that peer providers should still have personnel with a 'vivid' memory of both past practices and the event the subject of the EU. This time lapse may also have permitted the peer provider to reflect on and decide whether to change its practices in response to the EU, or to report any other effects.

The nature of the promises included in the EU: The ANAO suggested that such EUs may have deterrent effect by sending a message to the industry about conduct and consequences and may be educative.²⁷ Accordingly, we selected EUs that contained promises that affect the way an organisation functions. Such promises required either the implementation of a new compliance program or a remediation program.

The type of promisor to the EU: Deterrence of corporate holders of Australia Financial Services Licences which are peer providers of EU promisors is the focus of the pilot. For each of financial services and credit we chose two promisor companies. A public company promisor, as proxy for a large company, and a proprietary company promisor, as a proxy for a small company. We reasoned this may allow us to observe the effects of deterrence on the size of peer providers.

We chose the following four EUs that met these requirements:

- ACE Insurance Ltd (now Chubb Insurance Australia Ltd) – financial services industry
- CMH Financial Group Pty Ltd – financial services industry
- Cash Converters Personal Finance Pty Ltd and Cash Converters International Ltd – consumer credit provision
- Nimble Australia Pty Ltd – consumer credit provision

21 Australian Securities and Investments Commission, above n 5, RG100.78.

22 Dorothy Thornton, Neil Gunningham and Robert Kagan, 'General Deterrence and Corporate Environmental Behaviour' (2005) *Law and Policy* 262, 263.

23 Australian National Audit Office, above n 1, 64.

24 Charlotte Linde, *Working the Past: Narrative and Institutional Memory* (Oxford University Press, 1st ed, 2009) 1.

25 Omar El Sawy, Glenn Gomes and Manolete Gonzalez, 'Preserving Institutional Memory: The Management of History as an Organizational Resource' (1986) 1 *Academy of Management Proceedings* 118, 121.

26 Allen Berger and Gregory Udell, 'The Institutional Memory Hypothesis and the Procyclicality of Bank Lending Behavior' (2004) 13(4) *Journal of Financial Intermediation* 458, 462.

27 Australian National Audit Office, above n 1, 64.

Table 3 includes details of the EUs that are the subject of this pilot.

	FUNCTION	EU PROMISOR	NON-COMPLIANCE	PROMISES	REPORT
24 FEBRUARY 2016	Insurance	ACE Insurance Ltd through its insurance division known as Combined Insurance	From 2010 to 2014, authorised representatives of Combined were overselling policies (including duplicate cover), twisting/churning policies, and selling unsuitable policies. ACE failed to implement a framework that fosters and maintains culture of compliance within Combined	Change of business model + corrective action: remediation action plan + community benefits	An independent expert report is required to report on EU. Report not available at 30 August 2018.
23 MARCH 2016	Financial planner	CMH Financial Group Pty Ltd	Breach of duty to act in the best interests of the client in relation to the financial product advice provided... + misleading and deceptive conduct	Compliance program + remedial action plan	Independent expert report is required. An interim compliance report was issued on 30 May 2017 and a final report was issued on 17 January 2018.
4 NOVEMBER 2016	Cash loans, personal loans pawnbroker	Cash Converters Personal Finance Pty Ltd and Cash Converters International Ltd	Not making proper inquiries about each consumer's financial situation regarding credit contracts	Compliance program + corrective action + community benefits	Independent expert report required. An interim compliance report was issued on 28 August 2017 and Final Report was issued on 16 May 2018.
18 MARCH 2016	Personal loans	Nimble Australia Pty Ltd	Enter into small amount credit contracts with consumers without making reasonable inquiries about consumer's requirements and objectives in relation to credit contract or verifying financial position	Corrective action + community benefits + compliance program	Independent expert report issued on 9 August 2017.

Table 3

ii. Research Design

As our literature review did not identify any prior empirical research that addressed whether EUs have, or have the potential to impact the way in which peer providers operate in response to a proximate EU, the pilot was designed to be exploratory. Exploratory research is most useful in situations where there is only limited information and the researcher wishes to have the flexibility to explore related areas of research in the future.²⁸ We adopted a multi-method research strategy consisting of qualitative research through a pre-interview survey and in-depth personal interviews, which provides triangulation and rigor to the data collection method.

Five different stakeholder groups were selected to be interviewed for the pilot: credit providers, financial services providers, professional advisers, consumer advocates and ASIC officers. To identify peer providers in the credit and financial services industries, we first collected basic descriptive statistics of each promisor to the EU, including: primary and secondary industry SIC codes,²⁹ annual revenue and number of employees. We also noted location as previous research has shown that deterrence can be influenced by geographical proximity to a sanctioned company.³⁰

Using the Company 360 database,³¹ we next identified all registered companies that had an identical primary SIC code, a proxy for a competitor of the company subject to the EU. Annual revenue was filtered to equate it to the underlying EU. The researchers then cross-checked the preliminary list of competitors against all the companies registered for an Australian Financial Service or credit licence by ASIC. This was to create a final list of competitors for each underlying EU. In this way, the most comprehensive potential pool of peer providers available to be approached was created. Email invitations were sent to each company on the final list of competitors inviting them to participate in the pilot.

We interviewed personnel who responded from companies in each of the following categories:

- Credit industry; small company;
- Credit industry; large company;
- Financial services industry; small company; and
- Financial services industry; large company.

The sampling strategy for selection of the interviewees was based on non-probability, purposive sampling.³² Non-probability sampling does not use chance selection procedures but instead relies on the personal judgment of the researcher to decide who will be included in the sample. Minimum criteria for inclusion in the professional advisers' sample included those who have direct experience advising a party with either entering or with monitoring EUs. The participants for the interviews that were selected were senior executive officers vested with decision-making responsibility for the financial business and middle management personnel with experience of compliance and regulatory operations.

28 Robert Stebbins, *Exploratory Research in Social Sciences* (SAGE Publications, 1st ed, 2001).

29 Standard Industrial Classification (SIC) codes are four-digit numerical codes assigned to companies to identify its primary business. The classification was developed to facilitate the collection, presentation and analysis of data; and to promote uniformity and comparability in the presentation of statistical data. A primary SIC code is the code definition that generates the highest revenue for that company at a specific location in the past year.

30 Matthew S Johnson, 'Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws' (Working Paper, 29 September 2016) 15 <http://kenan.ethics.duke.edu/regulation/files/2016/09/johnson_oshareleases_091216.pdf>; Mary F Evans, Scott M Gilpatric and Jay P Shimshack, 'Enforcement Spillovers: Lessons from Strategic Interactions in Regulation and Product Markets' (Working Paper, University of Tennessee Knoxville, March 2016) 1 <http://static1.squarespace.com/static/55e8ab64e4b0b55649c4ab64/t/56fc5011d51cd41823e6072f/1459376145464/evans_gilpatric_shimshack_march2016.pdf>.

31 Company 360 is a subscription database that profiles the top 50,000 public and private companies in Australia.

32 Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (SAGE Publications, 2nd Edition, 1990).

i. Research Procedure

All peer providers were sent a pre-interview survey to complete. The survey was designed to be completed in no longer than 10 minutes and had 12 closed-end questions. The questions were designed to obtain a preliminary understanding of the participants' knowledge and experience with EUs, and basic corporate descriptive statistics.

Interview guides were prepared setting out the areas and topics for discussion, while also allowing the interviewer to probe the interviewee in an interactive way. The interviews were designed to take one hour to complete. The questions were open-ended, designed to gain the participant's views, experiences, reasons and opinions with respect to EUs. The interviews were based on a semi-structured question format in which the interviewer asks specific questions and then uses probing questions to clarify the interviewee's thoughts. Probing questions were in the form of clarification probes, steering probes to get the interview back on track, evidence probes, which aid in assessing the knowledge of the interviewee, and elaboration probes to encourage the interviewee to expand more about the topic, including context and motivations. At a macro level, the questions were designed to answer the following research questions:³³

- What did the peer providers know about EUs prior to this study?
- Did peer providers think EUs had the effect of deterring non-compliant conduct?
- Has knowledge of one or more EUs motivated peer providers to make changes to their internal compliance (why/why not)?
- What changes have been made?
- Have the changes had any effect?
- Have these effects diminished over time (if applicable)?

We conducted 32 interviews. Table 4 below sets out the number of interviews conducted in each category.

TYPE OF RESPONDENT/ INTERVIEWEE	INTERVIEWS CONDUCTED
ASIC	5
CREDIT PEER PROVIDERS	5
FINANCIAL SERVICES PEER PROVIDERS	10
PROFESSIONAL ADVISERS	7
CONSUMER ADVOCATES	5

Table 4

Each participant read and signed an informed consent form which included a brief outline of some of the questions to be discussed and how the information was to be used.

³³ A copy of the pre-interview survey, interview guides and survey guides are detailed in Appendices [A] – [E]. Ethical clearance has been received: HC17645.

D. LIMITATIONS OF THE PILOT

As it is a pilot study, this research has limitations. First, given time and budget restraints, the small sample size makes it difficult to generalise observations to the industry as a whole. Second, it is a self-selecting sample, and therefore it is possible that companies that did not accept our invitation to participate may have had different experiences to those that did. Third, our invitation may have prompted the participants to learn more about EUs prior to completing the survey and interview. Thus, the pilot may have influenced the level of EU knowledge that participants had, rather than existing EUs.

i. Sampling: Limitations of Interviews

Participants in the pilot study had various exposure to EUs and therefore their knowledge and capacity to answer questions varied. This made it difficult to compare 'like with like' and could also influence how the deterrent effect of an EU was perceived for peer providers. This was particularly so if the participant had worked in a company directly subject to an EU in the past. Participants also provided information that was not always based on actual observation, but on what they thought may occur in theory. Therefore, distinguishing between observed phenomena and predicted behaviour was not always possible. That is, we observed a bifurcation between 'it has led to...' versus 'it would/should lead to...' responses.

This was problematic when respondents had first-hand experience of being subject to an EU. How they perceived an EU could deter peer providers was likely influenced by an 'experiential effect', where their perception of risk is based on their previous or vicarious experiences of an EU.³⁴ Further, there is evidence that that if a person has not engaged in misconduct, they are more likely to overestimate the possibility of being caught or sanctioned and over-estimate general deterrence.³⁵ In addition,

sometimes respondents answered a particular way for one question, but subsequent responses provided conflicting information. For instance, a peer provider may have noted that they had taken an EU into account when making a decision, but had never implemented a change as a result of the sanction.

Consistent with prior general deterrence research,³⁶ information was frequently qualified by respondents, with many citing that the context of a situation, the size of an organisation, or the type of industry could influence how effective general deterrence would be. As such, many answers are subject to differing interpretation. For questions that elicited such heavily qualified responses, figures are not included in this report.

ii. Strengths of the Pilot

The pilot was designed to gain insight into the context and mechanisms behind a company being motivated (or not motivated) to adopt changes to their compliance practices. Our research explicitly questioned the motivations for any changes in practice and behaviour, including whether changes were being considered prior to the underlying EU being agreed.

Importantly, the pilot provides insight into the context in which decisions to change behaviour or practices operate. Context has been identified as essential to understand how and why certain initiatives may contribute to behavioural change.³⁷ The knowledge of both the context and mechanisms that shape the effects of EUs on peer providers impacts on general deterrence. Context therefore provides an important foundation for this and for future studies that analyse EU's 'efficiency' or effectiveness (as defined by ASIC) on a broader scale.

³⁴ Robert Apel, 'Sanctions, perceptions and crime: Implications for criminal deterrence' (2012) 29 *Journal of Quantitative Criminology* 67.

³⁵ *Ibid* 82.

³⁶ See for example Stephen Dimmock, William Gerken and Nathaniel Graham, 'Is Fraud Contagious? Coworker Influence on Misconduct by Financial Advisors' (2017) 73(3) *Journal of Finance* 3; Daphne W Yiu, Yuehua Xu and William P Wan, 'The Deterrence Effects of Vicarious Punishments on Corporate Financial Fraud' (2014) *Organization Science* 25(5) 1565.

³⁷ Ray Pawson and Nick Tilley, *Realistic Evaluation*, (SAGE Publications, 1st ed, 1997) *passim*. This could include the impact of other regulatory or enforcement changes that occur concurrently during the observation period. For more information, see John Braithwaite, 'In Search of Donald Campbell: Mix and Multimethods', *Criminology & Public Policy* (2016) 15(2) 417, 424.

III. GENERAL DETERRENCE AND EUs

A. THE PURPOSES OF EUs

An EU is a versatile regulatory tool that allows ASIC and other regulators who have this sanction at their disposal to remedy alleged misconduct comparatively more swiftly than sanctions higher on the enforcement pyramid. This may involve compensating affected consumers for their losses and compliance renewal programs intended to change the compliance practices of the promisor. ASIC has indicated that it uses EUs in instances where the sanction ‘provides a more effective regulatory outcome than non-negotiated, administrative or civil sanctions.’³⁸ ‘Effectiveness’ is realised by ASIC if the EU:³⁹

- promotes the integrity of, and public confidence in, our financial markets and corporate governance;
- specifically deters the person from future instances of the conduct which gave rise to the undertaking;
- promotes general deterrence in making the business community aware of the conduct and the consequences arising from engaging in that conduct; and/or
- provides an ongoing benefit by way of improved compliance programs.

Deterrence is therefore a central objective of an EU. The central elements of deterrence as a concept have long remained relatively consistent.⁴⁰ Deterrence may be specific, which addresses the wrongdoing of a specific individual or organisation.⁴¹ An EU may achieve this if the terms of the EU include promises that require a promisor to review its compliance programs, implement new measures that may prevent similar breaches from occurring in the future and compensate consumers where appropriate.

Deterrence may also be general. This may occur where observing others being sanctioned for misconduct motivates other individuals

or companies to avoid or desist from similar behaviour.⁴² General deterrence is predicated on the intended audience being aware of what behaviour is acceptable and unacceptable, and the consequences of non-compliance with the appropriate behaviour.⁴³ It has been argued that individuals make decisions to change (or not change) their behaviour based on their perception of the ‘severity, certainty and celerity’ of punishment.⁴⁴ This requires balancing the benefits of engaging in criminality, and the perceived risks of doing so. Deterrence literature provides some promising evidence that regulatory responses such as EUs have a modest, positive effect on corporate crime deterrence.⁴⁵

A 2014 systematic review of 58 studies⁴⁶ looked at the effectiveness of using different corporate crime deterrence strategies. These strategies included law changes, punitive sanctions (eg impact of imposed or threatened fines, prosecution, conviction etc), and regulatory policy (eg monitoring activity). The authors found that even if employed without the other strategies, regulatory policies (such as inspections or education) had a significant deterrence impact at an organisational level.⁴⁷ In contrast, formal or punitive sanctions, when implemented as standalone deterrence strategies, did not have a significant impact on deterrence. However, the authors cautioned that the results for the regulatory strategies were not always consistent, with the effect sizes varying for the analysis of single strategy approaches. Positively, the authors also found that the deterrent effects of regulatory policies are strengthened if, as ASIC does, they are combined with other enforcement methods:⁴⁸

Our results suggest that regulatory policies that involve consistent inspections and include a cooperative or educational component aimed at the industry may have a substantial impact on corporate offending. However, a mixture of agency interventions will likely have the biggest impact on broadly defined corporate crime.⁴⁹

38 Australia Securities and Investments Commission, above n 5, RG100.18.

39 Ibid RG100.25.

40 Kelli D Tomlinson, ‘An Examination of Deterrence Theory: Where Do We Stand?’ (2016) 80(3) Federal Probation 33, 33-38.

41 See, eg, Anthony A Braga and David L Weisburd, ‘The Effects of Focused Deterrence Strategies on Crime: A Systematic Review and Meta-Analysis of the Empirical Analysis’ (2012) 49(3) Journal of Research in Crime and Delinquency 323; Daniel S Nagin, ‘Deterrence: A Review of the Evidence by a Criminologist for Economists’ (2013) 5 Annual Review of Economics 83, 84; Aaron Chalfin and Justin McCrary, ‘Criminal Deterrence: A Review of the Literature’ (2017) 55(1) Journal of Economic Literature 5, 6.

42 Ibid.

43 Tomlinson, above n 40, 33-38.

44 Tomlinson, above n 40, 33.

45 See, eg, Natalie Schell-Busey et al, above n 2, 389; John Braithwaite ‘Restorative Justice and responsive regulation: The question of evidence’ (RegNet Working Paper No 51, School of Regulation and Global Governance (RegNet), 2016) 1; Yiu, Xu and Wan, above n 36, 1549.

46 The authors restricted their meta-analysis to a review of formal legal interventions and corporate deterrence to keep it manageable (Natalie Schell-Busey, above n 2, 388).

47 Natalie Schell-Busey, above n 2, 388.

48 Ibid 388; John Braithwaite, above n 37 417, 420.

49 Natalie Schell-Busey, above n 2, 387.

However, while an EU is also designed to promote general deterrence, the key issue is that an EU is an administrative sanction and consequently cannot be punitive in nature.⁵⁰ Targeted research on criminal justice programs and initiatives involving prosecutions show that general deterrence has consistently demonstrated weak effects.⁵¹ Accordingly, in the context of financial services and credit, questions may be raised as to whether a non-punitive sanction such as an EU has a deterrent effect.

B. PERCEPTIONS OF EUs OVERALL

The majority of respondents to the pilot,⁵² expressed either neutral or generally favourable views of EUs. EUs were often described as being timely and cost-effective means for ASIC to encourage better conduct in a company.⁵³ One professional adviser noted:⁵⁴

I see an EU as part of a pyramid of sanctions that's been introduced into Australian law over the last generation or so. I think in terms of the pyramid, it has been a useful mechanism.

Though not expressed in terms of the regulatory pyramid, most of the participants in the pilot⁵⁵ had a similar perception. One peer provider noted that an EU is 'a useful and flexible part of the toolkit which ASIC has for resolving differences and providing certainty.'⁵⁶ Another peer provider observed that EUs are an effective way to deal with an oversight or a 'slip' in existing regulation or law.⁵⁷

Table 5 summarises the perceptions that peer providers in the pilot have of EUs.

50 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974*, Report No 68 (1994) 38.

51 Travis C Pratt and Jillian J Turanovic, 'Celerity and Deterrence' in Daniel S Nagin, Francis T Cullen and Cheryl Lero Jonson (eds), *Deterrence, Choice and Crime: Contemporary Perspectives – Advancements in Criminological Theory* (Routledge, 2018) 18; Justin T Pickett and Sean P Roche, 'Arrested development: Misguided Directions in Deterrence Theory and Policy' (2016) 15(3) *Criminology & Public Policy* 727, 728-729.

52 93.75% of respondents (30 of the interviewees) had either neutral or favourable views of EUs.

53 See for instance, interview with respondents 6 ('regulatory mediation to improve and enforce compliance with the law'), 22 ('more expedient remedy that ASIC could use').

54 Interview with Respondent 21.

55 62.5% of respondents (20 respondents) directly referred to the fact that the EU was one of the tools available to the regulator and that it has its uses.

56 Interview with Respondent 8.

57 Interview with Respondent 5; a similar observation was made by Respondent 12.

PERCEPTION	SMALL PROVIDERS		LARGE PROVIDERS		TOTAL	PERCENTAGE
	CREDIT PROVIDERS	FINANCIAL SERVICES PROVIDERS	CREDIT PROVIDERS	FINANCIAL SERVICES PROVIDERS		
EUs ARE USED FOR REMEDIATION PURPOSES	2	3	2	1	8 OUT OF 15	53.3%
EUs ARE USED FOR CHANGE OF COMPLIANCE STANDARDS WITHIN AN ORGANISATION	2	7	2	2	13 OUT OF 15	86.7%
EUs HAVE EDUCATIONAL PURPOSE IN CLARIFYING THE STANDARDS EXPECTED BY ASIC	3	6	2	1	12 OUT OF 15	80%
EUs ARE OR ARE LIKELY TO HAVE A DETERRENT EFFECT	2	5	2	2	11 OUT OF 15	73.3%
REFER TO EUs AS HAVING PENAL EFFECTS	3	3	1	0	7 OUT OF 15	46.7%

Table 5

Table 5 shows that 86.7% of peer providers who participated in the pilot (13 out of 15 respondents in that category) stated that an EU is intended to change compliance standards within an organisation. As one respondent noted, an EU is usually accepted ‘when there is a deep seated procedural or cultural issue that ASIC would like to address.’⁵⁸ This perception was also echoed by professional advisors and consumer advocates.⁵⁹

73.3% of peer providers (11 out of 15 respondents in that category), 42.9% of professional advisors (3 out of 7 respondents in that category) and 80% of consumer advocates (4 out of 5 respondents in that category) found that EUs have, or have the potential for, a deterrent effect. 6.7% of peer providers (1 out of 15 peer providers) and 57.1% of professional advisers (4 out of 7 professional advisers) were neutral or ambivalent about this. 13.3% of peer providers (2 out of 15 peer providers) observed that EUs did not have any deterrent effect.⁶⁰ However, of these two peer providers one described an EU as a ‘second chance to get things right.’⁶¹

58 Interview with Respondent 15.

59 See for example, interview with Respondents 21, 23, 24 and 30.

60 Interview with Respondents 11 and 20.

61 Interview with Respondent 20.

Respondents to the pilot qualified the general deterrent effect of an EU in certain instances. For example, while several peers mentioned the penal effects of EUs, one professional advisor observed:⁶²

I am not sure how strong the deterrent value of an EU is going to be because, in the spectrum of remedies, it is at that relatively softer end.

EUs have been viewed as an educational strategy to enhance existing standards within an organisation. At the other end of the spectrum, this sanction has also been referred to as a penalty or having penal effect. These observations highlight the range of motivations that may mature into a change of behaviour by peer providers as a result of an EU.

As an administrative sanction an EU should not be punitive.⁶³ However, just because peer providers may *perceive* an EU is punitive due to the cost attached to it, it does not follow that, from a legal perspective, it is. The relevant factor is whether EUs have penal consequences.⁶⁴ Orders for compensation have been held not to be penal⁶⁵ though the law's concern with penalties has not been limited to monetary exactions.⁶⁶ The central distinction is that the EU agreement is voluntary: by contrast with a civil penalty or criminal fine there is no finding of wrong doing when an EU is accepted to permit an 'exaction'. Even in instances where the promisor agrees to a voluntary ban, an EU involves no involuntary loss of civil status of the sort involved with loss of office and consequently this is unlikely to be punitive in nature. This is the main non-financial sanction where the courts have sometimes found penal consequences.⁶⁷ Further, it is not obvious that community benefits agreed by parties to EUs would be considered penal as it is at least arguable that they are restorative in nature.

C. AVOID PERCEIVED PENAL EFFECTS OF EUS

Recent studies in corporate crime have provided promising findings regarding the effect of general deterrence through knowledge of punishment for corporate misconduct.⁶⁸ In 2016, an international study matched 302 listed firms with fraud offences to a further 302 firms with no fraud offence based on company size and industry to study directly if firms were deterred by punishment of peers. Statistically significant evidence of a deterrent effect was observed. Deterrence was stronger for companies considered as 'high-status' when they observed a peer's punishment than 'lower status' firms observing their peers.⁶⁹ It was also found that higher-status observer firms are statistically significantly deterred by lower-status peers' punishment, but the opposite was not true: lower-status peers are not deterred by higher-status peer's punishment.⁷⁰

The pilot interviews revealed that peer providers may be motivated to change behaviour for two reasons:

- to avoid punishment and sanction (negative/reactive motivation for change); and/or
- to improve business practices and ensure compliance (positive/proactive motivation for change);⁷¹

These two motivations are not mutually exclusive, as peer providers may both want to avoid negative consequences *and* to improve their business practices, that is to 'do the right thing' in terms of the law and the consumer. This finding is consistent with previous general deterrence research, that often the message being conveyed by enforcement can motivate behavioural change via 'fear' and/or 'duty'.⁷²

62 Interview with Respondent 22.

63 Australian Law Reform Commission (ALRC), above n 50, 38.

64 Rich v Australian Securities and Investments Commission [2004] HCA 42 at [37].

65 Ibid at [28] and note 35.

66 Ibid at [36].

67 Ibid at [26] and [36].

68 See, eg, David C. Cicero and Mi Shen, 'Do Executives Behave Better When Dishonesty is More Salient?' (2016) Social Science Research Network (SSRN) <<http://ssrn.com/abstract=2748258>> 1. In law and economics, deterrence is often referred to as 'spillover effects' or 'vicarious learning'.

69 Yiu, Xu and Wan, above n 36, 1564.

70 Ibid 1565.

71 See Section D, below.

72 Thornton, Gunningham and Kagan, above n 22, 265.

"PEER PROVIDERS MAY BOTH WANT TO AVOID NEGATIVE CONSEQUENCES AND TO IMPROVE THEIR BUSINESS PRACTICES."

There were many ways interviewees identified EUs as deterring an organisation from engaging in non-compliant behaviour through 'fear' mechanisms. The interviews revealed that the three main motivations were to:

- avoid perceived penal effects and outsiders intruding into the business;
- avoid costs of EUs; and
- avoid reputational damage.

Often these factors were reported as interrelated. Their combined negative impact was perceived to act as a deterrent for peer providers with one respondent noting:⁷³

Are they a deterrent? Absolutely they are. I can't feel there's too many institutions that would volunteer themselves for one. They are seen... There was a period of time, I feel, where it was almost a badge of honour to be having one but that was a brief window of time and no one's there. So their deterrent effect - reputationally, time, money, regulatory. From an organisation's point of view, working under an EU is not a good place to be. So institutions would rather avoid them. It's not good to be looking backwards rather than looking forwards.

i. Avoid Perceived Penal Effects and Intrusion of Outsiders

An EU at times was perceived by respondents to the pilot as a form of punishment or a penalty – not a promise, as is its legal nature and intended objective.⁷⁴ EUs were described by one respondent as 'a big stick which I think the majority of

organisations will try to avoid'.⁷⁵ Accordingly, some participants noted that their organisation had implemented costly changes as a result of an EU entered into by competitors. For instance, one peer provider noted that while the cost of implementing a change triggered by a peer EU was 'a strain on the company', the company still implemented the change to ensure compliance and avoid any scrutiny from the regulator.⁷⁶

"ARE THEY A DETERRENT? ABSOLUTELY THEY ARE. I CAN'T FEEL THERE'S TOO MANY INSTITUTIONS THAT WOULD VOLUNTEER THEMSELVES FOR ONE."

However, there was also a perception that an EU was burdensome but less penal than sanctions higher up the enforcement pyramid:⁷⁷

[The problem I have with EUs, it is that ASIC is] threatening to sue, and you've got this other administrative outcome, which does impose lots of burdens on a company ...

73 Interview with Respondent 24.

74 See for example, Interviews with Respondents 10, 11, 12, 17 and 25.

75 Interview with Respondent 11.

76 Interview with Respondent 20.

77 Interview with Respondent 25.

Aspects of EUs – such as remediation measures via community benefit payments (donations) sometimes to financial literacy funds – were also seen as having a punitive aspect which may contribute to deterrence. However, most of the comments in relation to this were from interviewees who were both peer providers and who had first-hand experience of an EU from past employment in a promisor business that had entered an EU, or comments by professional advisers who had advised promisors:

I wonder if ASIC kind of use community benefit fund payment as almost a bit of a punishment, without calling it a punishment...⁷⁸

My thoughts are ASIC is going down a very dangerous path. [...] ASIC has decided that, well we have this other weapon, which is a community benefit payment. That all sounds great but not if you're negotiating with ASIC and they ask for an exorbitant amount, because they're using it as a proxy for a penalty. That's what they are – in my view.⁷⁹

Another respondent noted that although donated community benefit payments may operate as a penalty, it provides the business with a more palatable way to acknowledge the non-compliance than through a fine for example. Consequently, the community benefit, while viewed as a penalty, may be seen as a 'goodwill contribution to demonstrate our goodwill to fixing the problem.'⁸⁰

A consumer advocate saw the potential for community benefit funds to increase accountability and provide a greater general deterrence effect if included in an EU, also referencing its potential penal effects.⁸¹

I think there should be more penalty or sort of the potential for the arbitrage of it all – 'we'll just factor that in', 'we'll just do bad conduct and we might get caught and we might have to remediate a little

bit, or settle to remediate a little bit' – isn't much of a deterrent overall. And so, having other things like community benefit payments or fine-like stuff might have a better effect of deterring them from the conduct on a greater level.

However, it is not only costliness of an EU that may be viewed as punitive. Another fear highlighted by peer providers relates to the intrusiveness of an EU. Not only does an EU impose the regulator's view on an organisation (a view that may be challenged),⁸² it usually brings in an external agency (such as an independent expert) with oversight powers and perceived direction over a business.⁸³

... one of the things that is most frightening for financial service providers is to have an external party come in and say how to run your business. So taking the proactive stance and trying to run your business in a way that meets all relevant standards and regulations and guidelines is the best way to go forward. So I would be very worried if a regulator told me how to run my business. So I'd rather run it on my interpretation which has to be a reasonable and fair interpretation of the legislation. So I think it is a good deterrent.

[...]

Instead of being able to make our own interpretation, we have to, in an EU situation, you're forced to have the strict interpretation of the regulator which may not be the most effective for your business.

Such involvement has been viewed by one peer provider as the equivalent of being 'belted' when they are 'good apples working to get compliance right.'⁸⁴

78 Interview with Respondent 30.

79 Interview with Respondent 25.

80 Interview with Respondent 4.

81 Interview with Respondent 29.

82 Interview with Respondents 5 and 13.

83 Interview with Respondent 13.

84 Interview with Respondent 10.

ii. Avoid Costs

Deterrence theory suggests subjects may make decisions to change (or not change) their behaviour in part based on their perception of the severity of the sanction.⁸⁵ EUs, while falling toward the bottom of the enforcement pyramid, are severe in terms of the cost associated with complying with the terms of the EU, costs that peer providers wish to avoid.

First, even before an EU is entered costs will be incurred. These are the costs associated with negotiating an EU as 'it's a long road before a particular organisation enters into an EU.'⁸⁶ Due to the costs of implementing an EU, 'the majority of organisations will seek legal advice or advice from professional consultants [...]'.⁸⁷ Another peer provider noted that if the negotiation process takes a long time, the drawback is that a reputable organisation would have already remedied the alleged conduct that concerned ASIC prior to entering into the EU, meaning that the EU promises are no longer relevant.⁸⁸

Second, there are costs associated with making changes to compliance systems. These include expert advice sought, management time invested in making the changes, training expenses, and any remediation costs. As this professional adviser explains:⁸⁹

[...] what's the price of an [EU]? They're expensive in terms of time and effort and distraction...

Peer providers reflected this in their interviews, with one noting:⁹⁰

no one wants to pick up an [EU] because...most people who work in compliance in the industry understand that they're big and time-consuming and expensive and no firm wants to have one.

Further costs usually imposed on the promisor are the fees of the independent experts who assess the

compliance of the organisation with its obligations under the EU. One peer provider noted:⁹¹

what the regulators don't really understand is the cost to business of actually implementing an enforceable undertaking and the impacts that it has on the running of a business, including taking people, sort of, away from what they would otherwise be doing to sort of being solely focused on the undertaking components for a long period of time with an independent expert over the top ... So I often wonder if it's a good use of resources. If you had those people that are taken out of their day jobs, then you've got to wonder if that's then creating more problems for the future because you've got so many people focused on meeting EU commitments rather redirecting that effort to broader compliance activity.

However, the costs of negotiating, implementing and assuring an EU are not the only costs associated with an EU. Remediation schemes are expensive themselves and raise the threat of litigation, especially class actions. Reflecting this reality, one professional adviser observed:⁹²

I think the biggest deterrent is not ASIC, it's class action risk.

An ASIC interviewee also highlighted this risk:⁹³

Quite often with an EU, it shows systemic conduct. From systemic conduct the next step is someone doing a class action. And with [business subject to an EU] that's what we've seen...

The possibility of a class action has also had a significant deterrent effect on peer providers. As one professional adviser noted, even though an EU may not include an admission of liability, the promisor has to acknowledge that ASIC's concerns are reasonably held. This provides a 'roadmap' for class action lawyers to build their case.⁹⁴

85 Harold G Grasmick and George J Bryjak, 'The Deterrent Effect of Perceived Severity of Punishment' (1980) 59(2) *Social Forces* 471; Steven Klepper and Daniel Nagin, 'The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited' (1989) 27(4) *Criminology* 721.

86 Interview with Respondent 6.

87 Interview with Respondent 6.

88 Interview with Respondent 10.

89 Interview with Respondent 24.

90 Interview with Respondent 19.

91 Interview with Respondent 10.

92 Interview with Respondent 25; But as noted by Respondent 5, the likelihood of such action will only occur when the sum of remediation is at least \$30 million.

93 Interview with Respondent 2.

94 Interview with Respondent 25.

Additionally, EUs have been relied on to a certain extent by consumer advocates to obtain a better outcome for consumers. For example, one consumer advocate has used arguments by analogy to seek consumer remediation. They have contacted peer providers and argued:⁹⁵

If there is an EU about a particular bit of conduct [...] Like it is the exact same conduct. So if this entity has gotten in trouble for doing XYZ and you are doing XYZ, come on.

Such a strategy has had mixed results depending on the industry sector that is being targeted by the consumer advocate. The argument was harder to achieve results by in lending than in the financial services sector.⁹⁶

iii. Avoid Reputational Damage

Reputational loss has the potential to be significant in deterring misconduct.⁹⁷ The literature has illustrated that misconduct affecting an organisation's customers, suppliers and investors may result in significant financial losses that may outweigh the cost of a fine imposed on the business.⁹⁸

As we have seen, the costs of entering into and implementing an EU are high. So is action in the form of corrective advertisement and customer compensation arising from an EU. Further, when the alleged conduct has also affected customers, an EU may negatively impact on business reputation. Fear of loss of reputation attached to an EU has been reflected in most of the pilot interviews conducted.⁹⁹ Even one of the two peer providers who noted that an EU does not have a deterrent effect observed that when a company enters into an EU its reputation 'will be tarnished quite a lot.'¹⁰⁰ An EU can ultimately impact on the brand of an organisation.¹⁰¹ For instance, one financial provider had no doubts

that an EU would damage their company, having observed the impact of an EU in the same industry:¹⁰²

If you look at some of the institutions that have been subject to [EUs] and that has hit them in an immediate and big way (the banks would be the obvious one) ... So when something, when an action is taken that actually undermines their confidence in the business, it can really damage reputation quite quickly ... if we were subject to an [EU], our company would take an incredible hit within the market.

[...] ultimately, if you've got a bad reputation that's going to impact your bottom line, your ability to implement your strategy, to retain your customer base, to acquire new customers. All of your business model is on sinking sand, really, if you don't have a good reputation

When another respondent was asked about whether EUs could damage the company, the response was unambiguous:¹⁰³

Oh, absolutely, yes. And I know in our risk register, reputational damage is the highest thing sitting on the register, so yep. [...] it's because the industry will know about it. Your customers will know about it. But it is also an indication that you weren't a responsible enough business to recognise and deal with an issue yourself. That, while you agreed to the undertaking, it was not something that you were a mature enough business to recognise and [have] done yourself. I think the damage to your market... there are impacts, not only financially, but there are impacts for our brand and we regard ourselves as a well-established brand...

"ALL OF YOUR BUSINESS MODEL IS ON SINKING SAND, REALLY, IF YOU DON'T HAVE A GOOD REPUTATION."

95 Interview with Respondent 29.

96 Interview with Respondent 29.

97 John Armour, Colin Mayer and Andrea Polo, 'Regulatory Sanctions and Reputational Damage in Financial Markets' (Working Paper No 62, Oxford Legal Studies Research Paper, 2010).

98 Deborah Murphy, Ronald Shrivs and Samuel Tibbs, 'Understanding the Penalties Associated with Corporate Misconduct: An Empirical Examination of Earnings and Risks' (2009) 44(1) Journal of Financial and Quantitative Analysis 55.

99 See for example, interviews with Respondents 8, 10, 13, 14, 16, 7 and 20.

100 Interview with Respondent 20.

101 Interview with Respondent 12.

102 Interview with Respondent 14.

103 Interview with Respondent 13.

Although the wider community may not hear about an EU being entered into, it has been observed that competitors of the promisor are generally aware that an EU has been entered into, tarnishing the reputation of the organisation.¹⁰⁴ Deterrence literature suggests that ‘high status’ firms may feel and fear this reputational loss more keenly, and may be more deterred than ‘low status’ firms.¹⁰⁵

that EU terms were also expensive to negotiate and implement. Future studies are therefore required to examine the relative strength of each of these mechanisms as a deterrent.

Factors associated with losing customers – which damages your market – were also specifically identified by pilot respondents as a deterrent related to reputational loss.¹⁰⁶ Related to this loss of reputation and to awareness of EUs, which we consider in Part IV below, ASIC has aimed to build one-to-one engagement with consumers with certain EUs. With these EUs they have widely disseminated the alleged conduct to consumers through financial counselling associations, social media (such as Twitter and Facebook) as well as their Money Smart Website.¹⁰⁷

Factors motivating behavioural change can be classified into more specific mechanisms. Table 6 provides an overview of these mechanisms. Mechanisms are classified as working to either deter non-compliant behaviour or promote compliant behaviour.

These were identified by interviewees both through observing actual behavioural change or expected behavioural change. Some mechanisms were raised more frequently than others, but this was not evidence of stronger deterrent effect. It cannot be inferred from the pilot interviews which mechanisms are more (or less) effective. The purpose of the pilot is to *identify* potential deterrence mechanisms, not to test their validity. It is also important to recognise that not everyone agreed with each deterrent mechanism identified or raised it as possible mechanism. On the one hand, complying with the terms outlined in an EU may be seen as more cost-effective than becoming subject to formal court enforcement. On the other, it was pointed out

104 Interview with Respondent 20.

105 Yiu, Xu and Wan, above n 36, 1564.

106 Interview with Respondent 13.

107 Interview with Respondent 2.

PROMOTE COMPLIANCE POSITIVE/PROACTIVE MECHANISMS	REDUCE NON-COMPLIANCE NEGATIVE/REACTIVE MECHANISMS
REMIND COMPANY OF COMPLIANCE RESPONSIBILITIES	AVOID PUNISHMENT
Identify what the regulator considers inappropriate practices	Avoid getting caught doing the same behaviour as the EU promisor
Understand ASIC's area of interest	Avoid increased external monitoring and oversight by independent experts
REINFORCE EXISTING PRACTICE(S)	AVOID COSTS
Confirm existing business approach is appropriate	Avoid class actions/damages
Justify business practices internally and externally	Avoid costly remediation schemes
	Avoid costs associated with negotiating and complying with EU terms
IMPROVE PRACTICE(S)	AVOID REPUTATIONAL LOSS
Guide companies on what behaviour is considered appropriate for the industry	Avoid business costs
Clarify potential grey areas of business practice	Avoid losing consumers/ customers
Use as a training tool to educate staff on appropriate behaviour	Avoid customer annoyance/impost
INCAPABLE PROVIDERS DEPART FROM INDUSTRY	
Cost of compliance is too high to be viable	
Risk of getting caught for non-compliance is too high	

Table 6

D. CHANGE IN BEHAVIOUR ASSOCIATED WITH EUS

The findings in this section support previous general deterrence research, that often enforcement action can motivate behavioural change, not only via ‘fear’ but also via ‘duty’.¹⁰⁸

The observations collected from the pilot suggest that EUs have the potential to improve business practices and ensure compliance at different levels:

- through clarification of which practices are or are not compliant;
- through reinforcing existing practices, and reassuring the organisation that it is compliant, encouraging continuing improvement of existing practices and in legitimating internal arguments for improvement; and
- through departure of incapable providers from the industry.

i. Clarification of Whether Practices are Compliant

Some respondents to the pilot noted that an EU provides an opportunity for providers to discover how the regulator views certain practices¹⁰⁹ and which compliance areas are under scrutiny.¹¹⁰ For instance, one professional adviser noted that EUs ‘certainly show where there’s an area of focus [...]’.¹¹¹ Another adviser observed that, when conducting a health check of a client organisation, they do not just advise on what they are asked to do by the client but also consider the standards and expectations set in relevant EUs.¹¹²

As noted in Table 5, peer providers have observed the educational role of EUs in clarifying standards. One respondent working for a small financial provider noted:¹¹³

... anything that assists us in, particularly the compliance and risk function, in identifying what ASIC’s views are and being able to communicate that to the operational side of the business is important and valuable.

Another respondent from large credit provider stated that they monitor EUs to ‘see where ASIC is heading.’ Further, they observed:¹¹⁴

ASIC’s views about what an uncertain area of the law might require is incredibly important. So to an extent you have a bit of a library of outcomes.

One respondent working for a small financial services provider noted that they have mined the register of EUs for training purposes to help promote compliance within an organisation:¹¹⁵

I have given training sessions in the past where we tracked all of the EUs given by ASIC over a 5 year period in relation to the different subcategories of what the EU was in relation to, you know, to be able to show there was a very heavy focus on monitoring and supervision across all of those [EUs] and that they, you know, it wasn’t only the large institutions that were receiving them but rather across the board. And the steps and cost and those kinds of things to help advisors get an understanding of just why no licensee ever wants an [EU].

Another respondent noted that education, in his perspective, is a secondary outcome of EUs.¹¹⁶ Lastly, EUs were also seen as useful in observing how ASIC may interpret compliance in areas where current laws and regulations may not be clear.¹¹⁷ One respondent observed that:¹¹⁸

...the enforcement procedures through an [EU] certainly help test the boundaries of those laws and set that expectation until challenged in court. We’ve seen challenges of those in court – and some which ASIC have won and some which ASIC have lost.

108 Thornton, Gunningham, and Kagan, above n 22, 265.

109 See for example, interviews with Respondents 2, 12, 13, 19, 22 and 27.

110 For example, interviews with Respondent 24.

111 Interview with Respondent 24.

112 Interview with Respondent 26.

113 Interview with Respondent 14.

114 Interview with Respondent 8.

115 Interview with Respondent 18.

116 Interview with Respondent 16.

117 For example, interview with Respondents 3, 7, and 14.

118 Interview with Respondent 7.

ii. Reinforcing Compliant Practices and Proactive use of EU information to Legitimate and Internally Promote Compliance Improvement

The concept that general deterrence strategies, such as publishing an EU, provide a ‘reminder’ and a ‘reassurance’ function to a peer organisation – rather than deterring bad practices *per se* – has previously been identified in research.¹¹⁹ Many respondents in the pilot reported that EUs provided these functions, which included reinforcing their belief that existing practices were sound and/or compliant.¹²⁰ As one respondent noted:¹²¹

...even if it is confirmation that we are doing what we believe we need to do, absolutely have reviewed documentation and policy on a number of occasions, even to be able to give a report to our responsible managers to give them my professional opinion on how we were fulfilling the obligations that ASIC have outlined weren’t fulfilled to their satisfaction by the recipient or promisor of the EU.

While some respondents may have been ambivalent about EUs, no respondent indicated that an EU would be completely ignored. This included the two respondents who did not report that EUs would have any general deterrent capacity:¹²²

...occasionally depending on the industry involved, I will share that with the relevant business area. If nothing else, just to say, ‘do a check to make sure we’re not impacted by this black-letter law approach to compliance’.¹²³

We always get updates from ASIC on decisions and penalties, EUs. So we also review our process, documentations, wordings, updates to be fully compliant. Even our dealer group sends us updated documentations with different wording to comply with EUs or penalties that are applied in the industry.¹²⁴

While EUs could be viewed as a *passive* reminder and reassurance to confirm that an organisation is compliant, and that non-compliant providers will be negatively affected, the pilot researchers have observed that some respondents go beyond this theoretical ‘pat on the back’. Our respondents report that EU information is – or should be – used *proactively* to review their company’s own processes, to identify any gaps or oversights in an effort to improve their business practices¹²⁵ and to learn from ‘other people’s mistakes’.¹²⁶ For example, one respondent in a small financial services organisation has noted:¹²⁷

Certainly from our perspective we have, as in the team who supports advisors, we’ve definitely reviewed our processes or the terms of the [EU] and, in fact, any ASIC media release to make sure that to the best of our knowledge and ability we’re fulfilling the expectations of the regulator.

Another respondent observed that institutions may:¹²⁸

... put a little note to their risk committee or board or ex-co or ... so this is what licensee A fell short of, this is why, we’ve already got it covered, or this is the impact to us, or this is what we might do about it.

"OUR RESPONDENTS REPORT THAT EU INFORMATION IS – OR SHOULD BE – USED PROACTIVELY TO REVIEW THEIR COMPANY’S OWN PROCESSES."

119 Thornton, Gunningham and Kagan, above n 22, 265.

120 See for example, interviews with Respondents 2, 11 and 18.

121 Interview with Respondent 18.

122 Interview with Respondent 11 and 20.

123 Interview with Respondent 11.

124 Interview with Respondent 20.

125 See for example interview with Respondents 5 (‘EUs could be utilised to improve compliance culture’) and 6 (‘our organisation has a very proactive compliance culture’).

126 Interview with Respondent 6.

127 Interview with Respondent 18.

128 Interview with Respondent 24.

"HERE'S WHAT POTENTIALLY WILL HAPPEN IF YOU RUN THE RISK OF HAVING AN EU, THIS IS WHAT IT WOULD INVOLVE IF WE WERE SUBJECT TO ONE."

Indeed, some respondents reported that the terms of an industry EU could be used to agitate management for change in their business' practices – and had been successful in fact.¹²⁹ At an industry level, an EU may be relied on 'to ensure the underlying issues are not replicated in the practices.'¹³⁰ At an institutional level, an EU may be used to instigate change in the organisation that management may not have originally seen as necessary. For example, one respondent stated that an EU may be a 'very powerful in focusing those resources into making improvements.'¹³¹ Other peer providers have had similar observations and have found that an EU may also put pressure on management to enhance compliance:¹³²

I have found it useful to be able to say 'OK, I understand, [that] you don't like what we're saying, but here's what potentially will happen if you run the risk of having an EU, this is what it would involve if we were subject to one'. That would actually assist the risk and compliance function and, I suppose, educating the business in what are acceptable behaviours in ASIC's view and our view as well.

Another respondent noted:¹³³

I'm reasonably confident to say that if that was a situation for someone in my type of role then being able to go with, 'here is the action, here is where I think we need to review' would be a very interesting conversation if a board [...] wasn't willing to review that accordingly.

The proactive use of EUs to review and change business practice supports research that suggests that usually businesses are compliant, or at least try to be compliant with the law.¹³⁴ The remarks of this respondent summarise this perception:¹³⁵

... I don't sit here in my current role or past roles in any organisation I've worked for thinking about making decisions so we don't get an [EU]. That's not how we think. I'd like to hope that's not how anyone thinks. But certainly every time you see someone get an EU, you'll always read it – you want to understand why, you want to sort of get a picture of what was happening at that licensee and what circumstances might have led to that so that you can make sure that's not a path that you're on or a path that you could have been on.

...
I think that if you're passionate about what you do and you're serious about being in this industry then any opportunity that you have to review, to learn, to potentially change, but to also confirm what is the position that the regulator is taking in relation to a certain aspect, why wouldn't you grasp that with both hands?

i. Departure of Incapable Providers from the Industry

An EU may clarify and signal ASIC's expectations, one professional adviser observing that an EU may lead to the departure of incapable providers from the industry:¹³⁶

I've certainly got clients who I've acted for on transactions who have made the conscious decision, you know, of we're not well equipped to deal with this so divestiture was the outcome, which is interesting. And I don't think it means that the regulatory enforcement tool that there's anything wrong with it. It just causes people to reconsider the basis of their business and what their skills are. Had a couple of clients that have sold wealth management divisions or got rid of them in a particular way because they've said 'we're not well equipped to run these businesses.

129 See for example Interview with Respondent 5, 12, 14, 18, 19.

130 Interview with Respondent 20.

131 Interview with Respondent 19.

132 Interview with Respondent 14.

133 Interview with Respondent 18.

134 Apel, above n 34, 93; Helmut Hirtenlehner and Per-Olof H Wikström, 'Experience or Deterrence? Revisiting an Old but Neglected Issue' (2017) 14(4) *European Journal of Criminology* 485, 15; Justin T Pickett, Thomas A Loughran and Shawn D Bushway, 'Consequences of Legal Risk Communication for Sanction Perception Updating and White-collar Criminality' (2016) 12(1) *Journal of Experimental Criminology* 75, 87.

135 Interview with Respondent 18.

136 Interview with Respondent 21.

Give them to somebody who is better equipped.’

Accordingly, an EU may influence an organisation to cease offering a particular service, because, from a business perspective, they are unable (or unwilling) to invest in the resources required to continue operating that service. This will be especially the case if the risk of being identified as non-compliant is high. This decision may be further influenced by guidance or actions taken by ASIC and the overall enforcement environment.

E. BARRIERS TO DETERRENCE BY EUS

Barriers to deterrence may be intrinsic or extrinsic, as discussed below. The deterrent effect of an EU may vary from sector to sector and from small to large organisations. Larger organisations, for example, have the resources to implement the changes that are required. Smaller organisations may have limited resources and may struggle to implement the changes needed to keep pace with best practices. Accordingly, the general deterrent effect from their perspective may be constrained by the financial resources of their institution. One study has highlighted that companies providing services to less educated, ‘unsophisticated’ consumers may have higher numbers of individuals engaged in misconduct.¹³⁷ As such, it suggests that lower customer education raises a barrier to deterrence, because identifying compliance short-comings through customer complaints is weaker.¹³⁸ In interviews for the pilot and from the literature we observed perceptions which may be considered barriers to deterrence:

- overconfidence in peer providers, peer influence and provider rationalisation;
- absence of celerity; and
- little evidence of capability or motivation to change poor compliance practices
- low volume and inconsistency in using EUs

"AN EU MAY INFLUENCE AN ORGANISATION TO CEASE OFFERING A PARTICULAR SERVICE."

i. Overconfidence Bias, Peer Influence and Provider Rationalisation

From respondents to the pilot and from the literature we observed behavioural barriers to deterrence. A key barrier is overconfidence bias. Peer providers are unlikely to make a change within their organisation if they do not detect that their conduct is similar to that of the promisor. Prior literature has identified peer providers as having an innate unwillingness to acknowledge behaviour or practices equivalent to a sanctioned entity, with one study noting ‘those that were punished were seen as fundamentally unlike our respondents – as ‘bad guys’ who flagrantly ignored the law.’¹³⁹ Further, as the literature on behavioural ethics demonstrates, people tend to believe that they view the world objectively and to see themselves as unbiased and competent. They can be overconfident about their abilities and prospects.¹⁴⁰

Several respondents to the pilot, especially professional advisers, have highlighted that some peer providers believe that their own compliance systems are more stringent than those of competitors. For instance, a peer provider noted that EUs are not really a deterrent because change is unlikely to occur if they are already compliant:¹⁴¹

... I think it has an influence, but again, you’ll only make the change if you feel you’re at risk or you are following that same path the organisation in question is. I don’t think there’s a great deal of change occurs because of EUs. Because you’d think that most organisations are doing the right thing or following the right path.

137 Mark Egan, Gregor Matvos and Amit Seru, ‘The Market for Financial Adviser Misconduct (Working Paper, No 22050, National Bureau of Economic Research, 2017) 1.

138 Egan, Matvos and Seru, above n 136, 6.

139 Neil A Gunningham, Dorothy Thornton and Robert A Kagan, ‘Motivating Management: Corporate Compliance in Environmental Protection’ (2005) 27 Law & Policy 289, 297-298. See also John Braithwaite and Toni Makkai, ‘Testing an Expected Utility Model of Corporate Deterrence’ (1991) 25 Law & Society Review 9.

140 Jennifer K Robbennolt and Jean R Sternlight, ‘Behavioural Legal Ethics’ (2013) 45 Arizona State Law Journal 1107, 1116.

141 Interview with Respondent 12.

Suggestive of this over-confidence, rather than a full review of the organisation's existing standards, peer providers usually approach a professional advisor for clarification of only the standard involved in an EU:¹⁴²

[Peer providers] usually come and ask questions like 'will you present to our board or our audit and risk committee about what you know about this, what were the issues that were of concern and what is the likely outcome that ASIC's seeking out of this enforcement. [...]

Sometimes the compliance or risk or the regulatory person will say 'can you come and talk to me about this? What are the key drivers?' and things like that. Because I think what happens in organisations – and it doesn't matter if it's an [EU], poor publicity, product recall – whatever it is – every board and risk committee then says 'could this happen to us?' So at that level they do have a conversation about it. But, as a consultant, if I said, 'would you like me to come in and have a check for you and to see whether the issues that arose are here?' and they go 'we'll take a look at it ourselves. We think we're pretty right in that space.' And sometimes they might be pretty right but my experience is most often they're not.

Another professional adviser highlighted the overconfidence bias of peer providers by stating:¹⁴³

They all are, and they all start with, that's not me. I've heard many clients say, 'we're not CBA, we're not Macquarie, we're not that.' So, part of our responsibility is sometimes to, not say, 'you are', but get them to have the realisation that they are.

Peer influences have been found to be significant in influencing risk perceptions – in some cases more so than the deterrent effect of legal sanctions. Hirtenlehner and Wiksröm found that three variables in young individuals (weak morality, low self-control and exposure to delinquent peers) had a statistically significant impact on future offending – and,

conclude that '[i]nvolvement with delinquent peers turns out to be the best predictor of subsequent criminality'.¹⁴⁴ Peer influences within – and across – firms engaging in misconduct has also been found. Further, various studies on financial advisers in America has found that fraud can be 'contagious'¹⁴⁵ – effectively transmitted through career networks.¹⁴⁶

These findings introduce an interesting paradox for ASIC's EUs: on the one hand, it would want to exploit the peer relations within the finance industry to diffuse its message and maximise general deterrence when a company has entered an EU. On the other hand, it would also need to compete with and weaken the peer-to-peer learning of misconduct. As misconduct is often unrecognised as such, its persistence may influence peers' capability to detect misconduct in their own organisation and thus provides a barrier to EU deterrence.

Rationalisations by providers about misconduct or non-compliance in an industry may be a further barrier to deterrence. When faced with the regulator's scrutiny, a provider may justify its conduct by pointing to competitors that are engaging in similar practices.¹⁴⁷ If an EU is viewed as a 'cost of doing business', after the promises are discharged there may be little likelihood of changes being sufficiently established, such as to dissuade the promisor from engaging in similar future conduct. Such a message is likely to disseminate more broadly to peer providers in the industry, providing a barrier to general deterrence. Longer term erosion of motivation to comply is an issue in some sectors, such as financial advice, which appears to have systemic issues with many providers having similar compliance failures (eg poor record-keeping or charging fees for no service). How to counteract these barriers to deterrence and use EUs to neutralise negative peer messages could benefit from future research.

142 Interview with Respondent 27.

143 Interview with Respondent 26.

144 Hirtenlehner and Wiksröm, above n 134, 10. The same study showed deterrent effects to be near-absent. However, the study involved young people, and therefore the applicability to adults – or organisations – is not clear.

145 Stephen G Dimmock, William C Gerken and Nathaniel P Graham, Is Fraud Contagious? Career Networks and Fraud by Financial Advisors (May 11 2015) <https://www.newyorkfed.org/medialibrary/media/research/conference/2015/econ_culture/Dimmock_Gerken_Graham.pdf>, 1>.

146 Ibid.

147 Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 336.

ii. Importance of Celerity

A further barrier to deterrence is that an EU may not correct industry conduct quickly, as EUs take time to negotiate and publicise. Despite many respondents to the pilot citing EUs as useful in avoiding lengthy court processes, others pointed out that entering an EU could also be a lengthy process – sometimes taking years to negotiate.¹⁴⁸ An ASIC representative also noted the time it can take to investigate and settle an EU:¹⁴⁹

... so you know, it takes us, to get to an EU, we've usually been working on a matter for a good year, if not more.

During this period is it plausible that peer providers will continue with conduct below regulatory standards as they are not privy to EU negotiations. The implication is that EUs may not supply a sufficiently swift outcome for either the promisor or the peer providers who might be deterred.¹⁵⁰ Once the EU is entered into and publicised, the sanction may start having a deterrent effect. Accordingly, a speedy entry to the EU or a direct statement by ASIC about acceptable standards is needed when poor conduct is detected, and the regulator believes that it is widespread.

iii. Little Evidence of Motivation or Capability to Change Poor Compliance Practices

EUs have the potential to positively affect a promisor's motivation to comply and improve the practices of the promisor. However, pilot respondents noted that this is not always achieved. Some peer providers viewed EUs as more effective for firms which want to be compliant, rather than less salubrious operators. A number of professional advisers and consumer advocates shared this view:

I think they do have a deterrent effect, but I think they're more likely to have an effect on people who are generally good operators who operate within law and are concerned to stay within the law.¹⁵¹

... on the whole, I think [EU]s have a role. And I do think they have a potential capacity to deter kind of the more likely to comply group, if that makes sense... But they tend to be like the bigger sort of players and the ones who are more concerned about their reputational risk, whereas I think there's a scale of more the rats and mice and other players who, to be honest, I think they don't give a banana over it. I don't think it necessarily deters their behaviour and they're just factoring it all into their overall overheads.¹⁵²

... if you think back to the changing behaviour, if it's a licensee that has no desire to change, an EU is not proportionate. Take them to Court, take their licence. So that's where an EU is unhelpful. If someone has to do something and they don't want to do it, then an EU won't do the job.¹⁵³

Consequently, it is likely some peer providers will never be deterred by EUs, either specifically or generally.

One peer provider observed an instance where a competitor had entered into an EU, and after the discharge of the promises of the EU, they reverted to some of the previous poor conduct:

So, despite [a competitor] having gone through an EU process and having worked with ASIC on that, the culture is still in opposition to ASIC's benchmarks, it [the EU] won't sustain that cultural change.¹⁵⁴

148 Interview with Respondent 6.

149 Interview with Respondent 2.

150 ASIC, above n 5, RG 100, 8.

151 Interview with Respondent 28.

152 Interview with Respondent 29.

153 Interview with Respondent 24.

154 Interview with Respondent 7.

This negatively affects the general deterrence of an EU. The rest of the industry will find that the promisor continues its bad practices after the EU without regulatory repercussions for back-sliding. Another peer provider had observed this and noted:¹⁵⁵

If organisations were to take [EUs] seriously ... then ASIC would go out of business. The fact that ASIC keep issuing these EUs against the same organisation but for different reasons to me suggests that they've lost their influence

However, along with motivation there may be a range of factors behind the inability of a company to sustain the changes introduced by an EU. One professional adviser noted:¹⁵⁶

EUs don't address the true causal factor [of the alleged misconduct]. So, if you think about why... So I'm just going to keep using the theme of advice remediation [...]. But my experience is, if you stood back and said, 'how is it that you're getting poor advice?' it is on the last 1% of a bell-shaped curve, what is the real cause of that? And none of the EUs address the fundamental root cause which would have covered things like systems, data architecture, monitoring systems, documentation quality and consistency. In the EUs we've seen around advice, you don't tend to – it's still up here and not down there in the detail.

The same professional adviser noted that EUs focus on specific deficiencies of a licensee not shortcomings in relation to the general obligations breached: 'there is little deterrence in my experience around the general obligations.'¹⁵⁷ This means that EUs are viewed as 'a compliance arrangement rather than a resolution of customer issues.'¹⁵⁸ That same professional adviser concluded: 'A regulatory change in approach may be needed in the way the true causal factor for the breach is identified.'¹⁵⁹

The fact that the true cause of poor conduct may not be dealt with by an EU requires consideration. One of the advantages of EUs in the mix of regulatory approaches that the literature suggests is best able

to deter, is that it is capable of greater precision and penetration than the blunter instruments of prosecution or civil penalty action. This greater focus is lost and the educational mechanisms involved in the deterrent effects of an EU are arguably diminished if it does not identify the true cause of poor conduct.

Along with motivation, lack of capability for sustained change in practices may be a barrier to specific deterrence. A peer provider noted that the return of non-compliance after the terms of an EU have been fulfilled may be the result of diminished capability through lost corporate memory. If this failing in specific deterrence is obvious to the industry, then it may provide an obstacle to general deterrence.¹⁶⁰

My question mark is around whether the changes are implemented on a sustainable basis. That is, changes are often made, but they're not implemented to ensure sustainability over the very long time. So for example, changes aren't made that are sustained over a 5 to 10 year period. If you have a look at the root causes of all of the EUs that ASIC issued, they invariably come down to issues of risk management systems, monitoring, supervision or your compliance systems – in almost every single circumstance. So why is it then, that an organisation tends to have the same problem in 5 to maybe 10 years down the track. And what I can only deduce from that, is the changes that were made in the previous 5 or 10 years aren't implemented in a sustainable way. All its corporate memory is lost over that time horizon, which means that changes are either reversed, investment isn't sustained and the culture then transcends or shapes or changes over time, which then leads to the same problems manifesting, causing the organisation to then have to make transformations again. So it's almost like steps, right? It's hardly linear in the context of continuous improvement. It is this massive change that occurs after an EU, then it plateaus for a number of years, then another step change needs to occur, then it plateaus for a number of years... so it doesn't feel smooth and sustained.

155 Interview with Respondent 11.

156 Interview with Respondent 26.

157 Interview with Respondent 26.

158 Interview with Respondent 26.

159 Interview with Respondent 26.

160 Interview with Respondent 16.

[...] One of the things that I have a problem with in corporate life is that loyalty has eroded over many years, over the last generation. Loyalty to one organisation is no longer common and therefore anyone who signs an EU may not be around in another 5-10 years' time when the decisions are made at that point to actually start to cause the undoing of all of the things that have changed because of the EU in the first place, if that makes sense.

The peer provider noted that this issue of lost 'corporate memory' may be addressed through ex-post monitoring: 'there almost needs to be another check point in maybe 3-5-7 years, to ensure that those systems have been changed and the changes are sustainable.'¹⁶¹ He further observed:¹⁶²

if you do [monitoring] only after a 1 or 2 year period, the people that have contributed to the EU, they've almost certainly moved on, the people who did the change will be seeking to move on and the new people will be completely unaware of what the cultural decisions were of the past and they'll continue to repeat and make the mistake of the past.

"THE MORE ASIC [ENTERS INTO EUS], THE GREATER THAT DETERRENCE VALUE WILL BE."

iv. Low Volume and Inconsistency in Using EUs

Research on deterrence suggests the greater the volume of regulatory supervision and enforcement the greater the deterrence effects.¹⁶³ One respondent to the pilot observed that 'the more ASIC [enters into EUs], the greater that deterrence value will be.'¹⁶⁴ This interviewee thought that a greater volume of EUs targeted to particular areas may make unscrupulous actors question their practices, as there would be greater likelihood of being sanctioned.

On the other hand, an indiscriminate use of EUs may be problematic as an EU would not be strong enough to generally deter less scrupulous operators who lack the motivation to change.¹⁶⁵

... I think there's a risk that some providers will continue practices while they can get away with it and if they think that the worst that can happen to them is an EU, rather than a prosecution – if they think 'well the consequence for us of continuing this ... worse comes to worst ASIC's going to contact us and we can enter into an EU – then that's not really a deterrent for providers who are not caring about their compliance requirements.

Another respondent observed that in the case of unscrupulous actors, ASIC should:¹⁶⁶

Take them to Court, take their licence. So that's where an EU is unhelpful. If someone has to do something and they don't want to do it, then an EU won't do the job.

"WHY IS ONE ORGANISATION SUBJECT TO AN EU AND ANOTHER IS NOT? "

155 Interview with Respondent 11.

156 Interview with Respondent 26.

157 Interview with Respondent 26.

158 Interview with Respondent 26.

159 Interview with Respondent 26.

160 Interview with Respondent 16.

161 Interview with Respondent 16.

162 Interview with Respondent 16.

163 See for example Apel, above n 34, 82. This is related to the experiential effect, as described earlier, in Section II: Background to the report.

164 Interview with Respondent 30.

165 Interview with Respondent 28.

166 Interview with Respondent 24.

Inconsistency of application of EUs was seen as a potential barrier to general deterrence. Respondents to the pilot noted that there is confusion over why some peer providers escape an EU while others submit to it. One consumer advocate observed that only one entity in a corporate group entered an EU with ASIC, not the whole group. This was even though it was apparent that the whole group was involved in similar conduct and had a similar structure to the promisor.¹⁶⁷ Some small peer providers may have reasoned that they are ‘under the radar’ of the regulator and consequently will not be detected for their conduct and become party to an EU.¹⁶⁸ A more systemic and consistent approach to the use of EUs was suggested. To highlight this perception of inconsistency in the use of EUs, one peer provider observed the following:

prior to our review [of the product sold by the peer provider], there were EUs entered into by [a competitor] [...]. And we had a similar product to them but we had taken the opinion that it was one of many products customers could choose and customers were actually better off on that – what we called the ‘flexi product’ – and so we didn’t. So despite ASIC signalling that they were unhappy with that kind of product, we continued to offer that product. ASIC did challenge us and we weren’t able to influence them around their opinion, so we resolved that very quickly with ASIC. And it had a component of a reimbursement and a fine to ASIC. So that was done a lot earlier in the process than getting to an EU. So from that point of view I suppose we didn’t change but we also didn’t go as far as an EU, if that makes sense.

Accordingly, the question raised by a range of participants, especially consumer advocates, is the following: why is one organisation subject to an EU and another is not?

One professional adviser further noted that the use of informal settlements or ‘shadow EUs’ may contribute to this perception of inconsistency. An informal settlement or (in the language of our respondents) ‘shadow EU’ involves ASIC running the settlement of non-compliance as an EU, but without the formalities, such as publication on the EUs register, usually attached to an EU. In most cases,

the only public acknowledgement that a shadow EU has been entered into is through an ASIC media release, with no disclosure of the terms attached to the private settlement. There is little transparency regarding the process attached to shadow EUs. The professional adviser found that ‘the absence of the formality slows down resolution [of the matter].’¹⁶⁹ The same respondent further noted the perceived injustice that may appear from the inconsistent regulatory treatment of providers who have been involved in similar conduct.¹⁷⁰

Because [...] there is EUs happening and then shadow EUs and [the latter] miss the impact I think of making a significant change happen because those who are in the shadow or not in the shadow, they just keep doing what they’re doing. So you penalise the one that’s got the EU more than ever, from a reputational point of view and their own personal organisational progress.

While use of EUs to further ASIC’s regulatory purposes is to be encouraged, an inconsistent use may undermine the legitimacy of EUs and their deterrence. ‘Shadow EUs’ lack publicity which is an acknowledged precondition to general deterrence, discussed further below.

A balance needs to be achieved between the use of EUs and the use of civil and criminal penalties. The legitimacy of general deterrence is also important to its effectiveness. Unreasoned action against some participants in the industry and not others may lead to resentment. Resentment may lead promisors to comply with the letter rather than the spirit of an EU, and for peer providers to do likewise or for general deterrence to fail altogether.

Further, not taking action is also problematic as it leads to ethical fading. Peer providers rationalise their misconduct by noting that while the behaviour is wrong everyone is doing it: ‘My condemners are hypocrites, deviants in disguise or impelled by personal spite.’¹⁷¹ If this rationalisation becomes well known, it may provide a barrier to both specific and general deterrence.

167 Interview with Respondent 29.

168 Interview with Respondent 26.

169 Interview with Respondent 26.

170 Interview with Respondent 26.

171 Parker and Evans, above n 147, 336.

IV. ENFORCEABLE UNDERTAKINGS: AWARENESS AS A PRE-CONDITION TO DETERRENCE

A precondition to deterrence is awareness of the alleged conduct that led to an EU and its promises. For instance, it has been found that individuals in a corporation modify their behaviour when they are made aware of misconduct via the media, even if the misconduct is not directly related to their industry.¹⁷² In one study, researchers examined insider trading and earnings management decisions of corporate insiders after the news of a local political scandal. They reviewed changes in the incidence of those decisions 12 months after the scandal was publicised. They found evidence that insiders did in fact ‘engage in fewer suspect behaviours’¹⁷³ in this period, and that: ‘Even the suggestion that certain self-serving actions are unethical and illegal appears to cause some executives to choose more appropriate courses of action on behalf of themselves and the firms they run.’¹⁷⁴

Consequently, this part of the report assesses:

- the awareness that peer providers have of EUs entered by promisors; and
- perceptions of peer providers about the clarity of EU terms and promises.

A. AWARENESS OF AN EU

General deterrence is predicated on the intended audience being *aware* of which behaviour is acceptable and unacceptable and the consequences of non-compliance with the appropriate behaviour.¹⁷⁵ In fact, the perceived certainty of sanctions is heightened if people know that the sanction is relied on by regulators to deal with particular misconduct.¹⁷⁶

i. ASIC Strategies to Raise Awareness of the Use of EUs

ASIC has established an online EUs register. This allows stakeholders to obtain a copy of an EU free of charge.¹⁷⁷ As part of the terms of the EU, the following clauses – or similar clauses – are usually included:¹⁷⁸

[The promisor] acknowledges that ASIC:

- may issue a media release on acceptance of this EU referring to its terms and to the concerns of ASIC which led to its acceptance;
- may from time to time publicly refer to this EU;
- will from time to time publicly report about the [promisor’s] compliance with this EU;
- will make this EU available for public inspection;
- may issue a media release referring to, or otherwise publicly refer to and comment on, the content [of the expert compliance reports]; and
- will make available for public inspection a summary of the content of the [expert compliance reports].

This acknowledgement puts the promisor on notice that its EU will be published and distributed to raise awareness of the alleged conduct. ASIC predominantly relies on the issue of media releases to subscribers to ASIC’s Media Alert including journalists, peer providers and industry bodies. The media release is also available on ASIC’s website.¹⁷⁹ Further, ASIC forwards the media release to a group of journalists which regularly engages with ASIC.¹⁸⁰ Consequently, EUs binding high profile providers are generally picked up by the media and further published and distributed. The information is distributed in different formats (online, in industry magazines, television) and to different audiences.¹⁸¹ Information about EUs is also disseminated through the media engagements and speeches of ASIC’s commissioners.¹⁸² To raise further awareness of EUs, Twitter has been used. ASIC tweets the link to its media releases, including EUs, to about 19,300 followers.¹⁸³

172 Cicero and Shen, above n 69, 21-23

173 Ibid 1.

174 Ibid 7.

175 Tomlinson, above n 40, 33-38.

176 Joseph C Ugrin and J Michael Pearson, ‘The Effects of Sanctions and Stigmas on Cyberloafing’ (2013) 29 Computers in Human Behaviour 812, 812.

177 Australian Securities and Investments Commission, Enforceable Undertakings Register (2018) <<http://asic.gov.au/online-services/search-asics-registers/additional-searches/enforceable-undertakings-register/>>.

178 Australian Securities and Investments Commission, Enforceable Undertaking, Thorn Australia Pty Ltd (Document Number 030133417, 23 January 2018), [4.1].

179 ASIC, above n 5, RG 100.

180 Interview with Respondent 9.

181 Interview with Respondent 9 and 2.

182 Interview with Respondent 4.

183 Interview with Respondent 9.

To facilitate communication of the main EU terms and the overall regulatory message, the media releases are kept simple and straightforward. They are not usually written in a way that targets a particular sector.¹⁸⁴ ASIC officers note that when a media release contains a particular message, the release is more effective: 'ASIC [in those circumstances] is more proactive in going out and doing a piece rather than waiting for questions from the journalists and so on. I think that's more effective because you are choosing the message.'¹⁸⁵

Sometimes media releases have also been issued targeting industries by location. When an EU affects consumers, the media release is sent to consumer advocates.¹⁸⁶ To further raise awareness about the conduct that occurred, a copy of the media release is sent to industry bodies. This practice has, for instance, been used in the credit sector.¹⁸⁷ ASIC finds it useful to cultivate relationships with these associations. An ASIC respondent to the pilot noted attending the yearly annual conference for an industry association had provided the respondent with an opportunity to highlight to the industry EUs, and outcomes that ASIC had been involved in.¹⁸⁸

Awareness of EUs also spreads through professional advisers and industry groups. They distribute newsletters and advise peer providers, drawing on their work with promisor parties to EUs. These secondary sources are valuable for smaller providers aware of ASIC's media releases but lacking the resources for active monitoring.¹⁸⁹

"EVIDENCE FROM THE PILOT SUPPORTS THE OBSERVATION, THAT THERE IS A HIGH AWARENESS OF EUS WITHIN THE INDUSTRY."

184 Interview with Respondent 1.

185 Interview with Respondent 3.

186 Interview with Respondent 2.

187 Interview with Respondent 2.

188 Interviews with Respondent 2.

189 Interviews with Respondents 11, 12, 13, 14, 17, and 18.

190 Interview with Respondent 6.

191 Interviews with Respondents 8 and 10.

192 Interviews with Respondents 5, 6 and 7.

193 Interviews with Respondent 2.

194 Interviews with Respondents 5, 6, and 7.

195 Interviews with Respondents 15 and 16.

196 Interviews with Respondents 11, 12, 13, 14, 17, 18 and 19.

197 Interviews with Respondents 12 and 18.

198 Interview with Respondent 27.

Our observations of the awareness of EUs from pilot respondents show a consistent picture. In credit lending, people working for small and large organisations have noted that they become aware of EUs through ASIC media alerts. As one pilot respondent noted:¹⁹⁰

I have always relied on information coming from ASIC directly. It's always a good approach to get information first hand rather than hearing it from social media or any other source.

Large peer providers seem to actively monitor ASIC's media releases. Internal compliance staff advise management regarding EUs that may be relevant.¹⁹¹ All respondents working in small organisations in the credit industry were subscribers to ASIC's media alerts.¹⁹² This supports an ASIC representative's statement that credit lenders are subscribers to ASIC's media alerts.¹⁹³ Another source of information that seems dominant within the credit group was dissemination by industry bodies/associations.¹⁹⁴

For the financial services industry (insurance and financial advice), the large organisations primarily relied on media releases by ASIC.¹⁹⁵ The smaller organisations on the other hand mainly relied on newsletters from industry forums and law firm updates. They were all aware of ASIC's media releases but a number of them did not have the resources for active monitoring.¹⁹⁶ Two respondents from the small organisations noted that they subscribe to ASIC's Twitter account but their main source of information is industry bodies.¹⁹⁷

One professional adviser noted, and evidence from the pilot supports the observation, that there is a high awareness of EUs within the industry.¹⁹⁸

There is a high awareness of it and that is both through all of their regulatory teams would have alerts set up so they would see EUs or advisors banned or those sorts of things. So to give you a specific example of that. So BMW Finance entered into an EU with ASIC and very quickly, if you spoke to anybody who was in auto-financing, they knew. And they know through the formal channels but they also know through the informal channels – it does not take even six degrees of separation to work your way through someone who has previously worked with the person who is dealing with it in a particular organisation.

B. CLARITY IN TERMS AND PROMISES OF AN EU

General deterrence is also predicated on the intended audience understanding the wrongful conduct and the consequences of non-compliance with the appropriate behaviour.¹⁹⁹ Accordingly, clarity of the terms of an EU is important.

A review of ASIC's EUs highlights that there is consistency in the structure of EUs accepted by ASIC. EUs usually have the following structure:

- Background: name of the parties involved in the EU and description of alleged breach.
- Description by ASIC of the penalties available for such a breach.
- Acknowledgement by the alleged offender of ASIC's concerns about their conduct.
- Undertaking: this section is very important as it notes the promises that the promisor undertakes.
- Acknowledgment that the EU will be available to the public and other standard legal matters are accepted;
- Signature of the parties: without the signature of the parties, the undertaking has no effect.

The structure outlined above may vary. For instance, on certain occasions, ASIC has added a definition section in the EU to clarify terms. Most EUs contain a section explaining the alleged conduct committed by the promisor. This background section is important to inform peer providers about the conduct that ASIC considers unacceptable. It may prompt reflection and change of behaviour.

As the repeated evidence from interviewees shows, information about conduct provides clarity about the standards that ASIC expects from industry participants. Further, in *McCann v Pendant Software Pty Ltd* [2006] FCA 1129 Finkelstein J stated that 'the meaning of an undertaking is to be determined having regard to its stated purpose'.²⁰⁰ The background information in the EU will help determine the purpose of the EU. That should make it easier for all the parties involved to interpret the undertakings accepted by the regulator. The deletion of this information might create confusion about the purpose and meaning of the EU.²⁰¹ The question then becomes whether the terms of the EUs and the promises included in the EUs are easily understood by peer providers. To address this question, we turn again to evidence from respondents to the pilot.

The interviews highlighted that there was clarity regarding the usual content, expectations and consequences arising from an EU. As one respondent noted regarding the structure of an EU:²⁰²

[EUs] usually involve an agreed set of facts. They usually involve allegations or ASIC's concerns. And they usually involve an agreed set of actions that commit the entity or organisation to completing those actions within a certain period of time. So they're very specific actions, which once complied with effectively means you comply with the EU. Failure to do so is contempt of that EU and will lead to proceedings in Court.

199 Tomlinson, above n 40, 33-38.

200 *McCann v Pendant Software Pty Ltd* [2006] FCA 1129, [25].

201 Occasionally background information in an EU is limited to the identity of the promisor for example and that they are already banned under a published banning order. This may be fair to the already banned but it has the capacity to undermine general deterrence: *Daws v Australian Securities and Investments Commission* [2006] AATA 246. Fortunately, redacting background information has not been implemented widely: *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2006] AATA 270, [29].

202 Interview with Respondent 16.

"USUALLY [AN EU] IS PROVIDED IN AN ACCESSIBLE FORM."

However, there are differing views on the clarity of the regulatory purpose(s), precise terms and what is required to fulfil the promises made in EUs.

i. Clarity of the Purposes of EUs as Revealed in Background Information

As observed above, having clear background information is important to maximise general deterrence. The perception of peer providers is mixed regarding this matter. All credit providers interviewed noted that they have read an EU and they generally understood and found the terms of the EU – including background information and promises undertaken by the promisor – clear.²⁰³ One respondent noted:²⁰⁴

Usually [an EU] is provided in an accessible form, readily available chronology of events and then the description of the conduct of concern to the regulator. [...] you get enough of a feel about the regulator's concern.²⁰⁵

However, what was viewed as less clear was 'why an EU was necessarily the right solution in that situation compared to other situations.'²⁰⁵ This puzzlement was shared by another peer provider. That respondent noted that why an EU is accepted is also relevant and there was no clarity about how ASIC was furthering its regulatory purposes through making enforcement decisions about different organisations. As the respondent noted, there is a feeling that ASIC is 'trying to jump on people rather than working with [organisations] who are reputable.'²⁰⁶ This credit provider further noted that the problem is not with the EU itself, but with the way the EU is drafted. The clarity of the EU may vary depending on who is drafting its terms. As the respondent noted 'some people get very tied up in very complicated language. Whereas where you just keep it simple and

straightforward, it should be no problem.'²⁰⁷

ii. Clarity of the Terms of EUs

The views of respondents were more mixed regarding the clarity of the terms and language of an EU. This was not surprising as there were varying levels of sophistication within the group. As one professional adviser noted:²⁰⁸

I can't recall an occasion where I've looked at the terms or information concerning the terms of an EU and being confused so in that sense I think they're easy to understand, I think so. Now whether that's so for professional advisers to a greater degree than the regulated entities and if, I guess depending on sectors, there's a very wide spectrum of sophistication. If you're talking about the financial advisory area, there'd be a lot of, you know, a wide spectrum of sophistication, whereas if you're talking about regulated entities such as the banking industry, I think you'd find that there'd be as high a level of sophistication within the regulated entity when it comes to dealing with regulators, certainly at the top end. But I'd assume anyone in that banking/insurance area would be able to understand what an EU means.

In fact, respondents who work in large financial services organisations observed that the EUs, including agreed facts, were clear.²⁰⁹ One of them noted that the EUs 'are drafted by lawyers, so from a lawyer's perspective they are quite clear.'²¹⁰

"YOU GET ENOUGH OF A FEEL ABOUT THE REGULATOR'S CONCERN."

203 Interviews with Respondents 5, 6, 7, 8 and 10

204 Interview with Respondent 10.

205 Interview with Respondent 10.

206 Interview with Respondent 5.

207 Interview with Respondent 5.

208 Interview with Respondent 22.

209 News with Respondent 15 and 16.

210 Interview with Respondent 15.

The theme of the legalistic format of an EU was highlighted in the interviews with respondents who work for small financial services providers.²¹¹ The EUs were viewed as black letter law documents,²¹² with one respondent preferring to read the headlines attached to the EU rather than the document itself.²¹³

Three out of the eight financial services respondents noted that they have not read or cannot remember reading an EU in full.²¹⁴ One of these respondents noted that the EUs 'are too boring' to read.²¹⁵ The remaining participants have read an EU and found them mostly clear.²¹⁶ Echoing the question of ASIC's regulatory intent in using an EU, already raised, one respondent noted, as did the credit lending respondents, that while the promises in the EU are clear, it is sometimes hard to determine why an EU was adopted and not other enforcement approaches.²¹⁷

Sometimes [an EU is] very clear but I don't have a legal background. So I spent the last 16 years in the financial services sector. I do have qualifications but I'm not a lawyer. So often it's trying to read through the legal lines to get an understanding of exactly what were the areas that ASIC was concerned about, particularly in relation to the Corporations Act.

Generally speaking the actions that are expected are reasonably clear but the reasons for the EU are not and I understand there are some components of privacy and those kinds of things that form part of that document as well, but it's not something that you generally speaking can pick up straight away and know exactly what's going on. It's sort of one of those things where you need to sit down and take your time to process it and sort of map what's been flagged as the issues and what's been identified as the actions that the AFSL or the advisor themselves are promising to take or committing to undertake in that time frame.

²¹¹ Interviews with Respondents 11, 13 and 20.

²¹² Interview with Respondent 11.

²¹³ Interview with Respondent 13.

²¹⁴ Interviews with Respondents 11, 13 and 17.

²¹⁵ Interview with Respondent 11.

²¹⁶ Interviews with Respondents 12, 14, 18, 19 and 20.

²¹⁷ Interview with Respondent 18.

²¹⁸ Interviews with Respondents 28, 29, 30, 31 and 32.

²¹⁹ Interview with Respondent 30.

²²⁰ Interview with Respondent 31.

²²¹ Interview with Respondent 30.

"THAT MEDIA RELEASES DO PROVIDE GUIDANCE REGARDING THE TERMS OF EUS."

The five consumer advocates interviewed had a different perspective regarding the clarity of EUs.²¹⁸ They all remarked on the complexity of the terms of EUs. One noted:²¹⁹

If possible, it would be good if [EUs] have less jargons in them. Because, in my head at least, one of the goal you are seeking to achieve with EU, is making people in community aware of the bad conducts that had happened, and if EU aren't in as simpler language as possible, you do run the risk of consumers who do have a right, not being aware of them.

Another observed the following:²²⁰

I would say they're not the easiest things to understand, to be honest. I think that one of the challenges ... the EU register is not the simplest thing to use. Particularly the way they're downloaded as PDFs that are not searchable, those photocopy PDFs, makes it difficult to analyse and search. Often I think that the definitions that are used are quite specific to the particular issue which can make reading them a bit challenging. It's possible, I think you have to [be] legally trained to understand them. They're probably not written for a lay audience.

However, it has also been noted that media releases do provide guidance regarding the terms of EUs and are very useful from a consumer perspective.²²¹

It is also the case that EUs are a form of statutory or regulatory contract and legal terms make them more certain in their legal effect, though as observed by respondents, not necessarily more comprehensible.

"IF POSSIBLE, IT WOULD BE GOOD IF [EUS] HAVE LESS JARGONS IN THEM."

iii. The Promises of an EU

An EU will include promises relating to a review of existing compliance programs and processes and controls within organisations. Further, respondents also noted that promisors would commit to remediation and community benefit payments depending on the alleged conduct that took place. Accordingly, there was a general awareness of the promises that are likely to be included in an EU.

However, one peer provider noted that while they had a general understanding of the promises that were included in an EU, it was not necessarily clear how these promises were to be fulfilled:²²²

... for instance, if one of the requirements was to develop a system for tracking and managing compliance risk. As a statement, it is sort of reasonably easy to understand what that means. But in terms of actually implementing that within a business, it's a much larger project so we have to figure out ourselves how to do that in a way that would satisfy the regulator. Because of course the regulator doesn't tell you, line by line, exactly what it wants you to do.

This was also a challenge to the independent experts (professional advisers) interviewed for the pilot.²²³ One respondent in this category stated that EUs are 'not so good in defining success or outcomes. [... the EU] is not often transparent [...] as to what 'good' looks like. Now if the [EUs] were to set measures of success or outcomes then you'd look at those and you would constantly be using that to define what we should be doing elsewhere.'²²⁴ Another respondent in the same category observed:²²⁵

[A]nything that's fact-based – the history of how we got here, those sorts of things I think are particularly clear and easy to understand. Usually, timelines and reporting requirements are very easily understood on the back of that. And, you know, the requirement to appoint an independent

expert and specifically what the independent expert has to report on or the timing that they have to report is very clear.

Where I think there's less clarity, and certainly where I find I struggle as an independent expert, is around things like... The independent expert generally is not party to the negotiation of the EU. So I sometimes find myself in a position where usually the business says when we were negotiating this it was agreed that... And I have no reference point back to that. And so therefore I need to go back through ASIC to get some clarification and usually that is a long drawn out process because people paraphrase, the same people that were in the room aren't necessarily the same people that are in the organisation. So that's really difficult.

One professional adviser raised the way in which community benefits are calculated and queried the grounds on which such benefits may be included in an EU. The respondent noted that the imposition of such a promise seems arbitrary.²²⁶

ASIC has used a consistent structure in its EUs. The fact that background information is usually included in the terms of an EU highlights to the peer providers the alleged conduct that resulted in an EU. This provides them with an opportunity to review their practices and ensure they are not involved in similar conduct. This may amplify deterrent effect as peer providers are not just aware of the EU but understand the conduct triggering entry to an EU.

The structure, terms and promises of EUs seem generally to be understood by the industry. The level of understanding of an EU, and in theory the level of general deterrence, varies depending on the sophistication of the audience. Areas for further consideration are: greater clarity in the regulatory purpose in choosing to use an EU, avoiding needlessly legal terms and greater specificity about expectations in fulfilling the promises of an EU.

"THE LEVEL OF UNDERSTANDING OF AN EU, VARIES DEPENDING ON THE SOPHISTICATION OF THE AUDIENCE."

²²² Interview with Respondent 19.

²²³ Interview with Respondent 24, 26 and 27.

²²⁴ Interview with Respondent 25.

²²⁵ Interview with Respondent 27.

²²⁶ Interview with Respondent 24.

V. CONCLUSION

The aims of the pilot have been:

- to appraise the general deterrent effect of EUs (if any) in changing the behaviour of peer providers; and
- to report to ASIC generally on the ‘efficiency’ or ‘effectiveness’ of EUs in acting as a deterrent through observations drawn from qualitative empirical data, as collected.

Our observations have largely been flagged as we have set out thematically and analysed the evidence from the pilot respondents. Those observations are based on the perceptions of peers to those providers entering EUs, and on those of expert professional advisers and consumer advocates. Our conclusions have been put in context by the experience of relevant ASIC officers. Pursuing the project aims we draw our observations together more tightly here. Firstly, we concentrate on observations of a perceived deterrent effect of EUs and their degree of alignment with the conventional elements of deterrence. Secondly, we focus on the perceived mechanisms of deterrence that might contribute to the ‘efficiency’ or ‘effectiveness’ of EUs in acting as a general deterrent. Finally, we turn to questions which, given the pilot nature of this work, remain to be researched in future phases to extend and deepen these initial observations.

A. PRESENCE OF A GENERAL DETERRENT EFFECT OF EUS

Statistically significant deterrent effects have been found in prior research on corporations. The effectiveness of a mix of regulatory strategies and traditional sanctions was prominent in a systematic study of nearly 60 projects on deterrence, though that study reviewed formal sanctions generally, not EUs.²²⁷ As shown in Table 5 and surrounding text setting out perceptions of peer providers, many of the respondents to the pilot considered that EUs were a deterrent, either actual or expected. That deterrence was observable in mechanisms set out in Table 6: avoiding being caught doing what the EU promisor did, avoiding the perceived penal effects

of EUs and intrusion by outsiders; avoiding financial costs, time and distraction from the business; and critically, avoiding reputational damage or loss. Our work identifies these mechanisms which seem, from corroboration by many respondents, to be confirmed as effects of deterrence. We cannot say which of this mix is more or less effective or ‘efficient’. We can however report an affirmative *perception* of general deterrence from EUs from the evidence of a significant majority of the pilot respondents.

The perceptions of the respondents are interesting in terms of the conventional elements of deterrence: certainty, severity and celerity. They are also illuminating about respondents’ general knowledge of EUs, barriers to deterrence, the duration of deterring effects and the relevance of context and motivation to the perceived general deterrence effects.

Turning to the requirement of certainty, respondents queried what they perceived as the unclear regulatory intent or inconsistencies in the use of EUs by ASIC. A particularly vivid example was given by a customer advocate who recalled that only one entity in a corporate group became a party to an EU when several entities were engaging in the same conduct.²²⁸ Respondents observed that the terms and language of EUs tended to obscure the reasons for using an EU in a particular case, though this perception was not universal. This may blunt the requirement in deterrence theory that sanctions should be certain, though opacity in the exercise of enforcement discretion is certainly not limited to EUs. Finally, on certainty, respondent perceptions were genuinely puzzled about the use of ‘shadow EUs’. Respondents were unclear whether a promisor really had an EU or not, and if not, why? We suggest this is not helpful to peer provider perceptions of the certainty of receiving an EU.

"MANY OF THE RESPONDENTS TO THE PILOT CONSIDERED THAT EUS WERE A DETERRENT."

²²⁷ Schell-Busey et al, above n 2, 389.
²²⁸ Interview with Respondent 29.

Some respondents voiced the opinion that EUs are from the ‘soft’ end of the enforcement pyramid. These perceptions suggest that EUs do not meet the conventional requirement of deterrence that sanctions are severe. Most respondents were quick to point out that EUs are not ‘soft’ in terms of expense, management time and the resources of management in driving compliance change or customer remediation. Some respondents even described EUs as ‘penalties’ or having penal effects. The perception of a majority of respondents was that EUs can be very severe in terms of loss of reputation and flow on loss of customers, revenue and standing amongst peers in the industry. Some respondents stated their perception that EUs had contributed to decisions by providers to discontinue certain products or even to leave the industry.

EUs are sometimes seen as a swifter form of justice. Deterrence theory sees this as EUs better meeting the celerity element of deterrence. A review of ASIC’s EUs (the data of which we have collected) shows they may take between six months to two years to be negotiated from the date when an alleged breach is detected by ASIC. The impact of celerity is also widely questioned by pilot respondents, in line with many other studies failing to demonstrate its impact on criminal behaviour.²²⁹ Celerity has limited application to actual punishments outside of research conducted in clinical settings. This has led researchers Pratt and Turanovic to conclude that it is a ‘practical impossibility’²³⁰ for punishment to be immediate in the criminal justice system in a way that is meaningful: ‘[t]he criminal justice system is not built for speed.’²³¹ Many respondents to the pilot corroborated those views in relation to EUs.

"MAJORITY OF RESPONDENTS WAS THAT EUS CAN BE VERY SEVERE IN TERMS OF LOSS OF REPUTATION."

"ASIC’S PUBLICATION AND DISTRIBUTION STRATEGIES RESULTS IN WIDE-SPREAD AWARENESS OF EUS IN THE FINANCIAL SECTOR."

Knowledge of the purpose and consequences of a deterrent strategy are considered critical to the rational decision-making attributed to deterrence. While there is significant research on the effectiveness of this element in corporate criminal enforcement, there is little on EUs and other non-traditional enforcement. Our research design and observations address this gap. They demonstrate that ASIC’s publication and distribution strategies aided by media dissemination results in wide-spread awareness of EUs in the financial sector and accurate understanding of their general purposes. Understanding of specific terms in EUs and what is needed to fulfil EU promises remains the subject of professional advice. However, ASIC media releases are quoted by respondents as a good source of knowledge and information about EUs. Finally, we observe that any additional awareness of EUs or extension of general deterrence from the publication of independent expert’s reports may be augmented by the issue of an ASIC media release at the time they are up-loaded to the ASIC EUs register.

In other studies where deterrence has been observed, usually where criminal sanctions are relevant, it has also been found that the deterrent effect did not last beyond the short-term. For example, in one study, in the second year following the scandal which provoked deterrence, the authors found evidence of executives resuming suspect behaviour. The researchers identifying this effect suggest it could be the result of the ethical considerations which triggered the deterrence being forgotten over time.²³² This is not unique to one study, as deterrence strategies often exhibit diminishing effects after their initial impact.²³³ These findings are replicated in the pilot, with our respondents doubting the longer-term effects of EU deterrence. Some even suggested EUs should contain terms for follow-up reviews at three and five years from completion of the initial EU.

229 tt and Turanovic, above n 51, 18.

230 Ibid 10.

231 Ibid 10.

232 Cicero and Shen, above n 68, 1, 5, 8.

233 Hirtenlehner and Wikström, above n 134, 494.

**"PERCEPTIONS OF PEER PROVIDERS
IN THE PILOT UNDERLINE THE
IMPORTANCE OF MIXED AND CO-
ORDINATED REGULATORY ACTION
AT THE TOP AND LOWER DOWN THE
ENFORCEMENT PYRAMID."**

We would add that such reviews should be publicly reported on.

The 'bad barrels'²³⁴ approach to examining crime in corporate settings is founded on crime occurring (at least in part) because of the organisational context in which an individual is placed. As the literature shows, group influences, criminogenic sub-cultures and contagion are significant factors in influencing the 'rational actors' in their calculus of the risk of detection and sanctions. Confirming the importance of context, respondents identified the differences between those peer organisations intrinsically motivated to comply and those which are not. As one respondent vividly described the small peer providers who were less concerned about loss of reputation from an EU: 'I think they don't give a banana over it.'²³⁵ The majority of the pilot interviewees did not share this view about their organisation and could detail deterrence mechanisms for improvement that showed a propensity to comply.

The perceptions of peer providers in the pilot underline the importance of mixed and co-ordinated regulatory action at the top and lower down the enforcement pyramid. The insight that the effectiveness of interventions is not in isolation from other contextual factors (including other regulatory policies and programs) is particularly salient for this research. As we have pointed out, in other studies researchers have found that the deterrent effects of regulatory policies are strengthened if combined with multiple interventions and enforcement methods.²³⁶ In summarising the findings of their

systematic review of corporate crime deterrence studies, Schell-Busey et al concluded:

Our results suggest that regulatory policies that involve consistent inspections and include a cooperative or educational component aimed at the industry may have a substantial impact on corporate offending. However, a mixture of agency interventions will likely have the biggest impact on broadly defined corporate crime.²³⁷

The strength of multiple strategies was considered a possible reflection of the nature of corporate crime – it is complex with diverse offenders, motivations and behaviours, and therefore requires a multifaceted response.²³⁸ However, it is still not certain the combination of 'punishment and persuasion'²³⁹ that produces the greatest benefits.

EUs respond to this insight about context in at least two ways. First, EUs themselves can include terms which 'involve consistent inspections and include a cooperative or educational component'²⁴⁰ and at the same time what respondents reported as 'penal' effects. Accordingly, they may respond more acutely to the variety of motivations and contexts bearing on an EU promisor and likewise to the wider population of those who might be generally deterred. Secondly, EUs have the advantages of more focused and penetrative enforcement than prosecution (respondents complained of regulatory intrusion), and they are also conditional on promisors fulfilling the terms of the EU. EUs come with a real and credible threat of tougher enforcement, such as prosecution or civil penalties if not fulfilled. In this way the EU can treat the promisor which discharges its promises in one way, and escalate enforcement action, should the EU promisor turn out to be recalcitrant. This is also a signal about appropriate conduct which may be relevant to general deterrence of peer providers.

**"RESPONDENTS DOUBTING THE
LONGER-TERM EFFECTS OF EU
DETERRENCE."**

234 Stelios C. Zyglidopoulos and Peter Fleming, 'Organisational Self-Restraint' in Shanna R Van Slyke, Michael L Benson, and Francis T Cullen (eds), *The Oxford Handbook of White-Collar Crime* (Oxford Handbook Online, 2016) 1-2.

235 Interviewee 29. See above footnote 156.

234 Stelios C. Zyglidopoulos and Peter Fleming, 'Organisational Self-Restraint' in Shanna R Van Slyke, Michael L Benson, and Francis T Cullen (eds), *The Oxford Handbook of White-Collar Crime* (Oxford Handbook Online, 2016) 1-2.

235 Interviewee 29. See above footnote 156.

236 Schell-Busey et al, above n 2, 388; Braithwaite, above n 45, 420.

237 Schell-Busey et al, above n 2, 387.

238 Ibid 408.

239 Braithwaite, above n 45, 418.

240 Schell-Busey et al, above n 2, 387.

"RESEARCHED CONCLUSIONS (RATHER THAN ARM-CHAIR OR MEDIA SPECULATION) ON THE GENERAL DETERRENCE OF EUs."

Finally, as generally conceded in the literature, the extent of the deterrent effect in corporate settings is not well-known or researched.²⁴¹ Knowledge of effective deterrence strategies is handicapped by limited studies, difficulties comparing studies, different definitions used in corporate offending research, and the lack of official or accurate data sources.²⁴² This all contributes to inconsistent conclusions in the research.²⁴³ It is also unclear how applicable international studies are to Australia's regulatory environment.

The conclusions of this study, though a pilot, address some of these difficulties. They offer researched conclusions (rather than arm-chair or media speculation) on the general deterrence of EUs where there are few other studies and none on financial services as far as we are aware. The pilot extends the current knowledge of deterrence research to civil sanctions and does observe perceptions of deterrent effects of EUs on peer providers. The pilot makes these contributions in relation to national Australian financial sector conditions. The pilot is also able to report perceptions of the 'fear' mechanisms as well as the 'duty' mechanisms which produce the general deterrence effects of EUs. It is to the latter that we now turn.

B. MECHANISMS REPORTED TO CONTRIBUTE TO COMPLIANCE IMPROVEMENT AND THE 'EFFICIENCY' OR 'EFFECTIVENESS' OF EUS

Research designs are evolving to take greater account of the context in which an intervention operates, and researchers are increasingly calling for it to feature more prominently in studies – particularly for corporate crime research.²⁴⁴

Researchers have recognised that simply identifying if an intervention 'works' is insufficient; understanding how and in what context is also required.²⁴⁵ In using open-ended interviews as well as a survey, our research design is conceived to explore these contextual factors.

More emphatic than the observations of general deterrence amongst peer providers arising from fear of consequences, is the considerable evidence from interviewees recognising and identifying ways in which they perceive EUs promote positive mechanisms with deterrent effects. Again, in Table 6 and surrounding text, we set out what these are. They suggest the publication of an EU entered by a competitor prompts in their organisation several responses which respondents to the pilot described as motivated by a duty or desire to be compliant or to do better compliance.

Respondents perceived that EUs can identify what the regulator considers inappropriate practices and by opposition, may clarify what are acceptable practices. They can remind peer providers of their responsibilities and help them understand what ASIC considers important in achieving compliance with law or (better) good practice. This may have an industry wide significance, through the further publication by industry associations of descriptive and evaluative information about EUs in newsletters and alerts for members. Some respondents to the pilot report using EUs for training and as a source of legitimacy for arguing for compliance improvements with management, which might otherwise meet opposition because of expense. All these mechanisms illuminate *how* deterrence effects are manifested. These are patterns of peer responses to open-ended questions that demonstrate the rich observations which can be collected from interview research.

Reverting to expense issues, EUs may also clarify the level of compliance required, and crystallise the cost of compliance. This may include the cost of new systems to support compliance and of remediation if clients are involved. Some peer providers report organisations discontinuing product lines or leaving

241 Schell-Busey et al, above n 2, 387; Braithwaite, above n 45, 420.

242 Schell-Busey et al, above n 2, 388; Braithwaite, above n 45, 420.

243 Schell-Busey et al, above n 2, 409.

244 Braithwaite, above n 45, 417; Peter Cleary Yeager, 'The Elusive Deterrence of Corporate Crime' (2016) 15(2) *Criminology & Public Policy* 439, 440;

Pratt and Turanovic, above n 51, 16.

245 Pawson and Tilley, above n 37

the industry. We suggest this is EUs provoking a risk-based assessment of the capabilities of the organisation to undertake compliance in an active enforcement environment and the costs of doing so. We acknowledge that divestiture decisions are made for many reasons, but it is at least credible to suggest that effective deterrence effects such as those reported have played a part here.

The evidence from the pilot suggests a variety of ‘efficient’ or ‘effective’ mechanisms flowing from EUs, motivated both to avoid an EU and in a positive way to be compliant or to improve compliance. Further research is needed to identify which of these mechanisms and perceived deterrent effects does in fact lead to increased compliance in the affected industries. Understanding how regulators might best formulate EU terms to trigger positive mechanisms in general deterrence would also be helpful.

C. FUTURE QUESTIONS FOR RESEARCH RAISED BY THIS PILOT PROJECT ON THE ‘EFFICIENCY’ OR ‘EFFECTIVENESS’ OF EUS

As the evidence and argument throughout demonstrates, the pilot has identified several opportunities for future research.

To begin with, the limits on time, budget and consequently numbers of interviewees points to the need for further work to deepen the evidence behind our observations. This is particularly so in the groups of credit licensees and financial services peer providers core to the perceptions of general deterrence related to EUs.

To support the knowledge and understanding that is fundamental to deterrence, research on how the terms of EUs might be written to be more easily understood by peer providers without legal training would be valuable to extend and deepen general deterrence. Given our observations of deterrence evidenced by particular mechanisms, research to differentiate and analyse the relative weight (and hence ‘efficiency’ or effectiveness) of these mechanisms would be very valuable. One dimension

of this and related, is research on mechanisms and regulatory review routines to encourage the endurance of compliance changes initiated under EUs.

Finally, and related to pre-disposition and capacity to comply, research to differentiate the perceptions of the deterrence effects of EUs in large and small peer providers would be very useful. This is especially relevant to Australian circumstances given the polarisation of the market in both the credit and financial services sectors between a small number of entities with a very large collective share of the retail market and many much smaller entities sharing the remainder.

"THE EVIDENCE FROM THE PILOT SUGGESTS A VARIETY OF ‘EFFICIENT’ OR ‘EFFECTIVE’ MECHANISMS FLOWING FROM EUS, MOTIVATED BOTH TO AVOID AN EU AND IN A POSITIVE WAY TO BE COMPLIANT OR TO IMPROVE COMPLIANCE."

VI. APPENDICES

APPENDIX A

INTERVIEW QUESTIONS FOR PEER PROVIDERS

The interviews will start with an introduction and the purpose of our research. Interviews will be conducted for one hour. Throughout the interview, the interviewers will also ask the participant to elaborate on their survey responses where applicable.

If a company has not heard of any specific EU or has made any changes, the questions relating to these issues will be skipped.

INTERVIEW

To start, we are interested to learn about what you know about enforceable undertakings, and if you are familiar with any that have been put in place.

1. What is your general perception of the purpose of an enforceable undertaking?
2. What do you think enforceable undertakings usually involve?

(e.g., type of undertaking given, monitoring obligations attached to the enforceable undertakings, officers in the companies being part of the enforceable undertaking)

3. How are you most likely to hear about a company entering into an enforceable undertaking?
4. Are you aware of any particular strategies that ASIC has used to disseminate the information in the enforceable undertaking?
 - i. From your perspective, has ASIC been proactive in this regard?
 - ii. If yes, how? Can you provide examples?
 - iii. What does the regulator do well or what can be improved in that regard?

5. Have you read an enforceable undertaking? If yes, are they easy to understand?

(e.g. the expectations and the terms of the undertaking)

- i. Can ASIC do anything to clarify their expectation regarding the enforceable undertaking?

We are now interested to see if enforceable undertakings your company is familiar with has prompted you to make any changes to your business practices.

6. As a result of an enforceable undertaking being entered into in your industry, did you seek any advice to help identify what changes, if any, may be required?

(e.g. from ASIC, law/accounting firms, other agencies, review best practice etc)

7. Have you reviewed your compliance systems because of an enforceable undertaking being entered into with a participant in your industry?
 - i. Did this result in any changes in the operation of your organisation? If yes, what were they?
 - ii. Were the terms of the undertaking helpful in implementing any changes to your organisation?

8. Describe the most important compliance improvements that have been made in recent years and why you have undertaken them? How long does it usually take to implement the changes that you have done and what processes are used?

(explore staffing, cost, training, etc...)

9. Are there changes you wanted to make but where not able to? Why not?

10. Do you know of any other organisation who has also changed its behaviour because of an enforceable undertaking entered into in your industry? What changes did they make?

Thank you for your time so far. We only have a few more questions to ask, and these are in relation to the overall effectiveness of the changes you may have implemented, and the overall effectiveness of enforceable undertakings in general.

11. To what extent do you believe that the knowledge of an enforceable undertaking within your industry may change practices within the field? Why or why not?

12. Overall, do you think the changes you have implemented as a result hearing about or reading an enforceable undertaking entered into by someone else made a difference regarding the practices within your organisation?

(Positive/negative: How did you assess the change (ie measure change)? What has impacted on the delivery/success of these changes? Have these changes been sustained over the long term? What will affect long term changes? Are changes sustainable? (eg consider financial and staffing aspects, whether changes are resource/time intensive, high administrative burden, a lot of investment for not a lot of perceived gain etc)

13. Finally, do you believe that enforceable undertakings are:

(explore reasons why this is the case)

- i. Fair
- ii. Equitable
- iii. Reasonable
- iv. Proportionate

That is the end of our questions, thank you for your time. Do you have any questions for us?
Interview ends.

APPENDIX B

INTERVIEW QUESTIONS FOR ASIC

The interviews will start with an introduction and the purpose of our research. Interviews will be conducted for no more than one hour. Throughout the interview, the interviewers will also ask the participant to elaborate on their survey responses where applicable.

INTERVIEW

We would first like to know about ASIC's publicity and awareness strategies for enforceable undertakings.

1. What are the strategies that you have used to publicise an enforceable undertaking (eg, media release, enforceable undertaking register, others)?
2. How effective do you think you are in disseminating the content/ message of the enforceable undertaking? Why/Why not?
3. Do you find that peer providers are aware of enforceable undertakings that are entered into by ASIC that involve competitors? Are you able to give us some examples?
4. Has any participant in the industry contacted you regarding an accepted enforceable undertaking seeking clarification regarding the conduct or the terms of the enforceable undertaking? If yes, can you provide examples?

Now we would like to ask you questions about whether you have observed any changes in practices in the various industries that have been affected by an enforceable undertaking.

5. After accepting an enforceable undertaking, have you found that there is a change in practices within the particular industry?
 - i. If yes, what type of change may have occurred?
 - ii. If no, what could be the reason behind this lack of change?

6. As a result of the acceptance of enforceable undertaking in a particular industry, have you noticed additional reporting of similar alleged breaches of the law to the one in the enforceable undertaking within the industry? Can you provide examples?

7. Have peer providers contacted you as a result of an enforceable undertaking being accepted to seek clarification regarding their rights and obligations in that area? If yes, do you keep a record of this information?

8. Finally, do you believe that overall enforceable undertakings are:

(explore reasons why this is the case)

- i. Fair
- ii. Equitable
- iii. Reasonable
- iv. Proportionate

That is the end of our questions, thank you for your time. Do you have any questions for us?
Interview ends.

APPENDIX C

INTERVIEW QUESTIONS FOR PROFESSIONAL ADVISERS

The interviews will start with an introduction and the purpose of our research. Interviews will be conducted for no more than one hour. Throughout the interview, the interviewers will also ask the participant to elaborate on their survey responses where applicable.

If an adviser has not heard of any specific EU or has made any changes, the questions relating to these issues will be skipped.

INTERVIEW

To start, we are interested to learn about what you know about enforceable undertakings, and if you are familiar with any that have been put in place.

1. What is your general perception of purpose of an enforceable undertaking?
2. Are the enforceable undertakings easy to understand? (eg. the expectations and the terms of the undertaking)
3. How are you most likely to hear about a company entering into an enforceable undertaking?
4. Are you aware of any particular strategies that ASIC has used to disseminate the information in the enforceable undertaking?
 - i. From your perspective, has ASIC been proactive in this regard?
 - ii. If yes, how? Can you provide examples?
 - iii. What does the regulator do well or what can be improved in that regard?
5. Have you read an enforceable undertaking? If yes, are they easy to understand?
6. Do you find that peer providers are aware of enforceable undertakings that are entered into by ASIC that involve competitors? Are you able to give us some examples?

Thank you for your time so far. We only have a few more questions to ask, and these are in relation to any changes in practices you may have made or witnessed in relation to enforceable undertakings, the effectiveness of the changes you may have implemented, and the overall effectiveness of enforceable undertakings in general.

7. To what extent, if any, have you changed your compliance review checks of a peer provider's system as a result of an enforceable undertaking? If yes, can you provide an example?
8. Have peer providers contacted you as a result of an enforceable undertaking being accepted to seek clarification regarding their rights and obligations in that area?
9. To what extent have you seen any changes in practices or behaviour as a result of an enforceable undertaking? If yes, can you provide any examples?
10. Do you believe that officers in the company should be part of an enforceable undertaking? Do you think that if they are included it would have an impact on their effectiveness? Why/why not?
11. Do you believe that overall enforceable undertakings are:
(explore reasons why this is the case)
 - i. Fair
 - ii. Equitable
 - iii. Reasonable
 - iv. Proportionate

12. From your experience, what is the most likely action that ASIC would take for the following breaches?

4 example breaches will be used based on the EUs we will be using (when selected). For each one, they will need to choose one of the following responses:

(EXAMPLE ONE)	a) CIVIL ACTION <i>(Select one)</i> b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION
(EXAMPLE TWO)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION
(EXAMPLE THREE)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION
(EXAMPLE FOUR)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION

That is the end of our questions, thank you for your time.
Do you have any questions for us? Interview end.

APPENDIX D

INTERVIEW QUESTIONS FOR CONSUMER ADVOCATES (INCLUDING MEDIA, FINANCIAL LITERACY ORGANISATIONS, LEGAL AID AND FINANCIAL COUNSELLOR)

The interviews will start with an introduction and the purpose of our research. Interviews will be conducted for one hour. Throughout the interview, the interviewers will also ask the participant to elaborate on their survey responses where applicable.

If an advocate has not heard of any specific EU or has made any changes, the questions relating to these issues will be skipped.

INTERVIEW

To start, we are interested to learn about what you know about enforceable undertakings, and if you are familiar with any that have been put in place.

1. What is your general perception of purpose of an enforceable undertaking?
2. Have you read an enforceable undertaking? If yes, are they easy to understand?
3. (e.g. the expectations and the terms of the undertaking)
4. How are you most likely to hear about a company entering into an enforceable undertaking?
5. Are you aware of any particular strategies that ASIC has used to disseminate the information provided in the enforceable undertaking?
 - i. From your perspective, has ASIC been proactive in this regard?
 - ii. If yes, how? Can you provide examples
 - iii. What does the regulator do well or what can be improved in that regard?

6. Do you find that peer providers are aware of enforceable undertakings that are entered into by ASIC that involve competitors?

Thank you for your time so far. We only have a few more questions to ask, and these are in relation to any changes in practices you may have witnessed in relation to enforceable undertakings, the effectiveness of these changes, and the overall effectiveness of enforceable undertakings in general.

7. To what extent do you believe that an enforceable undertaking may change behaviour within an organisation? Why?
8. Do you believe that officers in the company should be part of an enforceable undertaking? Do you think that if they are included it would have an impact on their effectiveness? Why/why not?
9. Do you believe that overall enforceable undertakings are:

(explore reasons why this is the case)

- i. Fair
- ii. Equitable
- iii. Reasonable
- iv. Proportionate

10. From your experience, what is the most likely action that ASIC would take for the following breaches?

4 example breaches will be used based on the EUs we will be using (now selected). For each one, they will need to choose one of the following responses:

(EXAMPLE ONE)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION	<i>(Select one)</i>
(EXAMPLE TWO)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION	
(EXAMPLE THREE)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION	
(EXAMPLE FOUR)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION	

That is the end of our questions, thank you for your time. Do you have any questions for us?
Interview end.

APPENDIX E

SURVEY QUESTIONS FOR PEER PROVIDERS

KNOWLEDGE OF ENFORCEABLE UNDERTAKINGS

1. Are you aware of any instances where a company has entered into an enforceable undertaking with ASIC?
 - a. In general? (yes/no/unsure)
 - b. In your industry specifically? (yes/no/unsure)

2. (If yes to Q1) How have you heard about companies entering into an enforceable undertaking? (Select all that apply)
 - a. media release
 - b. media (other than ASIC media release)
 - c. word of mouth
 - d. internal company advisory
 - e. external company advisory (e.g. lawyer, accountant) or
 - f. other (please describe)

3. (If yes to Q1) If you heard of an enforceable undertaking being applied against a company in your industry did you ever respond by:
(Select all that apply)
 - a. Reviewing your compliance procedures
 - b. Changing your management plans
 - c. Changing how you track or monitor things
 - d. Changing employee training
 - e. Changing company operations in some other way
 - f. Other (please describe)

DETERRENCE EFFECT OF ENFORCEABLE UNDERTAKINGS

4. From your experience, what is the most likely action that ASIC would take for the following breaches?

4 example breaches will be used based on the EUs we will be using (when selected).

For each one, they will need to choose one of the following responses:

(EXAMPLE ONE)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION	<i>(Select one)</i>
(EXAMPLE TWO)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION	
(EXAMPLE THREE)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION	
(EXAMPLE FOUR)	a) CIVIL ACTION b) CRIMINAL ACTION c) ENFORCEABLE UNDERTAKING d) OTHER ADMINISTRATIVE ACTION	

5. If a company enters into an enforceable undertaking, what is the likelihood that it would be required to take corrective or remedial action as part of this process?

(Select one)

- a) Not likely at all
- b) Somewhat likely
- c) Likely
- d) Very likely
- e) Always

10. Has your company been subject to any sanctions (other than an EU)?

- a) Yes
- b) No
- c) Unsure

Thank you for your time. We would appreciate it if you can return the survey by XXX. If you have any questions or require further clarification, please contact XXX.

DEMOGRAPHIC QUESTIONS

6. What financial functions does your financial services providers licence permit?

7. Which of the following bands most accurately describes your company's annual revenue in its last financial year as stated in the financial statements:

- a) Up to \$100,000?
- b) From \$100,000 to \$250,000?
- c) From \$250,000? to \$500,000?
- d) From \$500,000 to \$1,000,000?
- e) From \$1,000,000 to \$5,000,000?
- f) From \$5,000,000 to \$25,000,000
- g) \$25,000,000 and above.

8. Which of the following bands most accurately describes how many employees you have?

- a) Non-employing business/licensee?
- b) 1 to 4 employees?
- c) 5 to 19 employees?
- d) 20 to 199 employees?
- e) Greater than 199 employees?

9. Which of the following bands most accurately describes how many authorised representatives you have?

- a) 1 to 5 authorised representatives?
- b) 6 to 10 authorised representatives?
- c) 11 to 20 authorised representatives?
- d) 21 to 50 authorised representatives?
- e) 50 to 100 authorised representatives? Or
- f) More than 100 authorised representatives?

