



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 8

Hearings practice manual

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Appendix A

Part 3, Division 6 of the Australian Securities and Investments Commission Act on hearings

1 Scope of this manual¹

This *Hearings Practice Manual* sets out the principles and procedures we adopt in conducting administrative hearings held for the purpose of giving a person their statutory right to be heard.

As a matter of general principle we must give to persons who may be affected by many of our decisions an opportunity to be heard. The Corporations Act and the Corporations Regulations specifically give to certain persons a statutory right to a hearing.² This Manual deals only with hearings conducted in accordance with that statutory right to be heard.

This Manual refers to some sections of laws.³ Sometimes their content is stated briefly. You should, however, refer to the actual terms of the statute. You should not rely on the short summary in this Manual to state accurately or fully the effect of a section.

Where in this Manual we refer to “you” we are referring to the reader on the assumption that the reader is the person affected by a decision and has a statutory right to a hearing.

To assist you, Appendix A reproduces ss51-60 which constitute Division 6 of Part 3 of the *Australian Securities and Investments Commission Act* (ASIC Act) which applies to hearings in respect of the Corporations Act and the Corporations Regulations.⁴

Our obligation to hold hearings

There are three broad categories of administrative hearings that we conduct:

¹This Manual replaces the *ASC Hearings Manual* (updated in November 1993) published by the Centre for Professional Development.

²The classes of decisions under the Corporations Act and the Corporations Regulations which give an express statutory right to be heard are summarised in Part 4 of this Manual.

³ This Manual has been revised to reflect the changes to the law following the enactment of the *Financial Services Reform Act 2001* (FSR Act).

⁴Division 6 of Part 3 of the ASIC Act sets out, among other things, the powers we have in conducting our hearings.

- **protective hearings** in which we are contemplating using our administrative powers to protect the public generally and investors and consumers in particular⁵;
- **licensing hearings** which are held before we decide whether it is appropriate to refuse to grant a licence⁶ or to register a person as a liquidator or an auditor⁷; and
- **application of security hearings** which consider claims by other persons for payment from a security lodged with ASIC⁸ (see further discussion in 3.1 and 3.4.4 below).

We must conduct our administrative hearings with as little technicality and formality, and as expeditiously, as possible. However we must bear in mind the need for a proper consideration of the issues in question and the legislative requirements of the corporations legislation (other than the excluded provisions).⁹

When conducting administrative hearings we must comply with the requirements of procedural fairness.¹⁰ These are not a fixed body of rules, but procedural fairness may be provided in a variety of ways depending upon the nature of the power and the particular circumstances. The need for us to ensure our hearings are fair means that the procedures we adopt must be flexible and not applied rigidly without regard to the issues under consideration.¹¹

The purpose of administrative hearings is, as stated by Lee J in *Nam Bee (Australian) Pty Ltd -v- Corporate Affairs Commission (NSW)*,¹² to:

⁵Examples of protective hearings are: s206F of the Corporations Act (disqualifying a person from managing corporations); s915C (suspension or cancellation of an Australian financial services licence) and s920A (excluding a person from the financial services industry); and s739 (stop order hearing with respect to the offer, issue, sale and transfer of securities) and s1020E (stop order hearing with respect to financial product disclosure documents and statements).

⁶ For example, ASIC may only refuse to grant an application under s913A of the Corporations Act for an Australian financial services licence if it has given the applicant an opportunity to have a hearing (s913B(5)).

⁷ See for example ss1280(8) and 1282(10).

⁸ See for example s786(9) of the Corporations Act as it applied before the commencement of the FSR Act and s1284(2) of the Corporations Act and subregulation 9.2.05(5).

⁹ Subsection 59(1) of the ASIC Act.

¹⁰ Paragraph 59(2)(c) of the ASIC Act.

¹¹ *Kioa -v- West* (1985) 159 CLR 550; *Salemi -v- Mackellar [No 2]* (1977) 137 CLR 396 at 44.

¹² (1987) 12 ACLR 391.

enable the Commission to see and hear the applicant and to receive whatever evidence relevant to the application he chooses to put forward. The Commission can then, on the information which it has collected, and on the information provided and submissions made by the applicant, make a proper and just decision ...¹³

Hearings are usually conducted by one of our staff members to whom has been delegated the power to hold hearings (“the delegate”). The delegate has all the powers given to us under Division 6 of Part 3 of the ASIC Act. The delegate decides whether to exercise our powers after considering the evidence and submissions put by you, or on your behalf, and other relevant matters.

In conducting a hearing the delegate exercises a true administrative function and not a quasi judicial function.¹⁴ It follows that the traditional rules of procedure of courts or quasi judicial bodies do not apply to our administrative hearings.

Part 4 outlines some of the provisions under which you have a statutory right to be heard.

¹³Ibid at 397.

¹⁴*Boucher -v- ASC* (1996) 22 ACSR 503.

2 Guiding principles for conducting administrative hearings

We consider that it is very important that our hearings give you procedural fairness by giving you a proper opportunity to present your case.¹⁵ ASIC delegates conducting administrative hearings are guided by the following principles. We may vary or adapt our procedures to deal with particular cases if that is appropriate.

Principle 1

The opportunity to be heard

Generally you must have the opportunity to be heard before we make a decision that may be adverse to your interests. This opportunity includes your right to appear before us and present your:

- submissions, either in writing or orally; and
- evidence which addresses the issues of significance or of concern to us.

Principle 2

Your entitlement to a notice

You are entitled to:

- know the subject matter of the hearing, and in particular the issues which are of concern to us and for which there is a risk of us making an adverse finding;
- know the circumstances that may cause us to make a decision against you; and
- have sufficient time to prepare your response.

Principle 3

Your right to an impartial decision maker

You have the right to have the decision made by a person who has an open mind on the decision that should be made.

¹⁵ASIC is under a statutory obligation to observe the rules of procedural fairness - paragraph 59(2)(c) of the ASIC Act.

Principle 4

Findings of facts to be made on sound basis

Any findings of fact that we are required to make in a hearing must be based on material that is relevant, credible and probative, but the rules of evidence do not apply.¹⁶

Principle 5

There is no onus of proof

In administrative hearings there is generally no burden of proof. It is simply a matter of the facts that we find to be established on all the material before the delegate. As a practical matter, however, sometimes you may need to present material which supports you.

Principle 6

Court practice does not apply

The technical rules of evidence and the usual court rules of procedure and practice do not apply to our administrative hearings.¹⁷ The procedures we use, however, give you the opportunity to present evidence and to make submissions.

Principle 7

Applying policy and precedents

We will determine each matter on its merits. But in making a decision we are entitled to consider policy and precedent.

¹⁶Paragraph 59(2)(a) of the ASIC Act.

¹⁷Paragraph 59(2)(a) of the ASIC Act.

3 Conducting administrative hearings

Our administrative hearings are conducted informally and as quickly as possible. They should not be equated to a court or other judicial process. They are a critical part of our decision making process. They are used both in finding the facts about a matter and in considering the significance of those facts to the law. A hearing should not be approached on the basis of a contest between you, as the affected person, and us (that is, they are not “adversarial” proceedings). Nor should a hearing be treated as an appeal.

As Lee J in *Nam Bee (Australian) Pty Ltd v Corporate Affairs Commission (NSW)*¹⁸ stated:

The hearing ... is not to be conducted with formality as in a court or even as in a tribunal, its purpose being to ensure that the applicant has the opportunity to put before the Commission submissions and evidence on the matters which he chooses, which are relevant to the application. The hearing is not to be conducted as an appeal against a contemplated refusal of the Commission of the application. **It is not** to be conducted as if it were **a contest** between the Commission and the applicant.¹⁹ (Emphasis added)

Our procedures ensure that our administrative hearings are conducted effectively, efficiently and fairly. This means we can make a correct and proper decision in a timely manner.

Our practice and procedure is described below.

3.1 Notice of hearing

We will send you a notice about the hearing (see discussion below in 3.1.1 with respect to s206F of the Corporations Act matters). Generally, the notice will tell you:

- 1 under what provisions of the ASIC Act, Corporations Act or Corporations Regulations (the Regulations) we are conducting the hearing;
- 2 the purpose of the hearing;

¹⁸(1987) 12 ALCR 391.

¹⁹Ibid at 397.

- 3 the date, time and place, and how long we estimate it will take;²⁰
- 4 that, if you do not want to appear, you may write a submission which we will take into account;²¹
- 5 what happens if you do not respond to the notice (that is, we will make a decision on the basis of the information available);
- 6 the issues of concern to us or, in the case of an application for compensation under the Regulations, the bases the claimant is relying on;
- 7 who can give you further information about the hearing and their contact details (this will usually be the delegate); and
- 8 whether the hearing will be held in public or private (see further discussion in 3.6).

We will tell you if you can ask for a copy of the documents which we (or, in the case of an application for a compensation payment from a security under the Regulations, the claimant) will rely on.

We will also send you the information sheet that we have prepared on our administrative hearings.

Generally the delegate who will hear the matter will sign the notice of hearing. It is our view that the person who will hear the matter should be the person who has formed a view that there exists material that indicates that any statutory preconditions for holding the hearing are satisfied.

3.1.1 Notice under s206F - disqualification of directors

When we are considering whether you should be disqualified from managing corporations under s206F of the Corporations Act, you will be given a notice in the prescribed form which requires you to demonstrate why you should not be disqualified from managing corporations.²² If you wish to demonstrate why you should not be disqualified and want a hearing, you will need to notify us.²³ We will then serve on you a notice of hearing.

If you do not want to appear at a hearing there are two other options:

²⁰See s57 of the ASIC Act.

²¹See s57(3) of the ASIC Act.

²²Under paragraph 206F(1)(b) of the Corporations Act the notice to demonstrate why you should not be disqualified from managing corporations must be in the prescribed form.

²³Ibid.

1. you may make written submissions, including any material you want us to consider; or
2. you do nothing, and leave it to us to make a decision on the material indicated in the notice to demonstrate.

The person who issues the notice to demonstrate will usually be the person who will hear the matter. As noted above, it is our view that the person who will hear the matter should be the person who has formed a view that there exists material that indicates that any statutory preconditions for holding the hearing are satisfied.

3.2 Serving the notice of hearing

If you are an individual, ASIC will serve the notice of hearing either by delivering it to you personally or by leaving it at, or posting it to, your last known residential address.²⁴

If the notice of hearing is to be served on a company, ASIC may serve it by either leaving it at, or posting it to, the company's registered office or by delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory.²⁵

3.3 Time to prepare

Generally, we consider that 28 days should be adequate time for you to send us written submissions and/or arrange to appear in person and to arrange representation if you want it (but see discussion in 3.4.3 on stop order hearings). Generally, when we send you the notice of hearing advising you of your right to be heard a hearing date will be included.²⁶ The notice will also tell you how long the delegate estimates it will take to complete the hearing.

Normally, the hearing will start on the date stated in the notice of hearing. Therefore, you should contact the delegate (or the officer nominated to discuss alternative arrangements) as soon as possible if:

- the date is not convenient; or
- the time anticipated is, in your opinion, inaccurate.

²⁴ See s28A of the *Acts Interpretation Act* (Cth). See too s109X(2) of the *Corporations Act* with respect to service of a document on a director.

²⁵ See s109X of the *Corporations Act* for the manner of service on a company. If a liquidator or auditor has been appointed to the company ASIC may serve the notice by leaving it at, or posting it to, the address of the liquidator's office or auditor's office in the most recent notice of that address lodged with ASIC (s109X(1)(c) and (d) of the *Corporations Act*).

We may arrange a meeting to discuss these and other issues about the procedures for the hearing.

3.4 Who can attend a hearing?

3.4.1 Your right to be represented

Your right to have legal representation at a hearing is specifically recognised by s59(8) of the ASIC Act. You may be represented by a barrister or solicitor of the Supreme Court of a State or Territory or of the High Court.

Other persons may also appear as your representative provided the delegate has given his/her approval.

Section 59 of the ASIC Act states that if you are:

- a natural person, you are entitled to appear in person or be represented by an employee approved by us;
- a body corporate, you may be represented by one of your officers approved by us;
- an unincorporated association, or a natural person appearing in your capacity as a member of that association, then a member or officer of the association may act as your representative if we have given our approval.

If you want to be represented by someone other than a lawyer, you should contact the delegate or our staff member who is nominated as our contact as soon as possible after receiving the notice of hearing.

3.4.2 Other people who may attend

Subsection 56(1) of the ASIC Act gives the delegate a discretion to allow, in addition to you and your legal or approved representative, other persons to attend a private hearing. It may, for example, be appropriate for the delegate to allow you to have a friend or a relative to give you practical or moral support. Central to the delegate's decision of whether to allow others to attend is the question of fairness to you and whether the other person's presence will assist in the conduct of the hearing.

²⁶See paragraph 206F(1)(b) of the Corporations Act. Once you have informed ASIC that you wish to be heard a notice of hearing will be sent.

If you want to have a person attend the private hearing, you should contact the delegate or our nominated contact as soon as possible after the receiving the notice of hearing.

We may, subject to any appropriate conditions, also allow a person to intervene in the hearing.²⁷ Generally, you will be invited to comment on if another person should be allowed to intervene.

Witnesses you have called to give oral evidence will be allowed to stay while they give their evidence. Ordinarily they will not be allowed to be present during other parts of the hearing.

3.4.3 Stop Order hearings

Stop order hearings conducted under ss739(2) and 1020E(4) of the Corporations Act differ from hearings conducted under other provisions of the Corporations Act. Subsection 739(1) allows us to order that no offers, issues, sales or transfers of securities are to be made in some circumstances. Subsection 1020E(2) allows us to make orders with respect to a person's conduct where disclosure documents, statements or advertisements that relate to financial products are defective or the issuer of the financial product has breached s1017G of the Corporations Act.

We must give any “interested people” a reasonable opportunity to make oral or written submissions at the hearing on whether a stop order should be made.²⁸

"Interested people" are those whose interests would be affected by the making of a stop order. They may include people:

- with a direct financial interest in the disclosure documents;
- who would be exposed to civil liability under Part 6D.3 and Part 7.9 of the Corporations Act ;
- the corporation issuing the securities or the financial product; and
- the author of the statements under consideration.

Due to the nature of the circumstances in which making an order under ss739(1) and 1020E(2) is commonly made, the time allowed for preparing for a hearing will usually be much less than 28 days.

²⁷See paragraph 59(2)(b) of the ASIC Act. A person who intervenes may be allowed to present additional material to the delegate or to make submissions on the matter or both.

²⁸ Paragraphs 739(2)(b) and 1020E(4)(b) of the Corporations Act.

When a stop order is required before a hearing is convened we have the power to make pre-hearing interim orders.²⁹ These interim orders have effect for 21 days commencing from the day after the interim order is made. These orders may, of course, be revoked before the expiration of the 21 days.³⁰

3.4.4 Paying compensation from a security lodged with ASIC

A person can, for example, apply to us for compensation from the security bond a liquidator has lodged with us under s1284(1) of the Corporations Act if the liquidator does not carry out their duties adequately and properly.³¹ A person can also apply for compensation from the security bond lodged by a licensee.³²

Unlike our protective hearings, hearings conducted to decide whether compensation should be paid involve not only you as the affected person (liquidator or licensee) but also a third party (the claimant). Therefore, it would usually be appropriate for the claimant to also appear at the hearing as it is their application which is being considered. As noted in 3.1, as the affected person, you will generally be given the bases on which the claimant is relying well before the hearing. If you contest the claim, procedural fairness usually means that you must tell us and the claimant why you are disputing the claim.

You and the claimant may each make a written submission if you do not wish to appear in person at the hearing. The delegate will take these written submissions into account.

If you do not respond to the notice about the hearing, the delegate will make a decision on the basis of information they have.

3.5 Assistant to the delegate

The delegate may appoint another member or members of ASIC's staff to assist them conduct the hearing.

²⁹ Subsections 739(3) and 1020E(5) of the Corporations Act.

³⁰ ASIC is also able to make interim orders at any time during a hearing (see ss739(4) and 1020E(6)).

³¹ See s1284(2) of the Corporations Act and Part 9.2 of the Regulations.

³² Under s786(2)(d) of the Corporations Act, as it applied before the commencement of the FSR Act, a securities dealer or investment adviser may have been required to lodge a security with ASIC. See too Regulation 10.2.45 which empowers ASIC to impose as a condition of the grant of a financial services licence the lodgement of a security.

The assistant/s may help the delegate, for example, to elicit information about the issues identified in the notice of hearing as issues of concern and/or the statutory requirements for the power to be able to be used.

The precise role the assistant takes in a particular hearing is a matter for the delegate to decide. The assistant is subject at all times to the direction of the delegate who is the person responsible for conducting the hearing.

3.6 Will the hearing be held in public or in private?

In some cases the Corporations Act specifies whether a hearing is to be conducted in private. For example, paragraphs 913B(5)(a) and 915C(4)(a) of the Corporations Act³³ state that the hearing **must** be conducted in private. In such instances we have no discretion and the hearing will be held in private.³⁴

When the Corporations Act is silent, for example, when we are considering disqualifying a director under s206F, we must decide whether to conduct the hearing in public.³⁵ The notice of hearing will specify whether the delegate proposes to hold the hearing in public or in private. If you disagree with the delegate's proposal you should let the delegate know as soon as practical. If you ask for the hearing to be in public we would generally agree to that request.³⁶ However, if we consider, in light of the issues identified in s52, that the hearing should be in private, we may hold all or part of the hearing in private.³⁷

3.7 Taking an oath or affirmation

At a hearing evidence may be taken under oath or affirmation.³⁸ The oath or affirmation given must be appropriate to the culture and religion of the person giving evidence. We will therefore ask the person giving evidence whether they wish to swear an oath or make

³³ See too ss837 and 1200 of the Corporations Act, as it applied before the commencement of the FSR Act, which requires that the hearing be in private.

³⁴Section 54 of the ASIC Act.

³⁵See s52 of the ASIC Act.

³⁶Subsection 53(1) of the ASIC Act.

³⁷Subsection 53(2) of the ASIC Act.

³⁸ See s58(2) of the ASIC Act.

an affirmation. The person may not wish to give evidence in this way. That is a matter for them.³⁹

It is an offence to give evidence at a hearing which is false or misleading in a material particular.⁴⁰

3.8 Summoning a person to attend

The delegate has the power of a member of the Commission to compel a person to attend and give evidence or to produce books, or both.⁴¹

We do not envisage any case when the delegate would compel you to attend the hearing. This is because the hearing is to give you an opportunity to give us information or an explanation of events which may influence the decision the delegate will make. If you do not wish to attend, the delegate is entitled to make a decision based on the information they have. This information may include statements you have previously given to ASIC. Evidence that you gave during an examination under s19 of the ASIC Act may also be considered.⁴²

Similarly, we do not envisage that there will be many instances when the delegate would summon a witness to attend. We know that requiring a person to attend to give evidence or to produce documents is disruptive of their life and may involve substantial cost or inconvenience, or both. We will only exercise the power to summon a witness when there is a demonstrated need for it.

Usually a written statement of a witness or a copy of relevant documents will be sufficient. Before issuing a summons, the delegate would need to be satisfied that:

- the person can give relevant evidence or produce relevant documents; and
- there is a need to do so.

³⁹ If a person is summoned to appear at a hearing as a witness under ss58(1) of the ASIC Act the delegate may require them to take an oath or make an affirmation. See s58(2) of the ASIC Act. Subsection 63(3) of the ASIC Act provides that it is an offence to fail to comply with a requirement made under s58(2). See too the discussion in paragraph 3.8.

⁴⁰ See s 64(2) of the ASIC Act.

⁴¹ Subsection 58(1) of the ASIC Act. “Books” is defined broadly in s5(1) of the ASIC Act. If a hearing was held under s41 of the now repealed *Insurance (Agents and Brokers) Act 1984* ASIC could not compel the attendance of a person to give evidence and/or to require the production of books.

⁴² See *Kippe -v- Australian Securities and Investments Commission* (1996) 67 FCR 499.

For example, it may be necessary if a written statement cannot be obtained or would be insufficient, or the documentary evidence is not available. Another example is where a person may have information which may assist the delegate, but is under a duty of confidentiality that prevents them from disclosing it. In that case a summons is needed to override that duty of confidentiality.

The delegate will not automatically issue a summons if asked to do so. If you want a summons to be issued you should inform the delegate why the summons is needed - that is, indicate what the evidence the person is able to give **and** why they need to be summoned. The delegate will then make a decision on whether to issue the summons.

The person requesting the issue of the summons must pay the fees and allowances for the witness's expenses (as provided for in Schedule 2 of the Australian Securities and Investments Commission Regulations).

3.9 When should we call our own witnesses?

We consider that, as a matter of general principle, it will not be necessary to call witnesses. On occasion, it may be of assistance to the delegate for factual issues to be clarified by a person giving oral evidence. We expect that such circumstances will be rare. In most instances sending a written statement, for example, would be adequate.

When credibility is an issue and we have asked for you to call a witness on your behalf, it is generally up to you to have your witness available at the hearing. If they do not give oral evidence, the delegate will then have to decide what weight should be given to that information.

3.10 What is an impartial decision maker?

To be impartial a decision maker must be free from bias. This does not mean that the delegate is not allowed to have any knowledge or view about particular issues in question. Rather, it means that they must approach the hearing with an open mind so that they can be persuaded to change any tentative opinion they may have formed.

As noted in a paragraph 3.1, we consider that the delegate who will hear the matter should sign the notice of hearing. The mere fact that the delegate who gives the notice of hearing also proposes to make the final decision **does not** give rise to a reasonable apprehension of bias.

This is because the state of mind needed when giving a notice of hearing does not mean that the delegate already has a fixed view on the matters.⁴³

3.11 Do the rules of evidence apply?

The ASIC Act states that the rules of evidence do not apply in our administrative hearings.⁴⁴ Our hearings cannot, and should not, be equated with proceedings in a court of law. Their purpose and nature is quite different. Many of our administrative hearings are protective in nature,⁴⁵ while others are held to determine whether a person is qualified for an occupation.⁴⁶ Our hearings are not a contest between you and us, but are an inquiry to determine the facts and any other aspect of the matter on which the particular power should be exercised. The hearings are not run in an adversarial manner. They are run in an “inquisitorial manner” that is, as an inquiry to find the true position.⁴⁷

The use of terms such as “examination” and “cross-examination”, “particulars” and “onus of proof” is not appropriate and is misleading in the context of our administrative hearings (see also 3.12). The delegate must be satisfied that:

- all the issues relevant to the subject matter of the hearing have been clearly identified;
- you have been given the opportunity to address them; and
- statutory requirements for our having the power are met.

We consider that, generally, it is the role of the delegate to put the information to you (or the witness) then allow you (or the witness) a

⁴³*Story -v- NCSC* 13 ACLR 225; see too the comments of Finn J in *Malcolm McLachlan -v- ASC* (1998) 28 ACSR 47; affirmed on appeal *McLachlan -v- ASIC* (1999) 85 FCR 286.

⁴⁴Paragraph 59(2)(a) of the ASIC Act.

⁴⁵*ASC -v- Kippe* (1996) 67 FCR 499.

⁴⁶See for example the decisions in *Friend -v- Corporate Affairs Commission* 7 ACLC 106 at 115; *Delonga and ASC* (1994) 15 ACSR 450; (1995) 13 ACLC 246; *Sheslow and ASC* (1994) 12 ACLC 740; *Winter -v- ASC* (1995) 56 FCR 107; (1995) 13 ACLC 422; *Agushi and ASC* (1996) ACSR 322; *Laycock -v- Forbes* (1997) 15 ACLC 1814; *Kardas -v- ASIC* (1998) 29 ACSR 304; and *Foster -v- ASC* (1999) 57 ALD 779.

⁴⁷See comments of the Full Federal Court in *Boucher -v- ASC* (1996) 44 ALD 499 where the court observed in relation to a hearing conducted under the now repealed s837 of the Corporations Law that “[t]he proceeding was conducted by the Commission’s delegate in the exercise of an administrative function which enabled an inquisitorial, rather than adversarial inquiry”.

reasonable opportunity to explain it or to give your own version of events. Usually the delegate will not allow your legal or other representative to undertake the initial questioning but will allow them to clarify any matters on which you (or the witness) has been questioned and to present any material that has been overlooked.

As a matter of fairness, and to ensure that the information may be properly assessed, the delegate will usually point out to you material that appears to contradict, or to be inconsistent with, your evidence. The delegate will also point out contradictory or inconsistent evidence to witnesses. If there are credibility issues with some information or evidence, the delegate will also put that material to you. This does not mean that you (or a witness) will be "cross-examined" in the traditional sense. You are simply being given the opportunity to answer matters which may affect your credibility.

As noted before, the delegate must base their decision on material that is relevant and credible, and logically proves what the facts are.⁴⁸

You need to decide:

- what material you want to present to the hearing;
- the form in which you want to present it;
- how much evidence you want to present;
- if you want to dispute the accuracy or adequacy of the factual material on which we are contemplating acting; and
- if you want the delegate to consider including a provision in any order that may be made that permits you to do specified acts that you would otherwise be prohibited from doing and what, if any, conditions may be imposed.⁴⁹

It is for you to decide what material you want a delegate to consider. You may wish to rely entirely on the material we have identified in the notice of hearing or notice to demonstrate (see 3.1 above). You may wish to give evidence on oath yourself or call another person to give evidence to the delegate (see 3.8 above). You may also wish to provide the delegate with material in the form of documents. These documents could, for example, include written statements by people about the facts or copies of records that are relevant to the hearing. Of

⁴⁸*Minister for Immigration and Ethnic Affairs -v- Pochi* (1980) 31 ALR 666; and *Mahon -v- Air New Zealand Ltd* [1984] AC 808.

⁴⁹ See for example ss206F(5), 915H and 920B(3) of the Corporations Act.

course, you may also make submissions, either in writing or orally. Or you may wish to do a number or all of these things. You should consider very carefully how you present information you consider to be relevant to the delegate.

There may be a person or a document that is easily available to you that supports the conclusion that you consider the delegate should reach. If there is and you do not provide that material without any explanation, the delegate may form the view that the material would not have supported you.

If you want us to exercise the power under ss920B(3) of the Corporations Act or, if relevant ss831(1) and 1195(1) of the Corporations Act as it applied before the commencement of the FSR Act, you should think about the conditions that you believe deal with our concerns and tell us at the hearing, or in any written submission, that you want us to consider exercising that power.

In deciding the form of your evidence, you should remember that we are not bound by the rules of evidence and that you may present any material which is relevant and credible. As noted above, for example, often written statements from persons with knowledge of relevant events and other circumstances will be sufficient without the need for you to call them as witnesses to give evidence in person.

Generally you will not be given the opportunity to present more evidence if the delegate is not persuaded by the material you initially present. The delegate will not indicate as a preliminary matter whether the material you present is sufficient or not.

As noted in 3.7, it is important to be aware that it is an offence to give evidence at a hearing which is false or misleading in a material particular.⁵⁰

3.12 Is there a “burden of proof”?

This is a concept that arises in court processes, but it has **no place** in our administrative hearings. There is no “burden of proof” in our administrative hearings. Our administrative hearings give you an opportunity to give us information which may affect our decision. Generally, you do not have to prove or disprove anything. Rather, you

⁵⁰ See s 64(2) of the ASIC Act.

are given the opportunity to present information to assist us in our decision making.⁵¹ As the High Court has stated⁵²:

Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature [⁵³]. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by the delegate would not be an error of law. The term “balance of probabilities” ... as with the term “evidence” as used to describe the material before the delegates, ... seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance.⁵⁴

We must be persuaded about the matters with which we are concerned or which we must be satisfied about before we can make a decision. The hearing is the opportunity for you to persuade us to make a decision in your favour.

3.13 When should a hearing be adjourned?

Circumstances often arise when the delegate must consider whether to grant an adjournment. When the delegate is deciding whether to grant an adjournment they must decide what is fair in light of the circumstances of the case.⁵⁵ If you wish an adjournment you should notify the delegate as soon as possible. We consider that it is usually desirable to complete hearings as soon as practicable.

⁵¹*Cullen -v- Corporate Affairs Commission* (1989) 7 ACLC 121 at 124; *Gerard Farley -v- ASC* (1998) 16 ACLC 1502.

⁵²*Minister for Immigration and Ethnic Affairs -v- Wu Shan Liang* (1996) 185 CLR 259 at 282.

⁵³*Mahon -v- Air New Zealand* [1984] AC 808 at 814.

⁵⁴*Minister for Immigration and Ethnic Affairs -v- Wu Shan Liang* (1996) 185 CLR 259 at 282.

⁵⁵For example, if new material information has come to light which may be adverse to the affected person and he or she has not been given an opportunity to comment it may be appropriate to adjourn the hearing: *Boucher -v- ASC* (1996) 22 ACSR 503 at 511.

3.14 Enforceable undertakings

Section 93AA of the ASIC Act gives us the power to accept a written undertaking in connection with a matter on which we have a function or power under the ASIC Act. Under s93A we may also accept an undertaking from a responsible entity in the context of a managed investment scheme. These undertakings are enforceable by the Court.⁵⁶

Whether or not it is appropriate for us to accept an enforceable undertaking depends on the facts of a particular case. It should be noted that we will not enter into a confidential undertaking. See too ASIC's Practice Note 69 "Enforceable Undertakings" (<http://www.asic.gov.au> in the Publications section).

3.15 Review of the delegate's final decision

3.15.1 Review by ASIC

If you have been disqualified from managing corporations under s206F(1) you may ask ASIC for written permission to manage a particular corporation or corporations.⁵⁷ The permission may be given subject to conditions and exceptions.⁵⁸

If you have been banned from providing financial services or specified financial services in specified circumstances or capacities under s920A of the Corporations Act or acting as a representative of a dealer or investment adviser or as a representative of a futures broker or futures adviser under the Corporations Act as it applied before the commencement of the FSR Act⁵⁹ you may ask ASIC to vary or revoke

⁵⁶ See ss94AA(4) and 94A(4) of the ASIC Act.

⁵⁷ See subsection 206F(5) of the Corporations Act.

⁵⁸ If you have been prohibited from acting as a director under the now repealed s600 of the Corporations Act leave to manage must be obtained by the Court.

⁵⁹ See Division 5 of Part 7.3 (securities) and Division 5 of Part 8.3 (futures) of the Corporations Act as it applied before the commencement of the FSR Act .

that decision.⁶⁰ ASIC may vary or revoke the banning order subject to conditions.⁶¹

If you are a financial services licensee you may, in accordance with paragraph 914A(2)(b) of the Corporations Act, lodge an application to have licence conditions varied or revoked.⁶²

3.15.2 Review by the Administrative Appeals Tribunal

ASIC is required in accordance s1317D of the Corporations Act to advise you of your rights of review to the Administrative Appeals Tribunal (AAT). The delegate will inform you of your rights of review in this regard at the time of notifying you of his/her final decision.

3.16 Written reasons

The delegate will usually give you the reasons for their decision when they tell you what their final decision is.⁶³ If the delegate does not give you the reasons, you may ask for a written copy of them. The request should be in writing and made within **28 days** of being notified of his/her final decision.

3.17 Publication/press releases of our decisions

We are obliged to strive to maintain, facilitate and improve the performance of the financial system, and to promote the confident and informed participation of investors and consumers in the financial system.⁶⁴

⁶⁰ See s920D of the Corporations Act and s831, 832, 1195 and 1196 of the Corporations Act as it applied before the commencement of the FSR Act.

⁶¹ See s920B(3) of the Corporations Act and ss831(2) and 1195(2) of the Corporations Law as it applied before the commencement of the FSR Act.

⁶² See too ss786(7) of the Corporations Act as it applied before the commencement of the FSR Act.

⁶³ Sections 915G and 920F(1) of the Corporations Act require us to provide a statement of reasons to you at the time of issuing a notice of suspension or cancellation of your financial services licence or making a banning order. If we vary a banning order against you we will at your request provide a statement of reasons to you (ss920F(2) of the Corporations Act). If we refuse your application for registration as an auditor or liquidator we will send you the written decision and reasons within **14 days** of our telling you of our decision (see ss1280(9) and 1282(11) of the Corporations Act).

⁶⁴ Paragraphs 1(2)(a) and (b) of the ASIC Act.

Publishing the results of our hearings is an important aspect of our regulatory strategy. It assists us to educate, not only those who have been the subject of the hearing, but also others in the relevant industry, about what the Corporations Act requires and the consequences of failing to comply with the law.

We do not consider it appropriate to publicise that someone has been given an opportunity to be heard.⁶⁵ To publicise a hearing at this early stage may significantly disadvantage you because the substance of the issues leading to the hearing have not been discussed and determined. It is the outcome of the hearing which may be of regulatory impact.

If we make an interim order to stop the trading of securities under s739 or under s1020E with respect to financial services products we will usually need to publicise our action. This is necessary to keep the market informed about what is happening. In that instance, we would usually also state when any hearing would commence.

In some instances we have an obligation to publish our orders in the *Gazette*.⁶⁶ In addition to publishing the orders in the *Gazette* we will publish a press release.

⁶⁵See discussion in 3.6 with respect to ASIC's specific obligations to conduct certain hearings in private.

⁶⁶See, for example, ss915F(2) and 920E(2) which require ASIC to, as soon as practicable, on or after the day on which a decision cancelling or suspending the licence or the banning order or variation of a banning order is made, publish a notice of the action taken in the *Gazette*. See too ss834 and 1198 of the Corporations Act as it applied before the commencement of the FSR Act.

4 Your statutory right to be heard

There are a number of specific provisions in the Corporations Act and Regulations which require us to offer an opportunity to be heard. Some of the provisions are mentioned below.

4.1 Section 206F of the Corporations Act - Orders to disqualify a person from managing corporations⁶⁷

Under s206F(1) of the Corporations Act we may disqualify a person who has been a director of two or more failed companies from managing corporations. We may give a notice in the prescribed form which requires the person to “demonstrate” why disqualification for a period of up to five (5) years is not justified. Our order of disqualification may only be made after that person has been given an opportunity of being heard.

4.2 Licensing decisions under the Corporations Act⁶⁸

Under s913A of the Corporations Act a person may apply to ASIC for an Australian financial services licence. ASIC must, before refusing to grant a licence, give the affected person an opportunity to have a private hearing.

Under s914A(1) of the Corporations Act ASIC may impose conditions on a financial services licence. If ASIC imposes conditions when the initial licence application is granted the affected person has no statutory right to a hearing (see s914A(3)). If, however, after granting the initial licence, ASIC proposes to vary, revoke or impose additional conditions the affected person does have a statutory right to be heard at a private hearing.

Sections 915C and 920A enable ASIC to exclude persons from, or limit their participation in, the financial services industry. In some instances, before exercising these powers we must give the affected person the opportunity to have a private hearing.

⁶⁷Section 206F of the Corporations Act came into operation on 13 March 2000. Prior to 13 March 2000 administrative action “to prohibit” a person from acting as a director was taken under section 600 of the Law.

⁶⁸ Various provisions in Part 7.3 (securities industry) and 8.3 (futures industry) of the Corporations Act, as it applied before the commencement of the FSR Act, enabled ASIC to exclude a person from their relevant industry or to limit their participation therein. In some instances, before exercising those powers ASIC was required, to give the affected person an opportunity to have a private hearing. See for example ss783, 784, 1144A and 1145 of the old Corporations Act.

4.3 Sections 1280 and 1282 of the Corporations Act - Regulation of auditors and liquidators

If we are considering refusing to register a person as an auditor or as a liquidator, we must give that person the opportunity of appearing at a hearing and give evidence in relation to the matter.

4.4 Sections 739 and 1020E of the Corporations Act - Stop orders with respect to securities and financial products

Under s739(1) of the Corporations Act we have the power to order that no offers, issues, sales or transfers of securities be made because s728 has been contravened. Under s1020E(2) we have the power to make a stop order where a disclosure document or information required to be given under Part 7.9 or an advertisement or promotional material in relation to a financial product is defective or the issuer of financial products does not have, or has not maintained, an approved internal and external dispute resolution mechanism as required by s1017G.

We cannot make a stop order, other than an interim order,⁶⁹ unless we have held a hearing and given the affected person and other interested people an opportunity to make oral or written submissions.

4.5 Corporations Act Regulations hearings

The obligation on us to give a person a hearing also arises under the Corporations Act Regulations where an application is made for compensation from a security lodged with ASIC. Subsection 1284(2) of the Corporations Act, for example, provides in relation to a security given by a liquidator:

Where a security is lodged in accordance with subsection (1), the security may be applied by ASIC in such circumstances, for such purposes and in such manner as is prescribed.

The “prescribed circumstances” are set out in Regulation 9.2.05. Subregulation 9.2.05(5) provides that ASIC must give the liquidator an opportunity of being heard before deciding whether a person is to be compensated under subregulation (1).

Subsection 786(9) of the Corporations Act, as it applied before the introduction of the Financial Service Reform Act, provided that ASIC could apply a security given by a securities licensee "in such circumstances, for such purposes and in such manner as is prescribed". The relevant prescribed circumstances were set out in Regulation 7.3.04.⁷⁰

⁶⁹ See ss739(3) and 1020E(5) of the Corporations Act.

⁷⁰ See too Regulation 10.2.199 with respect to claims made for compensation after the commencement of the FSR Act.

ASIC may also require a financial services licensee to lodge a security with ASIC.⁷¹

4.6 No “hearing” required

In some circumstances there is no express statutory right to be heard. The grounds for us acting without offering an opportunity to be heard include:

1. where the licensee requests that the licence be suspended or cancelled;⁷²
2. when the licensee, become an insolvent under administration⁷³ or, in the case of a body corporate, an externally administered body corporate,⁷⁴ or in the case of a partnership, where a creditor's petition or a debtor's petition is presented under Division 2 or 3 of Part IV of the *Bankruptcy Act* 1966;⁷⁵
3. when the licensee is convicted of serious fraud;⁷⁶
4. when the licensee becomes incapable, through mental or physical incapacity, of managing their affairs;⁷⁷ and
5. when the licensee ceases to carry on the financial services business.⁷⁸

⁷¹ Subregulation 10.2.45(2).

⁷² Paragraphs 920A(3)(a), 915B(1)(e), 915B(2)(d) and 915B(3)(d) of the Corporations Act; and paragraphs 824(d), 825(c), 827(1)(a) and 1189A(d) of the Corporations Act as it applied before the commencement of the FSR Act.

⁷³ Paragraphs 920A(3)(a), 915B(1)(b) and 915B(4)(b)(i) of the Corporations Act; and paragraphs 824(a) and 1189A(a) of the Corporations Act as it applied before the commencement of the FSR Act.

⁷⁴ Paragraphs 920A(3)(a), 915B(3)(b) and 915B(4)(c) of the Corporations Act; and paragraphs 824(a) and 1189A(a) of the Corporations Act as it applied before the commencement of the FSR Act.

⁷⁵ Paragraphs 920A(3)(a) and 915B(2)(b) of the Corporations Act.

⁷⁶ Paragraphs 915B(1)(c), 915B(2)(c) and subparagraph 915B(4)(b)(ii) and 920A(3)(b) of the Corporations Act; and paragraphs 824(b) and 1189A(b) of the Corporations Act as it applied before the commencement of the FSR Act. “Serious fraud” is defined in section 9 of the Corporations Act to mean: “an offence involving fraud or dishonesty, being an offence: (a) against an Australian law or any other law; and (b) punishable by imprisonment for life or for a period, or maximum period, of at least 3 months.”

⁷⁷ Paragraphs 920A(a) and 915B(1)(d) and (4)(b)(iii) of the Corporations Act; and paragraphs 824(c) and 1189A(c) of the Corporations Act as it applied before the commencement of the FSR Act.

⁷⁸ Paragraphs 920A(a) and 915B(1)(a), (2)(a), (3)(a) and (4)(a) of the Corporations Act; and paragraphs 825(a) and 1190(a) of the Corporations Act as it applied before the commencement of the FSR Act. See too Paragraphs 825(d) and 1190(d) of the Corporations Act as it applied before the commencement of the FSR Act.

We also have no statutory obligation to offer a hearing in other circumstances, such as when we impose conditions when a financial services licence is initially granted⁷⁹, or refusing to grant a licence where there is an existing banning.⁸⁰

⁷⁹ Subsection 914A(3) of the Corporations Act. This position should be contrasted with imposition of conditions when initially licensed under ss786 and 1147 of the Corporations Act as it applied before the commencement of the FSR Act. See too s825A, and paragraphs 837(1)(a) and (e) and 1200(1)(a) and (e) of the Corporations Act as it applied before the commencement of the FSR Act for other instances where there was no statutory right to be heard.

⁸⁰ Subsection and paragraphs 837(1)(a) and 1200(1)(a) and (b) of the Corporations Act as it applied before the commencement of the FSR Act

Appendix A

Part 3, Division 6 of the Australian Securities and Investments Commission Act on hearings

Section 51 Power to hold hearings

51(1) The Commission may hold hearings for the purposes of the performance or exercise of any of its functions and powers under the corporations legislation (other than the excluded provisions), other than a function or power conferred on it by Division 1 of this Part or by section 657C or 657G of the Corporations Act.

Section 52 General discretion to hold hearing in public or private

52(1) Subject to sections 53 and 54, ASIC may direct that a hearing take place in public or take place in private.

52(2) In exercising its discretion under subsection (1), ASIC must have regard to:

- (a) whether evidence that may be given, or a matter that may arise, during the hearing is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence;
- (b) any unfair prejudice to a person's reputation that would be likely to be caused if the hearing took place in public;
- (c) whether it is in the public interest that the hearing take place in public; and
- (d) any other relevant matter.

Section 53 Request by person appearing at hearing that it take place in public

53(1) Subject to section 54, where:

- (a) the corporations legislation (other than the excluded provisions) requires ASIC to give a person an opportunity to appear at a hearing; and
- (b) the person requests that the hearing or part of the hearing take place in public;

the hearing or part must take place in public.

53(2) Despite subsection (1), where ASIC is satisfied, having regard to the matters referred to in subsection 52(2), that it is desirable that a hearing or part of a hearing take place in private, it may direct that the hearing or part take place in private.

Section 54 Certain hearings to take place in private

54 Where the corporations legislation (other than the excluded provisions) requires a hearing to take place in private, the hearing must take place in private.

Section 55 ASIC may restrict publication of certain material

55(1) Where, at a hearing that is taking place in public or in private, ASIC is satisfied that it is desirable to do so, ASIC may give directions preventing or restricting the publication of evidence given before, or of matters contained in documents lodged with, ASIC.

55(2) In determining whether or not to give a direction under subsection (1), ASIC must have regard to:

- (a) whether evidence that has been or may be given, or a matter that has arisen or may arise, during the hearing is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against an Australian law;
- (b) any unfair prejudice to a person's reputation that would be likely to be caused unless ASIC exercises its powers under this section;
- (c) whether it is in the public interest that ASIC exercises its powers under this section; and
- (d) any other relevant matter.

Section 56 Who may be present when hearing takes place in private

56(1) ASIC may give directions about who may be present during a hearing that is to take place in private.

56(2) A direction under subsection (1) does not prevent:

- (a) a person whom the corporations legislation (other than the excluded provisions) requires to be given the opportunity to appear at a hearing; or
- (b) a person representing under section 59:
 - (i) a person of a kind referred to in paragraph (a) of this subsection; or
 - (ii) a person who, by virtue of such a direction, is entitled to be present at a hearing;

from being present during the hearing.

56(3) Where ASIC directs that a hearing take place in private, a person shall not be present at the hearing unless he or she:

- (a) is a member;
- (b) is a staff member approved by ASIC; or
- (c) is entitled to be present by virtue of:
 - (i) a direction under subsection (1); or
 - (ii) subsection (2).

Penalty: 10 penalty units or imprisonment for 3 months.

56(4) Subsection (3) is an offence of strict liability.

Section 57 Involvement of person entitled to appear at hearing

57(1) This section applies where the corporations legislation (other than the excluded provisions) requires ASIC to give a person an opportunity to appear at a hearing and to make submissions and give evidence to it.

57(2) ASIC must appoint a place and time for the hearing and cause written notice of that place and time to be given to the person.

57(3) If the person does not wish to appear at the hearing, the person may, before the day of the hearing, lodge with ASIC any written submissions that the person wishes ASIC to take into account in relation to the matter concerned.

Section 58 Power to summon witnesses and take evidence

58(1) A member may, by written summons in the prescribed form given to a person:

- (a) require the person to appear before ASIC at a hearing to give evidence, to produce specified documents, or to do both; and
- (b) require the person to attend from day to day unless excused, or released from further attendance, by a member.

58(2) At a hearing, ASIC may take evidence on oath or affirmation, and for that purpose a member may:

- (a) require a witness at the hearing to either take an oath or make an affirmation; and
- (b) administer an oath or affirmation to a witness at the hearing.

58(3) The oath or affirmation to be taken or made by a person for the purposes of this section is an oath or affirmation that the evidence the person will give will be true.

58(4) The member presiding at a hearing:

- (a) may require a witness at the hearing to answer a question put to the witness; and
- (b) may require a person appearing at the hearing pursuant to a summons issued under this section to produce a document specified in the summons.

58(4A) An offence under subsection 63(3) relating to subsection (1), (2) or (4) of this section is an offence of strict liability.

58(5) ASIC may permit a witness at a hearing to give evidence by tendering, and if ASIC so requires, verifying by oath, a written statement.

Section 59 Proceedings at hearings

59(1) A hearing must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the corporations legislation (other than the excluded provisions) and a proper consideration of the matters before ASIC permit.

59(2) At a hearing, ASIC:

- (a) is not bound by the rules of evidence;
- (b) may, on such conditions as it thinks fit, permit a person to intervene;
and
- (c) shall observe the rules of natural justice.

59(3) Subject to subsection (4), Division 4 of Part 4 (other than section 104) applies, so far as practicable, in relation to a hearing as if the hearing were a meeting of ASIC.

59(4) At a hearing before a Division of ASIC, 2 members of the Division form a quorum.

59(5) At a hearing, a natural person may appear in person or be represented by an employee of the person approved by ASIC.

59(6) A body corporate may be represented at a hearing by an officer of the body corporate approved by ASIC.

59(7) An unincorporated association, or a person in the person's capacity as a member of an unincorporated association, may be represented at a hearing by a member or officer of the association approved by ASIC.

59(8) Any person may be represented at a hearing by a barrister or solicitor of the Supreme Court of a State or Territory or of the High Court.

Section 60 ASIC to take account of evidence and submissions

60 ASIC must take into account:

- (a) evidence given, or a submission made, to it at a hearing; or
- (b) a submission lodged with it under section 57;

in making a decision on a matter to which the evidence or submission relates.

Section 61 Reference to Court of question of law arising at hearing

61(1) ASIC may, of its own motion or at a person's request, refer to the Court for decision a question of law arising at a hearing.

61(3) Where a question has been referred under subsection (1), ASIC must not, in relation to a matter to which the hearing relates:

- (a) give while the reference is pending a decision to which the question is relevant; or
- (b) proceed in a manner, or make a decision, that is inconsistent with the Court's opinion on the question.

61(4) Where a question is referred under subsection (1):

- (a) ASIC must send to the Court all documents that were before ASIC in connection with the hearing; and
- (b) at the end of the proceeding in the Court in relation to the reference, the Court shall cause the documents to be returned to ASIC.

Section 62 Protection of members etc.

62(1) A member has, in the performance or exercise of any of his or her functions and powers as a member in relation to a hearing, the same protection and immunity as a Justice of the High Court.

62(1A) A delegate of a member has, in the performance or exercise of any delegated function or power in relation to a hearing, the same protection and immunity as a Justice of the High Court.

62(2) A barrister, solicitor or other person appearing on a person's behalf at a hearing has the same protection and immunity as a barrister has in appearing for a party in a proceeding in the High Court.

62(3) Subject to this Act, a person who is required by a summons under section 58 to appear at a hearing, or a witness at a hearing, has the same protection as a witness in a proceeding in the High Court.