



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 52

Enforcement action submissions

Chapter 1 — Introductory and general topics

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From 5 July 2007, this document may be referred to as Regulatory Guide 52 (RG 52) or Policy Statement 52 (PS 52). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 52.1) or their policy statement number (e.g. PS 52.1).

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Purpose

RG 52.1 The ASC has adopted a policy on the use of enforcement action submissions. In the limited circumstances described below, the ASC will invite or agree to consider submissions on what enforcement action it should take in response to findings made in an investigation.

This will enable the ASC, where practicable and appropriate, to have before it the views of persons under investigation at the time enforcement action is considered.

Background

RG 52.2 Enforcement action submissions will not be sought or considered in all investigations. Under this policy:

- (a) the ASC may invite the subject of an investigation to make a submission on matters of policy and law directed to whether the ASC should take any enforcement action, and if so, the type of action to be taken; or
- (b) a person who is subject to investigation may ask the Regional Commissioner of the office conducting an investigation if such a submission would be received, but it will be entirely in the discretion of the responsible Regional Commissioner whether he or she elects to consider such a submission.

RG 52.3 The ASC will generally consider submissions on enforcement action only when an investigation is substantially complete and the ASC is able to form a view on matters of fact.

RG 52.4 Where a person is invited to make a submission on enforcement action, the person is not obliged to do so. No adverse inference will be drawn from a decision not to make a submission on enforcement.

RG 52.5 This policy has been developed upon a review of the policy of the United States Securities and Exchange Commission (known as “Procedures relating to the commencement of enforcement proceedings and termination of staff investigations” and numbered Release No 5310) and through discussions with the Director of Public Prosecutions (DPP) and various members of the legal profession, representing clients subject to ASC investigation. These procedures are known in the United States as “Wells submissions” and the ASC sees benefit in appropriate cases of implementing similar procedures for submissions on enforcement action.

Enforcement

RG 52.6 Each year the ASC receives and processes over 8000 external complaints relating to corporate law matters. In addition, the ASC responds to matters which come to its attention through its

surveillance programs and through market intelligence (including press reports). Having regard to the number and complexity of the matters which come to its attention, the ASC can investigate fully only a proportion of these matters.

RG 52.7 The ASC has accordingly adopted a complaints management procedure to select the matters to which the ASC will allocate its resources, generally in a priority determined in accordance with the seriousness of the conduct identified. In addition, the ASC will from time to time carry out enforcement campaigns and surveillance programs which address particular types of conduct. By this method, the ASC strives to ensure coverage of complaints which it receives.

RG 52.8 To maximise the effectiveness of the resources employed in investigating those matters which come to its attention, the ASC has adopted a methodology which:

- (a) allocates priority to the investigation of matters according to the seriousness of the conduct identified;
- (b) requires each matter which it determines to investigate to be addressed by teams with all necessary skills (legal, accounting and forensic) relevant to the issues identified;
- (c) aims to ensure that all investigations into conduct identified after 1 January 1991 are completed within 12 months after the investigation is resourced; and
- (d) maximises the remedies which may be realised from the investigation of the conduct, giving the same consideration to identifying breaches of the general criminal law as it gives to identifying breaches of the Corporations Law (Law), and recognising that serious contraventions will need to be addressed in a range of ways, including civil enforcement (interlocutory or final), criminal prosecution and administrative action.

RG 52.9 The enforcement actions which may be taken as a result of an investigation include:

- (a) if criminal prosecution may be warranted, the referral of the matter to the DPP;
- (b) the commencement of, or intervention in, civil proceedings;
- (c) the release of information under s18 or s25 of the ASC Law;
- (d) administrative proceedings, for example proceedings for the revocation or suspension of, or imposition of conditions on,

- securities licences and disciplinary proceedings in relation to licensed persons, auditors and liquidators under the Law;
- (e) referral of the matter to a more appropriate law enforcement agency; or
 - (f) a decision that enforcement action (whether criminal, civil or disciplinary) is inappropriate, confirmed by way of letter to the subjects of the investigation. If the matter is publicly known, the ASC may also announce that it does not, at present, intend to take further action and the reasons for its decision.

Submissions as to law and policy, not fact

RG 52.10 Submissions will generally be considered on questions of policy, and, occasionally, on questions of law, rather than on factual matters. Submissions may address either or both of why the ASC should not commence any (or any particular) enforcement action and what form of enforcement action may be appropriate.

RG 52.11 Where the ASC invites a person to make a submission or agrees to consider a submission, the ASC will, generally, produce a written statement of facts but the statement will not be exhaustive of the findings of the investigation. For the purpose of the submission, the ASC will not be bound to release material on which the statement of facts is based. The statement of facts will form the basis on which the submission should be made.

RG 52.12 Consequently, submissions will normally be made against a clear factual background and prove most useful in connection with:

- (a) questions of law or policy bearing on the issue of whether a proceeding should be initiated, or other action taken; or
- (b) considerations relevant to a particular prospective defendant or respondent which might not otherwise be brought clearly to the ASC's attention.

RG 52.13 Where a prospective respondent has a significant disagreement as to a factual matter in the ASC's statement, it is not appropriate to attempt to resolve that dispute through submissions on enforcement action. In addition, where the ASC must discharge administrative functions, the ASC will wish to avoid any suggestion of apparent prejudgement of contentious factual matters. Accordingly, where a significant disagreement exists as to a matter of fact, it may

limit the extent to which it is useful to make submissions on enforcement action.

RG 52.14 Although a person will not be invited to dispute factual matters, he or she may elect to present new material as part of the submission. It should be clearly understood that this additional material will only be received on the terms that it is available for use by the ASC unfettered by special conditions or obligations of confidence.

Use to be made of submissions

RG 52.15 The ASC will not receive submissions on enforcement action on an “in confidence” or “without prejudice” basis and all submissions may only be made without limitation as to the use to which the ASC may put the submission. The use to be made of any submission is at the discretion of the Regional Commissioner or other appropriate ASC officer.

RG 52.16 In adopting this policy, the ASC recognises that corporate law is highly technical and particular aspects of the law may be subject to differing opinions and practices. As a regulator, the ASC is sensitive to the fact that some conduct which the ASC considers to be in contravention of the Law may, nevertheless, be widespread in practice and that some contraventions may result from an erroneous but genuinely held belief about the Law. While ignorance of the law is not a defence for unlawful conduct, the ASC recognises that, in these circumstances the most appropriate action may not be civil, criminal or disciplinary proceedings. Instead, it may be more appropriate to clarify the law and to make known the ASC’s attitude, together with the adoption by market participants of practices which fully comply with the law.

RG 52.17 Accordingly, whenever submissions on enforcement action are made, the ASC reserves the right to issue a public statement setting out its position, both as to the conduct the subject of the investigation and as to the content of the submission itself. In general, this will only occur if the fact of the investigation is already publicly known. If the investigation is not publicly known, and the investigation has identified practices which the ASC believes should be exposed or criticised, the ASC may choose to publish general guidelines on the practice.

RG 52.18 If the ASC elects to prepare a report on an investigation, it will normally include any relevant submissions on enforcement action, together with its comments on the submissions.

RG 52.19 Submissions on enforcement are not submissions in mitigation of penalty. Consistently with comments above, however, if a submission is to the effect that the relevant law or policy has been unclear, the ASC may look favourably on undertakings as to future conduct which would result in full compliance with the law and which indicate a better understanding of the relevant law or policy. In particular, the ASC will welcome the establishment of appropriate compliance programs by corporations designed to prevent and detect unlawful conduct by their officers, employees or agents. The giving of any undertakings or the adoption of compliance programs would not, however, preclude the ASC from taking further action, if necessary.

Criminal matters

RG 52.20 The ASC has entered into arrangements with the DPP consistent with the powers of the DPP under the *Director of Public Prosecutions Act 1983* (Cth), under which only the DPP will deal with the prosecution of serious offences. Only after prior consultation with the DPP will submissions on enforcement action be sought in these matters. Further, although submissions may be invited or considered by the ASC in matters where there is some concern as to the perceived operation of the law, submissions will not normally be invited or considered where the ASC suspects fraud or dishonesty.

RG 52.21 If the matter concerns a serious offence under the Law, the ASC will provide to the DPP any submissions on enforcement action, together with its comments on those submissions. This procedure will not in any way fetter the discretion of the DPP in respect of the matter, nor may the fact that the ASC has invited or agreed to consider a submission be seen as an inducement to provide information. If any person makes a submission on enforcement action to the ASC, it can only be on the basis that it is a voluntary submission and cannot in any manner affect or prejudice a subsequent prosecution or other enforcement action.

Procedure for making submissions

RG 52.22 The ASC will only accept written submissions on enforcement action, addressed to the Regional Commissioner in the office of the ASC responsible for the investigation. Submissions as to fact (if made) should be signed by the prospective respondent. Submissions by a body corporate must be signed by an authorised person. Submissions as to law or policy may be signed by the respondent's lawyer.

RG 52.23 If there is likely to be more than one respondent, submissions will normally be sought or considered only on an individual basis.

RG 52.24 Submissions must be made in a timely manner. Generally a period for making a submission will be specified by the ASC officer inviting the submission. This time may not be the same for all submissions, having regard to the circumstances of individual cases. The ASC cannot place itself in a position where it would lose its ability to respond, in a timely manner, to unlawful or unacceptable conduct since the ASC is often required to take immediate interlocutory or other action to protect the interests of investors and creditors. Accordingly, the ASC will not accept any attempt by those making submissions or their lawyers to impose a timetable for the consideration of the submissions on the ASC and the ASC reserves the right to withdraw the opportunity to make submissions on enforcement action at any time.

Advice of conclusion of an investigation

RG 52.25 If, following consideration of a submission on enforcement action, the ASC decides not to take action against a person who has been the subject of the investigation, the ASC may advise that person in writing. Recipients of this written advice should understand that it is not intended to exonerate them nor does it preclude further action by the ASC arising out of the investigation. The letter is merely designed to reflect the fact that as of its date, the ASC does not regard enforcement action as appropriate. The ASC may choose to resume its investigation or to reconsider enforcement action at any time.

RG 52.26 The letter will always contain a paragraph stating that:

“The use of this letter as a bar to, or defence in, any civil, criminal or disciplinary proceedings is neither intended nor appropriate. The letter merely reflects that as of its date the ASC did not elect to take enforcement action, based on the information it currently holds. This conclusion may be based upon various reasons, some of which may be irrelevant to the merits of subsequent proceedings.”

RG 52.27 If, as a result of a submission on enforcement, the ASC elects not to proceed, the ASC will not accept reimbursement of the costs of the investigation from the subject of the investigation.

Review

RG 52.28 The use of submissions on enforcement is believed to be novel in Australia. Accordingly, the ASC will review this policy and its implementation within 12 months from its commencement.

RG 52.29 The National Co-ordinator, Enforcement, will review all applications and draft decisions for 12 months to promote consistent decision making.