



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 92

Procedural fairness to third parties

Chapter 1 — Introductory and general topics

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From 5 July 2007, this document may be referred to as Regulatory Guide 92 (RG 92) or Policy Statement 92 (PS 92). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 92.1) or their policy statement number (e.g. PS 92.1).

Headnotes

Corporations Law s629, 750, 1067(3), 1317C; ASC Law 1(2), 127; Policy Statements 51, 57, 71 and 103; affected interests; confidentiality; consultation; exercise of discretionary powers; procedural fairness; reasonable expectation; third parties.

Contents

| | |
|--|-----------|
| Purpose | 2 |
| Related policies | 2 |
| Background | 3 |
| Procedural fairness obligations | 4 |
| ASC's approach | 4 |
| No material adverse effects on third parties | 5 |
| Potential material adverse effects on third parties | 5 |
| Affording procedural fairness | 8 |
| Content or nature of procedural fairness | 9 |
| Confidentiality of submissions | 10 |
| Applications | 11 |

Purpose

RG 92.1 This guide is a guide to how the ASC will afford procedural fairness when exercising its discretionary powers under the Corporations Law (Law).

RG 92.2 Procedural fairness essentially has two rules:

- (a) the fair hearing rule; and
- (b) the no bias rule.

This guide focuses on when the fair hearing rule requires the ASC to consult with third parties who may be adversely affected by a decision of the ASC.

RG 92.3 This guide replaces Memo 14/92 of 28 July 1992 (see 1995 *ASC Digest* at page *MEMO 93*).

Related policies

RG 92.4 This guide should be read in conjunction with Regulatory Guide 51, *Applications for relief*, (RG 51). It sets out the information applicants are required to provide to the ASC to ensure that applications are dealt with efficiently. It should also be read in conjunction with Regulatory Guide 103, *Confidentiality and release of information* (RG 103) and Regulatory Guide 57, *Notification of rights of review*, (RG 57) which deals with requirements to notify persons affected by decisions of the ASC.

RG 92.5 See also “Commentary on the Administrative Law Aspects of the ASC’s Exercise of Discretion” (1993 *ASC Digest* at page LC 21).

Background

RG 92.6 When the ASC grants relief it must ensure that the objectives of the provisions of the Law from which relief is sought are maintained. In granting relief, the ASC must often balance conflicting obligations such as:

- (a) observing rules of procedural fairness;
- (b) ensuring commercial efficiency (s1(2) of the ASC Law); and
- (c) preserving the confidentiality of information (s127 of the ASC Law).

RG 92.7 An applicant can reasonably expect that its application will not be unnecessarily delayed and its interests will not be detrimentally affected to an undue extent by the ASC’s decision-making process. It is also reasonable for third parties to expect the ASC not to make decisions which adversely affect their interests in a material way without giving them the opportunity to make submissions where the rule of procedural fairness requires the ASC to do so.

RG 92.8 When making decisions the ASC must also:

- (a) consider all the facts put to it;
- (b) take into account all, and only, relevant considerations;
- (c) grant relief for proper purposes only;
- (d) make reasonable decisions only; and
- (e) make decisions consistent with the policy of the law (including s1(2) of the ASC Law).

RG 92.9 All ASC decisions to grant or refuse relief are reviewable by the Administrative Appeals Tribunal (except decisions excluded from review under s1317C of the Law). The legality of ASC decisions and decision-making processes is also subject to review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

RG 92.10 The ASC’s conflicting obligations have the potential to make its decision making slow and labour intensive. This guide is

intended to help ASC officers to make those decisions more consistently and efficiently and to assist applicants in preparing and making applications.

Procedural fairness obligations

RG 92.11 The ASC's obligation to afford procedural fairness arises where it proposes to make a decision which may adversely affect a person's rights, interests or legitimate expectations. A person's "interests" are extremely broad: see *Kioa v West* (1985) 159 CLR 550 at 582 and *Ainsworth v Criminal Justice Commission* (1992) 106 ALR 11 at 19. They include:

- (a) legal rights and interests;
- (b) non-legal interests such as status, business and commercial or personal reputation; and
- (c) legitimate expectations of conferral of a benefit (including an expectation which has been created by a decision maker).

RG 92.12 If an applicant is granted relief under the Law, it could affect a third party's rights, interests or legitimate expectations. If the decision is likely to adversely affect the rights, interests or expectations of the third party in a material way the ASC must afford procedural fairness to the third party: see *Kioa v West* (1985) 159 CLR 550. For procedural fairness obligations to arise the decision must also be one which will affect the third party in a direct and immediate way: see *Kioa v West* and *Salemi v MacKellar (No 2)* (1977) 137 CLR 388 at 452. Many decisions of the ASC do not fall within this category.

RG 92.13 The fair hearing rule may therefore require the ASC to give potentially adversely affected third parties the right to make submissions on a proposed decision.

ASC's approach

RG 92.14 The ASC must address two issues when it considers its procedural fairness obligations to third parties in a particular case:

- (a) whether it must afford procedural fairness to any third party; and
- (b) if so, the content or nature of that procedural fairness.

RG 92.15 The ASC considers the following in deciding its procedural fairness obligations in relation to an application for relief.

- (a) Might any third party be directly, materially and adversely affected by the decision?
- (b) Has the applicant given sufficient reasons for the ASC to expedite the application and/or treat it as confidential?
- (c) Do the detrimental effects of consultation on the applicant (because confidentiality would be lost or granting the relief would take too long) outweigh the potential adverse effects on third parties?

The answers to these questions help the ASC to decide whether it must afford procedural fairness to third parties. They also assist in determining the content or nature of any procedural fairness.

No material adverse effects on third parties

RG 92.16 If a decision is unlikely to directly, materially and adversely affect a third party the ASC is not required to afford procedural fairness to that party. In these cases, the ASC decides the application on the basis of the applicant's submission and relevant ASC policy.

RG 92.17 Decisions under this heading include a wide range of procedural and facilitative decisions where third parties are either not affected or are not affected in a direct, immediate and material way. This includes many decisions made on applications relating to fundraising.

RG 92.18 An example of such an application in the takeovers area is one to allow an authorised nominee of a director to sign a Part A statement or notice of variation on behalf of the director. Another example is an application under s1067(3) to approve a person as trustee for the purposes of a new prescribed interest deed.

Potential material adverse effects on third parties

RG 92.19 Where the ASC proposes making a decision which is likely to adversely affect third parties in a direct and material way it must consider the content or nature of its procedural fairness obligations. Whether the ASC is required to consult with third parties depends on a range of factors including the possible detriment to the applicant of consulting and the type of relief sought.

Confining scope of relief

RG 92.20 The ASC always tries to reduce or eliminate adverse effects of a decision on third parties by imposing suitable conditions on the relief granted or by narrowly confining the scope of the relief. This will often mean that the ASC's decision has no direct, material and adverse affect on third parties and will remove the need to consult with third parties.

Splitting procedural fairness requirements

RG 92.21 The ASC will also consider whether the adverse effects relate only to part of an application. If the relief the ASC is considering can be split into discrete parts, so can its procedural fairness obligations. One part of an application may not require the ASC to give affected third parties the right to make submissions, but another part of the same application may.

RG 92.22 This is most obvious where the existence of the application and the proposal is confidential, and consultation on any part of the application before the proposal is publicly announced would detrimentally affect the applicant. It is occasionally possible to afford procedural fairness in relation to the second part of an application while maintaining the applicant's commercial confidentiality requirements. The ASC can do this by issuing two instruments. The first instrument provides the essential relief but reserves the power to specify terms and conditions. The second instrument specifies the terms and conditions.

RG 92.23 For example, in an application for s629 relief, the ASC may decide that third parties (in this case the downstream company) should not have the opportunity to make submissions on the substantive s629 relief for confidentiality reasons: see Regulatory Guide 71, *Downstream acquisitions*, (RG 71). However, once the upstream and downstream acquisitions are publicly announced, the downstream company may be afforded the opportunity to make submissions on the terms or conditions of the relief, such as the downstream bid price.

Detrimental effect on applicant clearly outweighs potential adverse effects on third parties

RG 92.24 If a decision may directly, materially and adversely affect third parties, the ASC will consider whether consultation would have a detrimental effect on the applicant which outweighs the potential

adverse effect on third parties. This effect may be due to loss of confidentiality or to delay.

RG 92.25 If the detrimental effects on the applicant of consultation clearly outweigh the possible adverse effect on third parties, the ASC will decide whether to grant relief on the basis of the applicant's submission and relevant ASC policy. It will not give third parties the right to make submissions before it makes the decision or executes the instrument.

RG 92.26 An example of such an application is one from a major listed multinational corporation to allow it to comply with Part A s 750 without having to disclose trading by directors and secretaries of minor and distantly related subsidiaries of the offeror in the offeror's or target's securities. In some cases, this could be a costly and time consuming exercise. In addition, where the takeover is still confidential, premature disclosure to the target could prejudice the offeror's prospects of a successful takeover.

RG 92.27 If the information the corporation proposes to leave out is insignificant and the effect on target shareholders small, the ASC would probably not impose a material commercial detriment on the applicant for the sake of a relatively small adverse effect on some third parties.

Material adverse effects on third parties not clearly outweighed by detriment to applicant

RG 92.28 If the previous paragraphs do not apply then the effect is that:

- (a) the decision is likely to directly, materially and adversely affect the interests of third parties; and
- (b) the adverse effects are not clearly outweighed by the detrimental effect on the applicant of consulting with third parties.

RG 92.29 The ASC will inform these applicants that because of procedural fairness obligations it cannot decide the application until third parties entitled to do so have had the opportunity to make submissions to it. A failure to afford procedural fairness in relation to a decision will invalidate it. The ASC will therefore refuse such an application if the applicant declines to provide potentially adversely affected parties with sufficient information to enable them to respond adequately to the proposed decision.

RG 92.30 An example of such an application is one to withdraw a takeover offer because of another clearly higher but conditional offer for the same securities.

Affording procedural fairness

RG 92.31 Affording procedural fairness requires:

- (a) identifying third parties who may be directly, materially and adversely affected by a decision;
- (b) deciding which third parties the ASC should notify;
- (c) ensuring that those third parties are provided with sufficient information to make informed and reasoned submissions to the ASC; and
- (d) allowing those third parties enough time to make submissions.

Identifying third parties who may be materially adversely affected

RG 92.32 Identifying third parties who may be directly, materially and adversely affected is important, but sometimes difficult. When the ASC is establishing who should be given the opportunity to make submissions on a decision, it often has:

- (a) limited information;
- (b) confidentiality restrictions on who it may contact in order to discover who may be directly, materially and adversely affected;
- (c) competing views from applicants and other parties;
- (d) commercial pressures to decide the application quickly; and
- (e) the possibility of many persons to consider (which may mean that consulting all of them would be impractical).

RG 92.33 The ASC must decide how to balance these competing interests. The most important considerations it must balance in order to afford all relevant persons procedural fairness are:

- (a) confidentiality versus disclosure; and
- (b) a quick decision versus consultation and its inevitable delays.

Who should be notified

RG 92.34 The ASC is required to afford procedural fairness to third parties who may be directly, materially and adversely affected by a decision. In doing so, the ASC does not necessarily have to consult with every person who may be affected by a decision and be entitled to receive notification of the decision once it has been made (see Regulatory Guide 57). As guided by the dicta of the Administrative Appeals Tribunal in *Hawker de Havilland Ltd v ASC* (1991) 6 ACSR 579 and *Magellan Petroleum Australia Ltd v ASC* (1993) 30 ALD 214 at 231, the ASC usually treats the board of directors of a company or the trustee or representative of a prescribed interest scheme (trustee) as representatives of the shareholders or prescribed interest holders.

RG 92.35 However, this may not always be appropriate if, for example:

- (a) the applicant is the company, a director or the trustee;
- (b) the company or trustee appears to be controlled or influenced by, or related to, the applicant;
- (c) the board or trustee's interests also appear to be affected by the decision; or
- (d) the differing interests of individuals or groups of shareholders or prescribed interest holders cannot adequately be represented or advocated by the board or trustee.

RG 92.36 Third parties seeking opportunities to make submissions must satisfy the ASC that their interests may be directly, materially and adversely affected by the decision proposed to be made by the ASC. The ASC considers each request in the light of the circumstances and the requirements of procedural fairness. The ASC does not accept blanket requests to be consulted on all, or any class of, future decisions relating to a particular company, trust or person.

Content or nature of procedural fairness

RG 92.37 If an obligation to afford procedural fairness to a third party arises, the ASC must determine the content or extent of the obligation. Depending upon the circumstances, this may range from informal consultation to the ASC giving the third party full access to information and time to make detailed submissions to the ASC.

Giving information to third parties

RG 92.38 The ASC will notify an applicant if it decides that it must give third parties the opportunity to make submissions.

RG 92.39 Before a third party can make submissions which do justice to its position, it needs to know what action the ASC has in mind and why. For this purpose, the ASC will provide, or require the applicant to provide, third parties with sufficient information about the action the ASC has been asked to take and any conditions or limitations the ASC is already minded to impose on the grant of relief. This may require third parties to be provided with part or all of the submissions made in support of the application. Wherever they are consulted, third parties may make submissions to ASC officers about the policy considerations which they regard as relevant to the decision.

Confidentiality of submissions

RG 92.40 The applicant may not want confidential information that is given to third parties to be passed on to others. If third parties must be notified of an application and the applicant has confidentiality requirements it must decide whether to waive its confidentiality requirements or negotiate confidentiality arrangements directly with the third parties.

RG 92.41 Third parties may be given information in confidence so that they can make submissions to the ASC. They must not give this information (or allow it to be given) to persons who would not be adversely affected by the decision (for example, to journalists). This would be inconsistent with the purpose of procedural fairness. Where a third party refuses to receive information in confidence the ASC will regard its procedural fairness obligations to the third party as having been fulfilled.

RG 92.42 The ASC may on occasions ask an applicant to respond to factual or policy submissions by a third party. If a third party requires a submission to be treated as confidential, it should say so.

Submission time

RG 92.43 The time allowed for third parties to make submissions on an application varies with the circumstances and the category of application. In *Hawker de Havilland Ltd v ASC* (1991) 6 ACSR 579, the Administrative Appeals Tribunal recognised that an application's

urgency may constrain the consultation time. Third parties usually have up to two business days in which to make submissions on takeover applications. They usually have longer for other categories of applications. If third parties do not meet these deadlines, the ASC may not wait for their submissions.

Applications

RG 92.44 If an applicant believes that a decision on its application may directly, materially and adversely affect any third parties, the applicant will assist the processing of its application if it provides details of:

- (a) third parties who may be directly, materially and adversely affected by the decision and their contact details;
- (b) the nature of the potential adverse effects on third parties;
- (c) the applicant's confidentiality requirements (if any);
- (d) whether, and in what way, the applicant may be detrimentally affected by giving third parties the opportunity to make submissions to the ASC (timing, confidentiality etc);
- (e) the type of conditions which could be imposed to limit the adverse effects on third parties; and
- (f) the material the applicant has already disclosed (if any) to those third parties, when it was disclosed and what arrangements the applicant has entered into with third parties. If the applicant discloses information to relevant third parties and makes agreements with them before it applies to the ASC, the ASC's decision can be made more quickly.

RG 92.45 The application should provide reasons to support these points. This information is in addition to the information required by Regulatory Guide 51, *Applications for relief*.

[*Historical note:* RG 92.45 amended 1/7/1996 by deleting the words "Streamlining of" before the words "Applications for relief".]

RG 92.46 Third parties making submissions should also address these matters, if they are relevant. They should also note that the ASC will only take into account relevant considerations when it makes a decision.