



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 172

Cooperating with ASIC

It is ASIC policy to encourage and fully recognise cooperation.

This information sheet is for:

- people and entities who think they may be or may have been involved in, or have knowledge of, misconduct that ASIC investigates
- people and entities who are being investigated by ASIC
- the general public.

It explains the benefits of cooperating with our investigations, and the factors we take into account when assessing cooperation.

It covers the following topics:

- why cooperate with ASIC
- how to cooperate with ASIC
- our approach to cooperation
- factors relevant to our assessment of your cooperation
- where you can get more information.

People who have information about misconduct that ASIC investigates, but who were not involved in the misconduct, should see Information Sheet 153 *How ASIC deals with reports of misconduct* (INFO 153) and Information Sheet 52 *Protection for whistleblowers* (INFO 52) on our website at www.asic.gov.au/infosheets.

Why cooperate with ASIC?

ASIC is empowered to take a range of administrative, civil and criminal actions in relation to alleged misconduct within its jurisdiction.

A cooperative approach to dealings with ASIC may benefit a person or company in many ways. For example:

- early notification of misconduct and/or a cooperative approach during an investigation will often be relevant to ASIC's consideration of which type of action to pursue and what remedy or combination of remedies to seek

Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

- in any proceedings commenced by ASIC we will give due credit for any cooperation we have received from the person or company against whom the proceedings are brought.

How to cooperate with us

You can cooperate with us by:

- self-reporting any misconduct to ASIC
- honestly and completely disclosing all information relevant to the misconduct
- providing voluntary assistance in the course of the investigation
- providing evidence in a form that can be used in court
- pleading guilty to or admitting any misconduct you committed or were involved in committing.

You can self-report or report misconduct to ASIC by filling in our online form, available on our website at

www.asic.gov.au/asic/asic.nsf/byheadline/Report+misconduct+to+ASIC?openDocument, or writing to:

Senior Manager
Misconduct and Breach Reporting
GPO Box 9827
In your capital city.

What we can do if you cooperate with ASIC

If you cooperate with ASIC we can:

- fully recognise your cooperation (taking into account where you have a self-reporting obligation)
- negotiate alternative resolutions to the matter
- take into account the degree of cooperation provided during the investigation when determining the type of remedy or remedies sought, depending on all the circumstances of the case
- in administrative and civil matters, make particular submissions to the tribunal or court as to what your penalty should be
- in criminal matters, take your cooperation into account as set out in ‘Cooperation in criminal matters’ below.

Cooperation in criminal matters

We conduct some prosecutions of minor criminal matters and refer more serious matters to the Commonwealth Director of Public Prosecutions (CDPP), which conducts those prosecutions in close cooperation with ASIC.

If you cooperate in criminal matters, ASIC will take into consideration any cooperation when determining:

- whether to commence a criminal prosecution or refer the matter to the CDPP
- what alleged offences to prosecute
- what penalties to seek.

Similarly, the CDPP considers cooperation offered or provided by you when making its own prosecution decisions in accordance with the *Prosecution Policy of the Commonwealth* (www.cdpp.gov.au/Publications/ProsecutionPolicy/).

In addition, the law recognises in a number of ways that a person who cooperates in the prosecution process, including by admitting criminal offences, is entitled to benefit from that cooperative approach. For example:

- in sentencing a person for an offence against Commonwealth law, a court must take into account ‘the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences’ (s16A(2)(h) of the *Crimes Act 1914*)
- the law relating to sentencing provides for significant ‘discounts’ in cases where there is an early guilty plea and/or where an offender cooperates with authorities and/or promises future assistance such as giving evidence at the trial of the co-accused (see also *Prosecution Policy of the Commonwealth* (www.cdpp.gov.au/Publications/ProsecutionPolicy/) at paragraph 6.4).

In criminal matters prosecuted by ASIC, we will provide information about the nature, extent and timeliness of your cooperation to the court. In criminal matters prosecuted by the CDPP, we will liaise with the CDPP about our assessment of your cooperation and also about the nature and extent of the information about your cooperation that will be provided to the court.

Publicising cooperation

We provide information to the public about the nature of our cooperation policy and the benefits associated with cooperating to enhance our approach to enforcement. In addition, we will retain a discretion regarding whether and how to disclose the fact, manner and extent of an individual’s or company’s cooperation in documents filed or issued by ASIC in connection with an enforcement action. For more information on ASIC’s policy on public comment, see Information Sheet 152 *Public comment* (INFO 152).

ASIC’s approach to cooperation

If you cooperate with us we may take one or more of the following approaches, depending on the particular factors and circumstances of your case.

Letter of comfort

We may give you a letter of comfort, which informs you that you are not the subject of an investigation and/or that you will not be the subject of civil or administrative action as a result of a specific investigation.

What you need to consider

A letter of comfort will not be binding on ASIC if it is later found that you have been untruthful and/or have not fully disclosed your involvement in the relevant conduct. Further, a letter of comfort does not prevent parties other than ASIC taking action against you.

Enforceable undertakings

We may accept an enforceable undertaking from you to settle a matter as an alternative to civil court action or other administrative actions. We will accept an enforceable undertaking if we believe it is the most effective and appropriate outcome, taking into account other factors. When drafting an enforceable undertaking we will negotiate the terms of the undertaking with you to achieve an appropriate outcome.

What you need to consider

The circumstances in which we will not accept an enforceable undertaking and what happens if you don’t comply with an undertaking given to ASIC are set out in Regulatory Guide 100 *Enforceable undertakings* (RG 100).

Indemnities

The CDPP may give you an undertaking (sometimes referred to as an indemnity) that prevents you from being prosecuted in specified circumstances. Such undertakings are usually only offered in the later stages of an investigation. The circumstances in which the CDPP might consider providing such an undertaking are set out in the *Prosecution Policy of the Commonwealth* (www.cdpp.gov.au/Publications/ProsecutionPolicy/) at paragraphs 6.1–6.9.

Criminal matters generally

ASIC’s general approach to criminal matters is set out in ‘Cooperation in criminal matters’ above.

Charge negotiation

Charge negotiations are conducted by the CDPP in consultation with ASIC once charges have been laid. Such negotiations can be consistent with the requirements of justice, provided certain conditions are met (see *Prosecution Policy of the Commonwealth* (www.cdpp.gov.au/Publications/ProsecutionPolicy/) at paragraph 6.14–6.21). Such negotiations may result in the defendant pleading guilty to fewer than all of the charges they are facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or being taken into account without proceeding to conviction.

Individual and company cooperation

When considering what remedy or combination of remedies to seek for individuals, we may take into account different factors to those relevant to companies. We evaluate individual cooperation on the facts and circumstances of each particular case.

The following factors are relevant when determining what remedy or combination of remedies may be sought for individuals and companies. These factors are not listed in order of importance, nor are they intended to be exhaustive or all inclusive. For more information on the factors we take into account when considering matters brought to our attention, see INFO 151.

Table 1: Factors we may take into account when considering remedies for individuals

<p>The nature and seriousness of your suspected misconduct</p>	<p>For example:</p> <ul style="list-style-type: none"> • the severity of your misconduct • the number of breaches • whether the misconduct was isolated or repetitive • whether the misconduct resulted in risk to investors or others.
<p>The cooperation you provide</p>	<p>For example:</p> <ul style="list-style-type: none"> • the timeliness, substance, quality and value of your cooperation • whether the cooperation was voluntary, truthful and complete • whether the information was already known to ASIC and, if not, whether it might otherwise have been discovered • whether a significant amount of time and resources are saved as a result of your cooperation.

Your personal and professional history	For example: <ul style="list-style-type: none"> • your culpability • your past compliance • whether you have made efforts to remedy the harm caused.
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Table 2: Factors we may take into account when considering remedies for companies

Self-policing before the discovery of misconduct	For example: <ul style="list-style-type: none"> • establishing effective compliance procedures • providing a strong message regarding compliance.
Self-reporting of misconduct (assuming you do not have an existing obligation to report the misconduct to ASIC) when it is discovered	For example: <ul style="list-style-type: none"> • conducting a thorough review of the nature, extent, origins and consequences of the misconduct • promptly, completely and effectively disclosing the misconduct to the public, to regulatory agencies and to self-regulatory organisations.
Any remediation undertaken	For example: <ul style="list-style-type: none"> • dismissing or appropriately disciplining wrongdoers • modifying and improving internal controls and procedures to prevent recurrence of the misconduct • appropriately compensating those adversely affected.
The cooperation provided	For example, providing all information relevant to the underlying breaches and the company's remedial efforts.

Where can you get more information?

- INFO 52 *Protection for whistleblowers*
- INFO 151 *ASIC's approach to enforcement*
- INFO 152 *Public comment*
- INFO 153 *How ASIC deals with reports of misconduct*
- RG 100 *Enforceable undertakings*
- RG 218 *Administrative action against persons engaging in credit activities*
- *Prosecution Policy of the Commonwealth* at www.cdpp.gov.au/Publications/ProsecutionPolicy/
- Call ASIC on 1300 300 630.
- Submit a question online at www.asic.gov.au/question.

Important notice

Please note that this information sheet is intended to give basic information about cooperating with ASIC. It does not cover all the relevant law in relation to cooperating with ASIC and it is not a substitute for professional advice. No section of this information sheet is intended to be all exhaustive or inclusive, and your particular circumstances must be taken into account when determining how the law applies to you.