



ASIC
Australian Securities &
Investments Commission

Terms of Reference

Review of ASIC's Enforcement Policies, Processes and Decision-Making Procedures

Issue date 17 October 2018

Scope of the Review

1. This review will assess ASIC's enforcement policies, process and decision-making procedures (**Enforcement Policies**). It will include an analysis of how the Enforcement Policies can best align with ASIC's regulatory strategy, policies, processes and decision-making procedures more generally (**Review**).
2. This Review is forward-looking and is designed to identify what changes should be made to the Enforcement Policies aligning with internal and external expectations of ASIC and ensuring ASIC obtains enforcement outcomes that are necessary for a fair, strong and efficient financial system for all Australians.
3. This Review will include assessing regulatory, supervisory and investigatory policies, processes and decision-making procedures insofar as they relate to the Enforcement Policies.
4. This Review will particularly focus on policies, processes and decision-making procedures relevant to:
 - (a) Whether or not to enforce the law using criminal and civil proceedings or other regulatory options; and
 - (b) The effectiveness and timeliness of the conduct of litigation and of enforcement outcomes.
5. This Review will pay regard to and incorporate, to the extent necessary and if appropriate, other reviews undertaken by ASIC in the last 24 months which may relate to this Review's scope.

Terms of the Review

6. **Review** how matters are currently, in practice, referred to Enforcement and investigations teams and the Enforcement Committee.
7. **Review** how matters are currently, in practice, "accepted" by Enforcement teams, particularly where and when (and by whom) are key decisions being made in relation to accepting cases (and how and whether the relevant decisions support the effectiveness of ASIC's broader regulatory work and Commission's defined strategic aims and regulatory priorities).
8. Is there sufficient "strategic" (in terms of meeting the articulated regulatory goals/priorities of ASIC) and "tactical" (in terms of using the correct enforcement options) guidance and oversight of the Enforcement Policies?
9. **Do** the current Enforcement Policies need to be updated to take into account ASIC's strategic goals/positioning?
10. **Review** the role of commissioners and the Commission in these decisions. What strategic guidance and direction should be provided by the Commission throughout the process either directly by participation or through guidance and policy? How can we ensure that Commission can provide effective, strategic guidance throughout the process?

11. Is there sufficient guidance and direction in the Enforcement Policies (and/or from the Commission on an ongoing basis) on what action to take and which enforcement option(s) should be pursued in a matter?
12. Is there sufficient guidance in relation to the penalties or other enforcement outcomes that should be sought/pursued in a matter?
13. Review the current (and what should be the optimal) weighting, attention and priority given to the enforcement goals of:
 - (a) specific and general deterrence;
 - (b) punishment/punitive effect;
 - (c) remediation; and
 - (d) public denunciation.
14. Review whether ASIC's enforcement goals and their implementation pay sufficient regard to clarifying uncertain areas of the law, new laws or penalties. Does ASIC give appropriate weight to the importance of a test case in its decision-making procedures regarding litigation?
15. Review the manner in which the governance, timeliness and resourcing of investigations (as defined in s. 13 of the ASIC Act) are managed in light of ASIC's strategic goals.
16. Review external directives and guidance to determine whether there are restrictions or issues therein that constrain our own enforcement processes (and goals). In particular, review whether there are circumstances when it may be considered appropriate to seek a waiver, or to depart, from those guidelines and practices when it is in our regulatory (and/or public) interests to do so (including, such as when we wish to pursue a higher penalty/outcome that would otherwise be constrained by these guidelines).
17. Review the Enforcement Policies with a view to applying the 'common language' of the Commission in order to align the Enforcement Policies with other Commission policies and processes and ensure that structure is applied across all steps in the enforcement processes. Also ensure that decision-making procedures adopt, in particular, the taxonomy of 'threats and harms'.
18. Review how the Enforcement Policies will respond to ASIC's new powers and penalties such as those coming out of the ASIC Enforcement Review Taskforce (including the penalties legislation that was consulted on in Sept – Oct 2018) and the proposed product intervention power and design and distribution obligations.
19. Review how ASIC can rationalise and simplify its Enforcement Policies.
20. Review and consider reconfiguring pre-litigation strategies to better take into account ASIC's potential litigation and court-assisted outcomes.

21. **Review and consider the interaction with regulated entities including banks and other large entities.**
22. **Review and consider any other relevant matters agreed by the Commission from time to time.**

OTHER MATTERS

23. **Externals (professional advisers including Senior Counsel) will be engaged to assist ASIC in the conduct of the Review.**
24. **A draft Review will be provided to the Commission of ASIC for comment on or before 14 December 2018 and the Commission will be regularly updated and consulted on progress of the Review.**
25. **The final Review will be provided to the Commission for approval on or before 10 January 2019.**