



ASIC
Australian Securities &
Investments Commission

REGULATORY GUIDE 8

Administrative hearings: Principles and conduct

November 2022

About this guide

This guide is for persons who are the subject of ASIC's administrative hearings.

This guide sets out the principles and procedures adopted in the conduct of ASIC's administrative hearings.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

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

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in November 2022 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded guide *Hearings practice manual: The principles of, and how we conduct, administrative hearings*, issued 14 May 1998, reissued 22 October 2000 and 7 March 2002, and rebranded as Regulatory Guide 8 on 5 July 2007.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act, the National Credit Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

Persons who may be affected by the exercise of certain of ASIC's administrative powers must be given a reasonable opportunity to be heard by a delegate of ASIC before a decision is made.

The delegate conducting the hearing is an impartial decision maker who exercises an administrative, and not a quasi-judicial, function.

The rules of evidence and court rules do not apply to our administrative hearings and there is no burden of proof in this type of proceeding.

Scope of this guide

- RG 8.1 This guide 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.
- RG 8.2 The *Corporations Act 2001* (Corporations Act) and the *National Consumer Credit Protection Act 2009* (National Credit Act) specifically give to certain persons a statutory right to a hearing. This guide deals only with hearings conducted in accordance with that statutory right to be heard.
- RG 8.3 Where in this guide we refer to 'you', we are referring to the reader on the assumption that the reader is the person potentially affected by a decision and has a statutory right to a hearing.

What this guide does not deal with

- RG 8.4 This guide does not deal with administrative decisions that do not require a hearing. For example, decisions:
- (a) under the *Superannuation Industry (Supervision) Act 1993*; or
 - (b) excluding a body from relying on the transaction-specific prospectus disclosure rules that apply to continuously quoted securities under s713 of the Corporations Act.
- RG 8.5 This guide also does not deal with:
- (a) ASIC's power to accept court enforceable undertakings; or
 - (b) the conduct of matters referred to the Markets Disciplinary Panel, the Financial Services and Credit Panel or committees convened under Pt 2 of Sch 2 (Insolvency Practice Schedule (Corporations)) to the

Corporations Act to consider liquidator registration and disciplinary matters.

Note: See [Regulatory Guide 100](#) *Court enforceable undertakings* (RG 100), [Regulatory Guide 216](#) *Markets Disciplinary Panel* (RG 216), [Regulatory Guide 263](#) *Financial Services and Credit Panel* (RG 263), and [Regulatory Guide 258](#) *Registered liquidators: Registration, disciplinary actions and insurance requirements* (RG 258).

How this guide refers to laws

RG 8.6 This guide refers to some sections of laws. Sometimes their content is stated briefly. You should refer to the actual terms of the statute. You should not rely on the short summary in this guide to accurately or fully state the effect of a section.

Our obligation to hold hearings

RG 8.7 ASIC has various powers under the Corporations Act and the National Credit Act. Some of these powers can only be exercised after the person potentially affected by the exercise of the power has been given an opportunity to be heard.

RG 8.8 There are two broad circumstances where we conduct administrative hearings:

- (a) *protective order hearings*—which we hold when we are contemplating using ASIC’s administrative powers to make orders that protect the public generally, and investors and consumers in particular; and
- (b) *licensing and registration application hearings*—which we hold before we decide whether it is appropriate to refuse to grant a licence (see, for example, s913B(5) of the Corporations Act and s41 of the National Credit Act) or to register a person as an auditor (see s1280(8) of the Corporations Act).

RG 8.9 There are a number of specific provisions of the Corporations Act and National Credit Act that require ASIC to offer a person an opportunity to be heard. This guide does not set out all of those provisions, but the most common provisions that provide a statutory right to be heard are:

- (a) protective order hearing provisions, which cover:
 - (i) orders to disqualify a person from managing corporations (s206F and 206GAA of the Corporations Act);
 - (ii) orders to suspend or cancel an Australian financial services (AFS) licence (s915C of the Corporations Act);
 - (iii) financial services banning orders (s920A of the Corporations Act);

- (iv) orders to suspend or cancel an Australian credit licence (credit licence) (s55 of the National Credit Act);
- (v) credit services industry banning orders (s80 of the National Credit Act);
- (vi) stop orders relating to securities and financial products (s739, s994J and 1020E of the Corporations Act); and
- (vii) infringement notices for alleged contraventions of continuous disclosure provisions (s1317DAC of the Corporations Act).

Note: Also see [Regulatory Guide 73](#) *Continuous disclosure obligations: Infringement notices* (RG 73).

- (b) licensing and registration application hearing provisions, which cover:
 - (i) AFS licensing decisions (s913B and 914A of the Corporations Act);
 - (ii) credit licensing decisions (s41 and 45 of the National Credit Act); and
 - (iii) registration of auditors (s1280 of the Corporations Act).

ASIC's powers when conducting our hearings

- RG 8.10 The powers ASIC has in conducting our hearings are set out in Div 6 of Pt 3 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and Div 2 of Pt 6-5 of the National Credit Act.
- RG 8.11 We must conduct our administrative hearings with as little technicality and formality, and as expeditiously, as possible. However, we must balance this with the need for a proper consideration of the issues in question.
- RG 8.12 When conducting administrative hearings we must comply with the requirements of procedural fairness: s59(2)(c) of the ASIC Act and s285(2)(c) of the National Credit Act. These are not a fixed body of rules. Procedural fairness may be provided in a variety of ways, depending on the nature of the power and the particular circumstances. To ensure our hearings are fair, we must adopt flexible procedures and not apply them rigidly without regard to the issues under consideration: see *Kioa v West* (1985) 159 CLR 550 and *Salemi v Mackellar [No 2]* (1977) 137 CLR 396 at 444.
- RG 8.13 The purpose of administrative hearings is, as stated by Lee J in *Nam Bee (Australia) Pty Ltd v Corporate Affairs Commission (NSW)* (1987) 12 ACLR 391, to:
- ... 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 ...

- RG 8.14 Hearings are conducted by an ASIC staff member who has been delegated the power to hold hearings (the delegate). The delegate has all the powers given to ASIC under Div 6 of Pt 3 of the ASIC Act and Div 2 of Pt 6-5 of the National Credit Act. The delegate decides whether to exercise ASIC's powers after considering the evidence and submissions put by you, or on your behalf, and other relevant matters.
- RG 8.15 In conducting a hearing the delegate exercises a true administrative function and not a quasi-judicial function: *Boucher v ASC* (1996) 44 ALD 499. It follows that the traditional rules of procedure of courts or quasi-judicial bodies do not apply to our administrative hearings.

Guiding principles for conducting administrative hearings

- RG 8.16 ASIC delegates conducting administrative hearings are guided by the principles set out in Table 1.

Table 1: Principles for administrative hearings

Principle	Explanation
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 ASIC and present your: <ul style="list-style-type: none"> • submissions, either in writing or orally; and • evidence that addresses the issues of significance or of concern to ASIC.
2 Your entitlement to a notice	You are entitled to: <ul style="list-style-type: none"> • know the subject matter of the hearing and, in particular, the issues that are of concern to ASIC and for which there is a risk of ASIC making an adverse finding; • know the circumstances that may cause ASIC to make a decision against you; and • have reasonable time to prepare your response.
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.
4 Findings of fact are made on a 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: see s59(2)(a) of the ASIC Act and s285(2)(a) of the National Credit Act.
5 There is no burden of proof	In administrative hearings there is no burden of proof. It is simply a matter of the facts that the delegate finds established on all the material before them. As a practical matter, however, sometimes you may need to present material that supports you.

Principle	Explanation
6 Court practice does not apply	The rules of evidence and the usual court rules of procedure and practice do not apply to our administrative hearings: see s59(2)(a) of the ASIC Act and s285(2)(a) of the National Credit Act. The procedures we use, however, give you the opportunity to present evidence and to make submissions.
7 Applying ASIC policy	We will determine each matter on its merits. But, in making a decision, we are entitled to consider ASIC policy.

B Conducting administrative hearings

Key points

Administrative hearings are not court hearings. They are conducted informally and as quickly as possible. Generally, ASIC considers that 28 days is sufficient time to prepare for an administrative hearing in most matters.

They are not adversarial proceedings; rather, they are inquisitorial hearings.

This section describes our usual practices and procedures. However, we may vary or adapt our practices and procedures to deal with particular cases if that is appropriate.

Our approach to administrative hearings

- RG 8.17 Our administrative hearings are conducted informally and as quickly as possible. They should not be compared 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 ASIC (i.e. they are not ‘adversarial’ proceedings). Nor should a hearing be treated as an appeal.
- RG 8.18 As Lee J in *Nam Bee (Australia) Pty Ltd v Corporate Affairs Commission (NSW)* (1987) 12 ACLR 391 stated:
- The hearing ... is not to be conducted with formality as in a court or even as in tribunal, its purpose being to ensure that the applicant has the opportunity to put before the Commission submissions and evidence on the matters that he chooses, which are relevant to the application. The hearing is not to be conducted as an appeal against a contemplated refusal by the Commission of the application. *It is not* to be conducted as if it were *a contest* between the Commission and the applicant. (Emphasis added)
- RG 8.19 Our procedures aim to ensure that our administrative hearings are conducted effectively and fairly.

Notice of hearing

Notices for matters other than director disqualifications

- RG 8.20 When we are considering whether we should exercise ASIC’s protective powers (other than ASIC’s powers under s206F and s206GAA of the

Corporations Act to disqualify directors) or ASIC's licensing powers (which require a hearing to be held before we make a decision), we will send you a notice about the hearing. Generally, the notice will tell you:

- (a) under what provisions of the Corporations Act or National Credit Act we are conducting the hearing;
- (b) the purpose of the hearing;
- (c) the date, time and place of the hearing (see s57 of the ASIC Act and s283 of the National Credit Act);
- (d) that, if you do not want to appear, you may write a submission which we will take into account (see s57(3) of the ASIC Act and s283(3) of the National Credit Act);
- (e) what happens if you do not respond to the notice (i.e. we will make a decision on the basis of the information available);
- (f) the issues of concern to ASIC and the documents on which those concerns are based;
- (g) who can give you further information about the hearing and their contact details (this will usually be the delegate); and
- (h) whether the hearing will be held in public or private.

RG 8.21 We will tell you how you can ask for a copy of the documents on which we will rely.

RG 8.22 We will also send you a copy of [Information Sheet 1 Administrative hearings \(INFO 1\)](#), which briefly explains how we conduct administrative hearings.

Notices about disqualifying directors

RG 8.23 When we are considering whether you should be disqualified from managing corporations under s206F or s206GAA of the Corporations Act, we will give you a notice to demonstrate why you should not be disqualified from managing corporations (notice to demonstrate). The notice to demonstrate must be in the prescribed form: see s206F(1)(b) and s206GAA(1)(b) of the Corporations Act.

RG 8.24 If you wish to demonstrate why you should not be disqualified and would like a hearing, you will need to notify us. You have 14 days from the date of being served with the notice to demonstrate to advise the delegate that you want to be heard. We will then arrange a hearing before a delegate.

Declining the opportunity to appear at a hearing

RG 8.25 If you do not want to appear at a hearing there are two other options:

- (a) you may make written submissions, including any material you want ASIC to consider; or

- (b) you may do nothing, and we will make a decision on the basis of the information available.

RG 8.26 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 ASIC information or an explanation of events that 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: see s1349 of the Corporations Act. However, statements made in an examination under s253 of the National Credit Act that are the subject of a claim of privilege against self-incrimination are inadmissible in an administrative proceeding against you.

Serving the notice of hearing or notice to demonstrate

- RG 8.27 If you are an individual, generally we will serve the notice of hearing or notice to demonstrate either by delivering it to you personally or by leaving it at, or posting it to, your last known residential address: see s28A of the *Acts Interpretation Act 1901*.
- RG 8.28 If the notice of hearing is to be served on a company, we may serve it by either:
- (a) leaving it at, or posting it to, the company's registered office (see s109X(1)(a) of the Corporations Act); or
 - (b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory (see s109X(1)(b) of the Corporations Act).
- RG 8.29 If a liquidator or administrator has been appointed to the company, we may serve the notice by leaving it at, or posting it to, the address of the liquidator's office or administrator's office in the most recent notice of that address lodged with ASIC: see s109X(1)(c) and (d) of the Corporations Act.

Time to prepare

- RG 8.30 Generally, we will nominate a hearing date in the notice of hearing advising you of your right to be heard. However, in the case of a notice to demonstrate, a hearing date will be arranged after you advise us that you want to be heard.
- RG 8.31 In most cases, we consider that 28 days from service of the notice is a reasonable time for you to send ASIC written submissions and/or to appear in person and to arrange representation if you want it. However, see our discussion of stop order hearings at RG 8.40–RG 8.50.

Joint and concurrent hearings

RG 8.32 On occasion, we may take administrative action against more than one person for conduct arising out of the same or substantially similar circumstances (e.g. action under s206F of the Corporations Act against co-directors). In such cases, if requested (e.g. by both directors), we would ordinarily agree to conduct a joint hearing in these matters. We may also decide to take administrative action against the same person while exercising more than one power, such as taking action under both the Corporations Act and the National Credit Act. Where requested by the affected person, we would ordinarily agree to conduct such matters concurrently.

Who can attend a hearing

Your right to be represented

RG 8.33 You have a right to be legally represented at a hearing: see s59(8) of the ASIC Act and s285(8) of the National Credit Act. You may be represented by a barrister or solicitor of the Supreme Court of a State or Territory or of the High Court.

RG 8.34 Other persons may appear as your representative, provided the delegate has given their approval: see s59 of the ASIC Act and s285 of the National Credit Act. If you are:

- (a) a natural person, you are entitled to appear in person or be represented by an employee approved by ASIC;
- (b) a body corporate, you may be represented by one of your officers or employees approved by ASIC; or
- (c) an unincorporated association, or a person appearing in your capacity as a member of an unincorporated association, you may be represented by a member, officer or employee of the association approved by ASIC.

RG 8.35 If you want to be represented by someone other than a lawyer, you should contact the delegate as soon as possible after receiving the notice of hearing, or after you elect to attend a director disqualification hearing in a s206F or s206GAA matter.

Other people who may attend

RG 8.36 The delegate has discretion to allow, in addition to you and your legal or approved representative, other persons to attend a private hearing: see s56(1) of the ASIC Act and s282 of the National Credit Act. 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.

- RG 8.37 If you want to have a person attend the private hearing, you should contact the delegate as soon as possible after receiving the notice of hearing, or after you elect to attend a director disqualification hearing in a s206F or s206GAA matter.
- RG 8.38 We may, subject to any appropriate conditions, also allow a person to intervene in the hearing: see s59(2)(b) of the ASIC Act and s285(2)(b) of the National Credit Act. A person who intervenes may be allowed to present additional material to the delegate or to make submissions on the matter or both. Generally, you will be invited to comment on whether another person should be allowed to intervene.
- RG 8.39 Witnesses you have called to give oral evidence will generally be allowed to stay only while they give their evidence. Ordinarily they will not be allowed to be present during other parts of the hearing.

Stop order hearings

Prospectus and product disclosure statement related stop order hearings

- RG 8.40 ASIC has the power to make 'stop orders', which may require that:
- (a) no offers, issues, sales or transfers of securities be made in some circumstances (see s739(1)(a), (b), (d), (e) and (g) of the Corporations Act); or
 - (b) specified conduct regarding the securities to which a defective advertisement or publication relates must not be engaged in (see s739(1)(c) and (f) of the Corporations Act).
- RG 8.41 We may also make orders about your conduct where:
- (a) disclosure documents, statements or advertisements that relate to financial products are defective or do not comply with Pt 7.9 of the Corporations Act;
 - (b) the issuer of the financial product has breached s1017G of the Corporations Act; or
 - (c) information made publicly available under s1017BA or 1017BB of the Corporations Act is defective (see s1020E(2) of the Corporations Act).
- RG 8.42 Stop order hearings conducted under s739(2) and 1020E(4) of the Corporations Act differ from hearings conducted under other provisions 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: s739(2)(b) and 1020E(4)(b) of the Corporations Act.

- RG 8.43 ‘Interested people’ are those whose interests would be affected by the making of a stop order. They may include:
- (a) people with a direct financial interest in the securities or financial products the subject of the disclosure documents;
 - (b) people who may be exposed to civil liability under Pts 6D.3, 6D.3A and 7.9 of the Corporations Act;
 - (c) the corporation issuing the securities or the financial product; and
 - (d) the author of the statements under consideration.
- RG 8.44 Due to the nature of the circumstances in which we commonly make an order under s739(1A) and 1020E(2), the time allowed for preparing for a hearing will usually be much less than 28 days.
- RG 8.45 When a stop order is required before a hearing is convened, ASIC has the power to make pre-hearing interim orders: see s739(3) and 1020E(5) of the Corporations Act. 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. We are also able to make interim orders at any time during a hearing: see s739(4) and 1020E(6).

Stop orders under Pt 7.8A—design and distribution obligations

- RG 8.46 ASIC has the power to make stop orders where it is satisfied that a provision of Div.2 of Pt 7.8A (see s994B, 994C and 994D) or s994E has been breached: see s994J. ASIC may order, in writing, that specified conduct in respect of the financial product (except excluded conduct) must not be engaged in while the order is in force.

Note: ‘Financial product’ has a meaning for Pt 7.8A set out in s994AA(1). This includes financial products regulated by Div 2 of Pt 2 of the ASIC Act.

- RG 8.47 We must give any ‘interested person’ a reasonable opportunity to make oral or written submissions at a hearing on whether a stop order should be made (s994J(3)).
- RG 8.48 When a stop order is required before a hearing is convened, ASIC has the power to make pre-hearing interim orders: see s994J(4). 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. We are also able to make interim orders at any time during a hearing: see s994J(5).

- RG 8.49 The person on whom the order is served must take all reasonable steps to ensure that other people who undertake conduct to which the order applies are aware of the order: see s994J(7).
- RG 8.50 [Regulatory Guide 274](#) *Product design and distribution obligations* (RG 274) provides more information about stop orders under the design and distribution obligations: see RG 274.227–RG 274.236.

Assistant to the delegate

- RG 8.51 The delegate may permit another member or members of ASIC staff to be present at the hearing.
- RG 8.52 The precise role the ASIC staff member takes in a particular hearing is a matter for the delegate to decide. The ASIC staff member is subject at all times to the direction of the delegate, who is the person responsible for conducting the hearing.

The hearing may be held in public or in private

- RG 8.53 In some cases the legislation specifies whether a hearing is to be conducted in private. For example, s913B(5)(a) and 915C(4)(a) of the Corporations Act and s55(4)(a) and 80(4)(a) of the National Credit Act state that the hearing *must* take place in private. In such instances we have no discretion and the hearing will be held in private.
- RG 8.54 When the legislation is silent (e.g. s206F of the Corporations Act), we must decide whether to conduct the hearing in public: see also s52 of the ASIC Act and s278 of the National Credit Act.
- RG 8.55 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: see s53(1) of the ASIC Act and s279(1)(b) of the National Credit Act. However, we must consider the issues identified in s52 of the ASIC Act and s278 of the National Credit Act. If, taking those issues into account, we consider that the hearing should be in private, we may hold all or part of the hearing in private: s53(2) of the ASIC Act and s279(2) of the National Credit Act.

Privacy notice

- RG 8.56 Material provided by you at the hearing may contain personal information including sensitive information about you or about other individuals. The purposes for which we will use the personal information include to enable us to conduct the hearing, make the decision and write the reasons for decision.
- RG 8.57 ASIC's [Privacy policy](#) sets out how we handle and use personal information, including:
- (a) when we may disclose personal information;
 - (b) how to obtain access to and seek correction of your personal information; and
 - (c) how to complain about breaches of privacy by ASIC.
- RG 8.58 If you provide a statement from a witness, you should inform the witness about our privacy policy. We will assume that you have made the witness aware of our privacy policy and that the witness consents to you disclosing their personal information to ASIC.

Giving false evidence

- RG 8.59 It is an offence to give evidence at a hearing that is false or misleading in a material particular: see s64(2) of the ASIC Act and s291 of the National Credit Act.

Witnesses

- RG 8.60 As a matter of general principle, we consider that it will not be necessary for us to call any witnesses on which we rely. Generally, the delegate will rely on written statements that a witness provides to them.
- RG 8.61 If you want someone to give evidence on your behalf, a written statement of the witness will usually be sufficient. On occasion, the delegate may ask you to have the witness available to attend the hearing in person.

Summoning a person to attend

- RG 8.62 The delegate has the power of a member of the Commission to compel a person to attend and give evidence, to produce specified documents, or both: see s58(1) of the ASIC Act and s284(1) of the National Credit Act. 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 and inconvenience. The delegate will only exercise the power to summon a witness when there is a demonstrated need for it.

- RG 8.63 Before issuing a summons, the delegate would need to be satisfied that:
- (a) the person can give relevant evidence or produce relevant documents; and
 - (b) there is a need to do so.
- RG 8.64 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 that 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.
- RG 8.65 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 decide whether to issue the summons.
- RG 8.66 The person requesting the issue of the summons must pay the fees and allowances for the witness's expenses: see Sch 2 of the *Australian Securities and Investments Commission Regulations 2001* and reg 35 of the *National Consumer Credit Protection Regulations 2010*.

Taking an oath or affirmation

- RG 8.67 A person may be summoned to appear at a hearing as a witness under s58(1) of the ASIC Act or s284(1) of the National Credit Act. In these cases, the delegate may require them to take an oath or make an affirmation: see s58(2) of the ASIC Act and s284(2) of the National Credit Act. It is an offence to fail to comply with a requirement made under s58(2) of the ASIC Act or s284(2) of the National Credit Act: see s63(3) of the ASIC Act and s290(2) of the National Credit Act.

Impartial decision makers must be free from bias

- RG 8.68 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: *Winter v ASC* (1995) 56 FCR 107; (1995) 13 ACLC 422.

- RG 8.69 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: *Story v NCSC* (1988) 13 ACLR 225; see too the comments of Finn J in *McLachlan v ASC* (1998) 28 ACSR 473; affirmed on appeal in *McLachlan v ASIC* (1999) 85 FCR 286.

The rules of evidence do not apply

- RG 8.70 The ASIC Act and the National Credit Act state that the rules of evidence do not apply in our administrative hearings: see s59(2)(a) of the ASIC Act and s285(2)(a) of the National Credit Act. Our hearings cannot, and should not, be compared with proceedings in a court of law. Their purpose and nature are quite different. Many of our administrative hearings are protective in nature (e.g. *ASIC v Adler* (2002) 42 ACSR 80 at [56]), while others are held to determine whether a person is qualified for an occupation. Our hearings are not a contest between you and ASIC. They 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.

Note: See 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 an adversarial inquiry’.

- RG 8.71 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. The delegate must be satisfied that:
- (a) all the issues relevant to the subject matter of the hearing have been clearly identified;
 - (b) you have been given the opportunity to address them; and
 - (c) statutory requirements for our having the power are met.

The material and evidence you need for the hearing

- RG 8.72 You need to decide:
- (a) what material you want to present to the hearing;

- (b) the form in which you want to present it;
- (c) how much evidence you want to present;
- (d) if you want to dispute the accuracy or adequacy of the factual material on which we are contemplating acting;
- (e) if you want to make submissions to the delegate about the scope of any orders that might be made against you—for example, a banning order under s920B of the Corporations Act may specify that a person is prohibited from doing one or more of the activities listed in that section; and
- (f) 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 (e.g. s206GAB, 915H and 920B(3) of the Corporations Act and s62 and 81(3) of the National Credit Act).

RG 8.73 You may wish to rely entirely on the material we have identified in the notice of hearing or notice to demonstrate. You may wish to give evidence yourself. 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 course, you may also make submissions, either in writing or orally. 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.

RG 8.74 The delegate conducting the hearing is an impartial decision maker who exercises an administrative function. It is not the role of the delegate to settle or negotiate an outcome in an administrative law proceeding. As such, the delegate will not accept any evidence or submissions given to them on a without prejudice basis. Rather, any evidence or submissions you give to the delegate will be understood by the delegate to be capable of being used by them to ascertain the facts of the matter and make a decision.

RG 8.75 We consider that, generally, it is the role of the delegate to allow you (or the witness) a reasonable opportunity to explain or to give your own version of events. The delegate may ask questions to clarify any matters on which you (or the witness) have made submissions or given evidence.

RG 8.76 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. You may wish to provide that material to the delegate.

RG 8.77 In deciding the form of your evidence, you should remember that the delegate is not bound by the rules of evidence and that you may present any material that is relevant and credible. 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: see RG 8.56—RG 8.57.

- RG 8.78 The delegate will not provide a preliminary view as to whether the material you present is sufficient to address our concerns. They will also generally not invite you to provide more evidence if they are minded to make an adverse decision. However, during the course of a hearing, evidence you give and submissions you make may give rise to additional concern(s) that were not otherwise set out in the notice. If the delegate intends to take such a concern into consideration when making their decision, you will be given an opportunity to respond to the additional concern by providing more material and/or providing additional written submissions.

There is no ‘burden of proof’

- RG 8.79 ‘Burden of proof’ is a concept that arises in court processes, but has *no place* in our administrative hearings. Our administrative hearings give you an opportunity to give us information that may affect our decision. Generally, you do not have to prove or disprove anything. Rather, you are given the opportunity to present information to assist us in our decision making. As the High Court has stated in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 282:

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

- RG 8.80 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.

When a hearing should be adjourned

- RG 8.81 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 (e.g. if new material information has come to light that may be adverse to the affected person, and they have not been given an opportunity to comment, it may be appropriate to adjourn the hearing—*Boucher v ASC* (1996) 44 ALD 499).

- RG 8.82 If you require 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.

Written reasons

- RG 8.83 The delegate will usually give you the reasons for their decision when they tell you what their final decision is. We must give you a statement of reasons when we issue a notice of suspension or cancellation of your credit licence or make a banning order: see s61 and 85 of the National Credit Act. Similarly, we must give you a statement of reasons when we issue a notice of suspension or cancellation of your AFS licence or make a banning order: see s915G and 920F(1) of the Corporations Act.
- RG 8.84 If we vary a banning order against you, we will give you a statement of reasons if you request it: see s920F(2) of the Corporations Act. If we refuse your application for registration as an auditor, we will send you the written decision and reasons within 14 days of our telling you of our decision: see s1280(9) of the Corporations Act.
- RG 8.85 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 the final decision.

Publication of our decisions

- RG 8.86 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: see s1(2)(a) and (b) of the ASIC Act.
- RG 8.87 Publishing the results of our hearings where an order is made against you is an important aspect of our regulatory strategy. It helps ASIC educate those who have been the subject of the hearing, and also others in the relevant industry, about what the Corporations Act and National Credit Act require and the consequences of failing to comply with the law.
- RG 8.88 We do not consider it appropriate to publicise when you have been given an opportunity to be heard, because the substance of the issues leading to the

hearing have not been discussed and determined. It is the outcome of the hearing that may have regulatory impact.

RG 8.89 If we make an interim order to stop the trading of securities under s739 or, in respect of financial products, under s1020E of the Corporations Act, 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.

RG 8.90 In some instances we have an obligation to publish our orders in the [ASIC Gazette](#). For example, we must publish a notice in the *ASIC Gazette* as soon as practicable after we:

- (a) notify an AFS licensee of our decision to cancel or suspend their licence (see s915F(2) of the Corporations Act); or
- (b) make or vary a banning order (see s920E(2) of the Corporations Act).

RG 8.91 We must publish a notice on our website if we:

- (a) make an order cancelling or suspending your credit licence (see s60(3) of the National Credit Act); or
- (b) make or vary a banning order against you (see s84(3) of the National Credit Act).

The notice must state when the action took effect.

RG 8.92 We publish these notices on the ASIC registers: see the [banned and disqualified persons search](#) and the [professional registers search](#).

RG 8.93 In addition to publishing the orders in the *ASIC Gazette* or on our website, we are likely to publish a media release.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is the definition in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
credit activity (or credit activities)	Has the meaning given by s6 of the National Credit Act
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
delegate	ASIC staff member delegated the power to hold hearings and make decisions under Div 6 of Pt 3 of the ASIC Act or Div 2 of Pt 6-5 of the National Credit Act
financial product	Generally, a facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: See Div 3 of Pt 7.1 of the Corporations Act for the exact definition. In addition to the general categories above, this specifies certain things as being included or excluded from the definition.
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
notice of hearing	A notice that ASIC issues under the Corporations Act or the National Credit Act, notifying the recipient of their right to be heard in relation to whether ASIC should take action against them

Term	Meaning in this document
notice to demonstrate	A notice that ASIC issues under s206F or s206GAA of the Corporations Act, notifying the recipient of their right to be heard in relation to whether they should be disqualified from managing corporations
Pt 6-5 (for example)	A part of the Corporations Act, the ASIC Act or National Credit Act, as specified (in this example numbered 6-5)
RG 100 (for example)	An ASIC regulatory guide (in this example, numbered 100)
s35 (for example)	A section of the Corporations Act, the ASIC Act or National Credit Act, as specified (in this example numbered 35)

Related information

Headnotes

adjournment, adversarial and inquisitorial hearings, AFS licence, attendance at hearing, auditors, Australian credit licence, Australian financial services licensee, burden of proof, court enforceable undertakings, credit licensee, delegate, disqualification of directors, financial products, impartial decision maker, licensing, licensing hearings, notice to demonstrate, notice of hearing, oath or affirmation, opportunity to be heard, private and public hearings, procedural fairness, protective order hearings, publication or media releases, registration application hearings, right to be represented, rules of evidence, service, stop orders, stop order hearings, summons, time to prepare, witnesses, written reasons

Regulatory guides

[RG 73](#) *Continuous disclosure obligations: Infringement notices*

[RG 98](#) *ASIC's powers to suspend, cancel and vary AFS licences and make banning orders*

[RG 100](#) *Court enforceable undertakings*

[RG 216](#) *Markets Disciplinary Panel*

[RG 218](#) *Licensing: Administrative action against persons engaging in credit activities*

[RG 258](#) *Registered liquidators: Registration, disciplinary actions and insurance requirements*

[RG 263](#) *Financial Services and Credit Panel*

[RG 274](#) *Product design and distribution obligations*

Legislation

Acts Interpretation Act 1901, s28A

Australian Securities and Investments Commission Act 2001, Pt 2 Div 2; Pt 3 Div 6; s1, 19, 52, 53, 56, 57, 58, 59, 63, 64

Australian Securities and Investments Commission Regulations 2001, Sch 2

Corporations Act 2001, Pts 6D.3, 6D.3A, 7.9; Pt 7.8A Div 2; s109X, 206F, 206GAA, 206GAB, 713, 739, 913B, 914A, 915C, 915F, 915G, 915H, 920A, 920B, 920E, 920F, 994AA, 994B, 994C, 994D, 994E, 994J, 1017BA, 1017BB, 1017G, 1020E, 1280, 1317DAC, 1349

National Credit Act, Pt 6-5 Div 2; s41, 45, 55, 60, 61, 62, 80, 81, 84, 85, 253, 278, 279, 282, 283, 284, 285, 290, 291

National Consumer Credit Protection Regulations 2010, reg 35

Superannuation Industry (Supervision) Act 1993

Cases

ASIC v Adler (2002) 42 ACSR 80

Boucher v ASC (1996) 44 ALD 499

Kioa v West (1985) 159 CLR 550

Mahon v Air New Zealand Ltd [1984] AC 808

McLachlan v ASC (1998) 28 ACSR 473

McLachlan v ASIC (1999) 85 FCR 286

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Nam Bee (Australia) Pty Ltd v Corporate Affairs Commission (NSW) (1987) 12 ACLR 391

Salemi v Mackellar [No 2] (1977) 137 CLR 396

Story v NCSC (1988) 13 ACLR 225

Winter v ASC (1995) 56 FCR 107, (1995) 13 ACLC 422