



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 180

ASIC's approach to involvement in private court proceedings

This information sheet provides general information on our approach to becoming involved in private court proceedings. It covers:

- [our enforcement role and involvement in private litigation](#)
- intervention as a [party](#) or appearing as [amicus curiae](#) or 'friend of the court'
- [how we decide whether to intervene](#)
- [intervention after service of notice of application](#)
- proceedings commenced by ASIC, including [commencing civil proceedings under s50](#) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and [commencing other proceedings](#) that are potentially relevant to private claims.

This information sheet is intended to help the general public, potential litigants and their legal representatives, and courts.

Our enforcement role and involvement in private litigation

Direct enforcement action to deter misconduct is one of a number of regulatory tools available to us. Other regulatory tools that we use are engagement with industry and stakeholders, surveillance, guidance, policy on the exercise of discretion, and education. We use ASIC's enforcement powers to detect and deal with unlawful conduct, to recover money in appropriate circumstances and sometimes to prevent unlawful conduct or dissipation of assets before it happens (e.g. by seeking an injunction or a freezing order).

There are also a number of options available to private persons (whether corporations or individuals) to enforce their rights under the laws administered by ASIC. Examples of private enforcement include:

- taking matters to dispute resolution schemes authorised by ASIC for licensees (e.g. financial advisers or credit providers), which enable consumers to resolve a dispute with a licensee without recourse to litigation
- private litigation, including participating in a class action for breach of duty under an Act or under private contract.

There will be occasions when we intervene in private litigation as a party. If appropriate, we will intervene, and our approach to doing so is set out under [How we decide whether to intervene](#) below. Alternatively, we may appear as *amicus curiae* or do neither. We do not

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

lightly intervene in matters where a case primarily concerns the personal legal rights and remedies available to the parties unless there is a broader regulatory benefit that may be achieved through our intervention.

The law envisages our intervention through express statutory provisions and under the rules of superior courts, such as the Federal Court and the state Supreme Courts.

In some circumstances, we also have the power to commence proceedings on behalf of a private claimant, or to indirectly assist claimants to themselves enforce their rights: see [Commencing civil proceedings under s50 of the ASIC Act](#) and [Commencing other proceedings relevant to private claims](#) below.

Note: For more detailed information on how we approach our enforcement role, see Information Sheet 151 *ASIC's approach to enforcement* (INFO 151).

This information sheet does not cover our approach to making submissions to the court about proposed schemes of arrangement under s411 of the *Corporations Act 2001* (Corporations Act). Guidance on our approach to these schemes is set out in Sections F–G of Regulatory Guide 60 *Schemes of arrangement* (RG 60). This information sheet also does not cover ASIC's role in applications for reinstatement of registration of a company.

Intervention as a party

We have the right to intervene in private court proceedings that relate to a matter arising under the Corporations Act or the *National Consumer Credit Protection Act 2009* (National Credit Act).

Note: It is also possible for ASIC to seek leave from the court to intervene in unconscionable conduct and consumer protection proceedings under s12GO of the ASIC Act and also under the rules of the court.

A variety of court proceedings can 'relate to a matter arising under' the Corporations Act or the National Credit Act. For example, a matter arising under different legislation or the general law, but which has implications for the interpretation or administration of the Corporations Act or National Credit Act, may 'relate to a matter arising under' those Acts. An example of this could be an action under state legislation such as the *Contracts Review Act 1980* (NSW), which relates to hardship and unjust transactions provisions in the National Credit Act.

Where we intervene in private proceedings, ASIC is taken to be a party to the proceedings.

Appearing as amicus curiae

Intervention as a party is different from seeking to appear as amicus curiae. An amicus curiae is a person who seeks to assist the court (e.g. by making submissions to it on a particular matter). Appearing as amicus curiae does not involve becoming a party to the proceedings.

We may apply to the court for leave to appear as amicus curiae. If leave is granted, the court may set conditions. Alternatively, the court may invite ASIC to appear. The courts have given leave to ASIC to appear as amicus curiae to:

- draw the court's attention to a specific aspect of the proceedings that it appears would not otherwise be brought to the court's attention by the parties, and which we are well placed to explain to the court
- help the court interpret legislation that we administer or formulate a principle of law
- address issues relevant to an affected class, such as creditors, who are not appearing as parties
- provide a contradictory view to that offered by the parties, where no such view would otherwise have been provided.

The basis for our seeking to appear as amicus curiae may be either under court rules (e.g. Federal Court (Corporations) Rules 2000) or, where applicable, the court's own inherent authority. We are generally more likely to seek to appear as amicus curiae than to intervene as a party in court proceedings.

How we decide whether to intervene

We have a wide discretion in the exercise of ASIC's power to intervene as a party. In deciding whether or not to intervene in proceedings, we will consider whether it would represent the most appropriate use of our finite resources. The specific factors that we will consider will vary according to the circumstances of the case. Broadly, however, we will be guided by the following four general principles:

- whether intervention is of strategic regulatory significance
- whether the benefits of intervention outweigh the costs of doing so
- whether issues specific to the case warrant intervention
- whether alternatives are available, including appearing as amicus curiae or taking action ourselves.

Whether intervention is of strategic regulatory significance

We will not normally intervene as a party in private litigation unless:

- a case raises matters that are clearly significant to our statutory objectives or exercise of our functions and powers
- important issues of interpretation of legislation, going to the heart of the legislative policy of the provision or to ASIC's powers or ability to administer the legislation, arise.

Note: For a list of Acts under which ASIC has functions and powers, see s12A of the ASIC Act.

In assessing this, we consider the seriousness of the matter and particularly its market impact, which includes its impact on market integrity or the confidence of investors and financial consumers.

We have intervened in the past where we determined our involvement in proceedings was valuable and in the public interest, with examples including matters related to:

- applications to extend a voluntary administration and liquidator inquiries
- the approval of a scheme of arrangement (see [RG 60](#))
- interpretation of statutory provisions with respect to managed investment schemes
- a challenge to enforcement of a debt under a credit contract.

Whether the benefits of intervention outweigh the costs of doing so

Intervention as a party requires us to commit resources to preparation of our case and, in some circumstances, may expose us to costs orders. We weigh this against the broader benefit to the public of intervention. We must ensure that we direct finite resources appropriately.

Whether issues specific to the case warrant intervention

We will consider issues specific to the case as part of any decision about whether or not to intervene. For example, whether:

- we have information or evidence that should be put before the court and which will not be submitted by one of the parties to the proceedings
- a contradictory view will not be argued by one of the parties to the proceedings (e.g. intervention may be needed to highlight a particular argument that may not otherwise be adequately canvassed)
- we may wish to be in a position where we could potentially appeal an adverse finding

- the intervention might occupy the court's time unnecessarily, adding to the costs of the proceedings without a commensurate benefit
- intervention could assist our other regulatory or enforcement action.

Whether alternatives are available

We consider whether intervening will send an appropriate message to the market or whether an alternative course of action is more appropriate.

Seeking to appear as amicus curiae will often be more appropriate. When considering whether to seek to appear as amicus curiae, we will equally apply the broad principles of the strategic regulatory significance, the benefits of applying to appear as amicus, whether issues specific to the case warrant such an application and whether alternatives are available.

We are also less likely to intervene as a party if we are considering taking action in another court ourselves. Providing information or documents that we possess to parties to the proceedings (where appropriately requested) may also be an alternative to direct intervention or other action.

Note: For more information on when we provide information and documents to third parties engaged in private litigation, see Information Sheet 181 *Providing information and documents to private litigants* (INFO 181).

Intervention or amicus appearance after notice of court application

There are certain types of Corporations Act applications that ASIC must be given notice of (as required under that Act or the court rules). After being given notice of an application we may then decide to either intervene or seek leave to appear as amicus curiae. If ASIC must be given notice of such an application, this must be done within a reasonable time. What is a reasonable time may vary:

- in the case of a relatively simple application relating to an insolvency matter, such as an application to deregister a company or an application to stay a winding up, we consider a reasonable time to be not less than two business days before the hearing
- for more complex applications a reasonable time will be longer and will depend on the complexity of the application
- some applications may have a different period of notice specified (e.g. under s206G of the Corporations Act, notice of an application by a disqualified person to manage a corporation must be lodged with ASIC at least 21 days before commencing the proceedings).

If inadequate notice is given to us, we may advise the court that notice was not given to ASIC within a reasonable time.

Commencing civil proceedings under s50 of the ASIC Act

ASIC has powers to begin a civil action to recover damages or property for persons (including companies) who have suffered loss: s50, ASIC Act; and s275, National Credit Act (s50 proceedings). Our discretion about whether or not to commence s50 proceedings is wide. The power to commence such proceedings includes four elements:

- there must be an investigation or compulsory examination under the ASIC Act or National Credit Act
- it must appear to ASIC to be in the public interest to begin and carry on the proceedings
- recovery of damages or property are sought (damages claim is for fraud, negligence, default, breach of duty or other misconduct committed in connection with a matter to which ASIC's investigation or examination related)
- if the proceedings are to be commenced on behalf of a person (not a company) that person must give their written consent.

Note: We will also generally seek the consent of a corporation before commencing a s50 proceeding on its behalf.

We consider a range of factors when deciding whether to commence enforcement proceedings, including s50 proceedings, to ensure that we direct finite resources appropriately and that commencing and carrying on an action is in the broader public interest, beyond the private interests of the particular plaintiffs on whose behalf we commence the proceedings. Our approach to commencing a s50 proceeding is consistent with our approach to commencing enforcement actions generally: see [INFO 151](#).

Requirement for an investigation

Before we can contemplate commencing s50 proceedings, we must have commenced a formal investigation into suspected misconduct to gather any evidence that a contravention of the law has occurred to use in an appropriate enforcement action.

Formal investigations occur when we suspect there may have been a contravention of a law relating to our regulatory responsibilities, at which point we may require a person to attend an examination and answer questions on oath or affirmation: see Information Sheet 145 *ASIC's compulsory information-gathering powers* ([INFO 145](#)).

It must be in the public interest

'Public interest' is not defined in the relevant legislation and the factors that determine whether an action is in the public interest cannot be exhaustively defined. They will vary according to the circumstances of the case and, even when it appears an action might be in the public interest, that may be insufficient to justify commencing a s50 proceeding, given other factors.

Examples of issues that we may consider before deciding if commencing s50 proceedings is in the public interest include:

- whether such proceedings advance our regulatory purposes, objectives and aims (e.g. advancing our strategic priorities)
- the extent of the losses suffered by persons on whose behalf s50 proceedings would be commenced
- the size of the class of persons on whose behalf s50 proceedings would be commenced
- whether there is any prospect of recovery of losses from the defendants
- the nature and potential cost of the proceedings
- the potential prejudice to the conduct of an ASIC investigation
- whether s50 proceedings could prejudice law enforcement, including by another agency at federal or state and territory level
- the potential harm to the interests of an individual or group of individuals (e.g. whistleblowers).

Alternatives available to the plaintiffs

There may be alternatives to proceedings for recovery of damages or property available that we will take into account in deciding whether to commence s50 proceedings. For example, we are less likely to commence s50 proceedings on behalf of a person who has a claim for damages or property where that person:

- has not yet sought external dispute resolution by:
 - lodging a dispute with a financial services provider with the Financial Ombudsman Service or the Credit Ombudsman Service, or
 - pursuing a complaint about superannuation with the Superannuation Complaints Tribunal
- is already pursuing a private action funded by the plaintiff's own resources

- is pursuing a private action (including a class action) funded by a litigation funder or community legal centre
- is participating in an existing class action, or
- has the ability to pursue one of these alternatives but has not yet done so.

In considering these alternatives, we will consider whether plaintiffs with equal or similar rights are treated equally.

Requirement for consent

Section 50 proceedings are carried on in the name of a person who may commence a proceeding for recovery of damages or property. In some circumstances, the public interest in commencing (or not commencing) proceedings may be inconsistent with the wishes of the individual person in whose name proceedings would be commenced. Accordingly, if the person is not a company, we must first obtain the person's written consent before commencing proceedings.

In the case of a company, we may begin and carry on proceedings in the name of the company even where the company may not itself consider that it is in the company's interests to bring the proceeding (e.g. it would cause commercial inconvenience to the company). However, generally we will seek a company's consent before commencing s50 proceedings on its behalf. We may also discontinue s50 proceedings, taking into account the broader public interest, without the company's consent. It may be possible for the company to take over the conduct of the proceedings.

When obtaining consent to commencement of a s50 proceeding, we will enter into a consent agreement with the person or company. The consent agreement will address a number of matters, including whether consent will be sought before discontinuing a matter.

Commencing other proceedings relevant to private claims

We may take enforcement action that is potentially relevant to private claims in a number of ways. A number of these are mentioned here, but this is not an exhaustive list:

- we may take urgent action, such as seeking an order to prevent assets from being moved or used, or seeking an injunction
- we may seek a compensation order from a court in circumstances where the legislation provides that we may apply for such orders and they are available for particular types of misconduct (e.g. s1325(1), Corporations Act; s12GM, ASIC Act; and s178, National Credit Act) – as with s50 proceedings, our decision to seek such an order is considered against a range of issues and factors (see [INFO 151](#))
- we may make an application in the public interest with respect to hardship, unjust transactions or unconscionable interest charges under Div 3 of the National Credit Code;
- we may apply to the court for a declaration of contravention of a civil penalty provision of the Corporations or National Credit Act and, if we do so, may also apply for other relief (e.g. a compensation order: see s1317E and s1317J). A declaration of a contravention may be relied on in certain circumstances as conclusive evidence of the contravention (s1317F).

We are also empowered to provide information and documents to parties engaged in private litigation in certain circumstances: see [INFO 181](#) and [Regulatory Guide 103 Confidentiality and release of information \(RG 103\)](#).

Where can I get more information?

- Download copies of:
 - [Regulatory Guide 60 Schemes of arrangement \(RG 60\)](#) and [Regulatory Guide 103 Confidentiality and release of information \(RG 103\)](#); and

- Information Sheet 151 *ASIC's approach to enforcement* ([INFO 151](#)), Information Sheet 145 *ASIC's compulsory information-gathering powers* ([INFO 145](#)) and Information Sheet 181 *Providing information and documents to private litigants* (INFO 181).
- Contact ASIC on 1300 300 630.
- Submit a question online at www.asic.gov.au/question.

Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. Omission of any matter on this information sheet will not relieve a company or its officers from any penalty incurred by failing to comply with the statutory obligations of the Corporations Act.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.