



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 15

Enforcement action—no undertakings

Part 3 of the ASC Law

Issued 18/4/1994

From 5 July 2007, this document may be referred to as Regulatory Guide 15 (RG 15) or Practice Note 49 (PN 49). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 15.1) or their practice note number (e.g. PN 49.1).

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Purpose

RG 15.1 This guide clarifies that the ASC will not give undertakings about enforcement action.

Background

RG 15.2 During investigations under Pt 3 of the ASC Law, the ASC has been asked to give undertakings about enforcement action. For example, the ASC is asked if it will notify the subject of the investigation of the proposed action before it refers the matter under

investigation to the Director of Public Prosecutions (DPP) or takes other enforcement action.

RG 15.3 The ASC is under no obligation to give an undertaking about enforcement action and will not give an undertaking to this effect.

Examinees' rights

RG 15.4 An examinee's rights in relation to an examination conducted under s19 of the ASC Law are set out in Pt 3 of the ASC Law. For example, the examinee's lawyer can attend, examine their client and address the inspector on the matters that the inspector has asked the examinee about (s23(1) of the ASC Law). This allows an examinee's representative to submit to the inspector, for example, that there is no basis on which to charge the examinee with any offence or that the examinee has a statutory defence to an alleged contravention. However, the inspector does not have to rule on or respond to such a submission and it would usually be premature to do so.

RG 15.5 An examinee can make a statutory claim of privilege against self-incrimination (s68 of the ASC Law). If the examinee claims privilege before answering, the answer cannot be used as evidence against the examinee in a criminal proceeding or a proceeding for the imposition of a penalty (s68 of the ASC Law).

RG 15.6 The examinee can object to statements that were made in the examination being admitted subsequently (s76 of the ASC Law). They can also obtain a record of the examination (s24 of the ASC Law). If the examinee is a lawyer, they may claim legal professional privilege where applicable (s69 of the ASC Law).

RG 15.7 In addition, if the ASC's conduct might affect a person's rights, interests or legitimate expectations, examinations must be conducted fairly and natural justice must be observed.

RG 15.8 After the ASC has assessed the evidence collected in an investigation, it may decide to prepare a s16 interim or a s17 final report containing a conclusion which is adverse to the reputation of a person. In this case, as a matter of procedural fairness, the ASC usually informs that person of the adverse conclusion before it reports to the Minister. This gives the person an opportunity to give relevant information and make submissions to the ASC.

Decision to take enforcement action

RG 15.9 The inspector must act fairly in a procedural sense (*Re Pergamon Press* [1971] Ch 388). If the ASC concludes that an examinee may have committed an offence and that the matter should be referred to the DPP, the examinee is not entitled to be informed of this decision. It has been firmly established by the courts that when a decision to commence criminal proceedings is made, the principles of natural justice do not have to be observed (*Newby v Moodie* (1987) 78 ALR 603 at 605).

RG 15.10 It follows that the ASC may take a step short of a decision to prosecute (such as granting leave or authorising a person to commence criminal proceedings) without giving the subject of the decision prior notice or inviting that person to make submissions.

RG 15.11 The ASC's decision to refer a matter to the DPP is an administrative step. It is similar to those which Northrop and Lockhart JJ referred to in *Edelsten v Health Insurance Commission* (1990) 27 FCR 56 at 68 as "mere stepping stones which may lead ultimately to the making of a decision which does affect the person's position".

RG 15.12 Apart from the fact that the law does not require undertakings to be given in these circumstances, the ASC is not in any case prepared to give them because the enforcement process can often be delayed by agreeing to these requests.