



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 17

Fees for subpoenas

Chapter 9 — Miscellaneous

Issued 13/6/1994

From 5 July 2007, this document may be referred to as Regulatory Guide 17 (RG 17) or Practice Note 51 (PN 51). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 17.1) or their practice note number (e.g. PN 51.1).

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Purpose

RG 17.1 This guide sets out how the ASC will assess fees for complying with subpoenas served on it. It sets out how the ASC will calculate fees and how much the fees will be whenever a subpoena is served on the ASC.

RG 17.2 The ASC receives many subpoenas every year. There may be some confusion about the fees the ASC will impose in complying with them. This is because fees are imposed by the Corporations Law and other statutory provisions (including Rules of Court).

RG 17.3 References to sections, subsections, paragraphs and subparagraphs in this guide refer to the Corporations Law unless otherwise stated.

Documents which may be subpoenaed

RG 17.4 There are two types of ASC documents which may be subpoenaed:

- (a) documents which may be requested under s1274; and
- (b) other documents.

Section 1274 documents

RG 17.5 A person may inspect any document lodged with the ASC (with certain exceptions — see para 6 below). The person may also require a certified copy of such documents. Certified copies are admissible in evidence as being of equal validity as the original document (s1274(5)). They are admissible as prima facie evidence of the information contained in them (s1274(4C)).

RG 17.6 The following documents are excluded from s1274(2):

- (a) applications for registration as auditor or liquidator under s1279;
- (b) documents lodged under the provisions of Ch 7 (other than Pt 7.12 or 7.13) or Ch 8;
- (c) notification of certain matters regarding auditors and liquidators under s1287 and triennial statements by registered auditors and liquidators under s1288;
- (d) notice of a decision of the Companies Auditors and Liquidators Disciplinary Board under s1296(2)(b);
- (e) reports lodged by receivers under s422, lodged by official managers under s452 and lodged by liquidators under s533; and
- (f) documents which have been destroyed or otherwise disposed of.

RG 17.7 Any person can obtain from the ASC a certified copy or extract of any document to which s1274 applies. The ASC will calculate the cost for providing certified copies according to items 63–69 of the Corporations (Fees) Regulations.

RG 17.8 A person may serve a subpoena on the ASC seeking documents which he or she could have obtained under s1274. In this

case, the ASC will charge a fee according to item 71 of the Corporations (Fees) Regulations. This fee is charged per document, as well as other charges calculated according to items 65, 67 and 68.

RG 17.9 The ASC must not comply with the subpoena until the fee is paid (s1355(1) of Pt 9.10). Although the fee is set out in the Corporations (Fees) Regulations, the fee is imposed by s25 of the *Corporations Act 1989* (Cth) and s22 of the corresponding Acts of the States.

DOCIMAGE

RG 17.10 If an image of a document has been incorporated into DOCIMAGE (the ASC's electronic register), the ASC will not produce the original under subpoena. This is because the ASC destroys the original after it has incorporated the document into DOCIMAGE.

RG 17.11 The ASC will provide a copy of the DOCIMAGE document (s1274(2) and 1274(4B)). However, the copy is not admissible unless the ASC has certified it. The ASC will charge the usual search fees. It will also charge a fee for certification, according to item 69 of the Schedule to the Corporations (Fees) Regulations.

ASCOT documents admissible

RG 17.12 An extract from the ASCOT database is now considered to be evidence of the matters stated in it (under the new s1274B). The extract does not have to be certified and no further fees have to be paid. However, copies of documents generated from the DOCIMAGE facility must still be certified.

Other documents

RG 17.13 The ASC cannot charge a fee unless it is a "chargeable matter" as defined in s9 (under s1351). Paragraph (e) of the definition refers to "the production by the ASC under a subpoena of such a register or document". However, this only applies to documents the ASC produces that have been lodged with it under s1274. Therefore, if the ASC produces documents that it initially obtained using compulsive powers, it is not a "chargeable matter". In this case, the ASC will use other statutory provisions, particularly the Rules of Court, in deciding what costs to charge.

Witness expenses

RG 17.14 The ASC will seek costs for witness expenses according to the relevant Rules of Court which allowed the subpoena to be issued (see *Collins v Godefroy* (1831) 1 B & Ad 950; *Bank of New South Wales v Withers* (1981) 52 FLR 207).

Conduct money

RG 17.15 For example, under O 27 r 3 of the Federal Court Rules 1979, a person is not obliged to come to court and answer a subpoena unless he or she has received a proper fee as conduct money. Under O 27 r 4A of the Federal Court Rules 1979, a court or judge may order compensation for substantial expense or loss in complying with the subpoena. This allows the ASC to seek recovery of legal costs in deciding confidentiality and privilege issues. These are assessed on a solicitor and client basis.

RG 17.16 The ASC will seek conduct money and other compensation for complying with subpoenas as appropriate. If an objectionable subpoena is served on the ASC, simply paying the usual fee will not necessarily ensure that the ASC complies with it. The ASC considers each subpoena's validity and any objections to it. In particular, it is constrained by issues of confidentiality and privilege. For example, the ASC will not release documents which are still needed for enforcement purposes, according to public interest immunity.