



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 103

Confidentiality and release of information

ASIC Law

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From 5 July 2007, this document may be referred to as Regulatory Guide 103 (RG 103) or Policy Statement 103 (PS 103). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 103.1) or their policy statement number (e.g. PS 103.1).

Editor's note: This guide replaces Superseded Policy Statement 17 [SPS 17], Superseded Policy Statement 78 [SPS 78], and the memo "Section 127 of ASIC Law and liaison with other government agencies".

Headnotes

ASIC Law s13, 18, 19, 25, 26, 28, 37, 49, 50, 68, 69, 76-83, 127, 127A; Corporations Law s313, 477(3), 788, 815 and 1181; confidentiality; authorised use and disclosure; reputation; procedural fairness; examinations and transcripts of examinations and related books; documents obtained under notice; compulsory powers; Director of Public Prosecutions; liquidators; Australian Stock Exchange Ltd; Sydney Futures Exchange Ltd; costs; Johns v ASC; Ex parte Wardley; Marcel v Commissioner of Police; NCSC v News Corporation; Re Pergamon Press; Re Mining Houses of Australia; Re Arrows Ltd (No 4); Rank Film Distributors v Video Information Centre; Jarrett v Seymour; Martin v Pharmacy Restructuring Authority; Pharmacy Restructuring Authority and Anor v Martin; FCT v Nestle; Smith Kline & French Laboratories (Australia) Ltd and Ors v Secretary, Department of Community Services and Health; Shapowloff v Stirling Henry Ltd (in liq.).

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Purpose

RG 103.1 In this guide ASIC indicates the practices it will adopt in relation to the disclosure of information obtained by the exercise of its compulsory powers. The practices are adopted in the light of the High Court's decision in *Johns v ASC* (1993) 178 CLR 408.

RG 103.2 This guide is divided into the following parts:

- (a) Part I describes ASIC's confidentiality obligations, in particular s127 of ASIC Law and the *Johns v ASC* case (RG 103.4–RG 103.14);
- (b) Part II outlines the operation of the various disclosure powers of ASIC (RG 103.15–RG 103.28); and
- (c) Part III discusses how ASIC will carry out its procedural fairness obligations (RG 103.29–RG 103.53).

RG 103.3 In this guide, references to provisions are references to ASIC Law unless otherwise specified.

Part I: Confidentiality

RG 103.4 ASIC must take reasonable measures to prevent unauthorised use and disclosure of information it receives in confidence in connection with its statutory functions: s127(1). Certain uses and disclosures are taken to be authorised (s127(2)–(6)); see RG 103.23–RG 103.28.

RG 103.5 Section 127 adopts, as a starting point, the equitable doctrine of confidentiality under which use and disclosure of information can be restrained if:

- (a) the information is confidential in fact (that is, not widely available); and
- (b) ASIC has received the information under circumstances which allowed its use and disclosure for limited purposes only.

However s127 alters the equitable doctrine in two ways. It imposes a statutory obligation on ASIC to take all reasonable measures to prevent unauthorised use and disclosure of confidential information. It also authorises ASIC to make certain uses and disclosures of information, notwithstanding that it is confidential.

RG 103.6 Dicta in *Johns v ASC* (1993) 178 CLR 408 suggest that, like the majority in the Federal Court, their Honours read s127(1) applying to information:

- (a) if ASIC receives it in the course of its statutory functions (whether or not in confidence); or
- (b) if it is received in confidence (whether or not in the course of ASIC's statutory functions).

RG 103.7 A more natural reading of the section is that it applies only to information which is received both in confidence and in the course of ASIC's functions. Their Honours did not discuss this reading and ASIC does not regard the issue as finally settled. In most circumstances the difference between the two readings will be less than it may seem. Where ASIC receives information in confidence, but outside its statutory functions, its obligations under the general law of confidentiality are similar to those under s127(1).

RG 103.8 Where ASIC receives information in the course of its statutory functions free from any obligation of confidence, use or disclosure of the information is necessarily authorised, so s127(1) does not apply in any case. It is ASIC's view that s127(1) does not impose obligations of confidentiality where the information itself is not in fact confidential. Information obtained under ASIC's

compulsory powers will not necessarily be confidential. Thus, for example, if under one of its compulsory notices ASIC obtains a file of newspaper clippings, the fact that the clippings were obtained compulsorily does not mean that the information in the clippings becomes confidential when it has already been publicly disclosed. (The existence and composition of the file might be confidential, however.)

RG 103.9 Nor does s127 impose an obligation on ASIC not to disclose information in circumstances where the relationship between the person who provided the information to ASIC and the person to whom ASIC discloses it is such that no obligation of confidentiality can arise. For example, if ASIC learns some sensitive business information about a company in the course of an examination, and the liquidator of the company wants access to that information, ASIC owes the company no duty to withhold the information from the liquidator, as the company itself has no right to withhold any of its confidences from the liquidator. (However, it may be that a person other than the company is owed a duty of confidentiality with respect to the same information.)

RG 103.10 ASIC (and its staff) may be provided with information which is confidential in two ways:

- (a) voluntarily — for example, information provided in support of applications for discretionary relief and in respect of some complaints of alleged breaches of the law; and
- (b) under compulsion — for example, under a notice to produce documents or during the course of an examination. (Compulsory powers for purposes relating to investigations are set out in Pt 3 of ASIC Law. Information may also be compulsorily obtained for purposes other than an investigation under various provisions of ASIC Law (such as the hearings power in Div 6 of Pt 3 and s49) and the Corporations Law (such as s313 and s788).)

RG 103.11 In *Johns v ASC* (1993) 178 CLR 408 the High Court held that ASIC is authorised to use and disclose information for the purposes for which it was obtained under ASIC Law or the Corporations Law. Accordingly, if ASIC obtains information with a view to instituting criminal, civil or administrative proceedings, the use of the information in those proceedings is authorised use and any disclosure incidental to the proceedings is authorised disclosure.

RG 103.12 Under equitable principles, ASIC would be able to use confidential information it obtained either voluntarily or compulsorily only for the purposes for which it was obtained, unless some other use was impliedly or expressly authorised by the person who provided it,

or the disclosure was to a person who was legally entitled to the information. Section 127 extends the purposes for which ASIC may use information it has obtained.

RG 103.13 The Court in *Johns v ASC* (1993) 178 CLR 408 emphasised that s127 does not restrain ASIC from making authorised use and disclosure of information. Section 127(3) makes it clear that ASIC may use confidential information in its possession for any of its functions and powers. In addition to the authorised uses specified in s127(2), (3), (4) and (4B), ASIC Law also specifically provides (s127(6)) that nothing in any of these sections is to limit what might otherwise constitute authorised use or disclosure. For example, ASIC is entitled to rely on actual authorisation given by the person affected.

Information obtained under the co-operative scheme

RG 103.14 Information which was obtained under the co-operative scheme laws and which has since been provided to ASIC is affected by s127A: see s127(7). The nature of the obligation and the test for release are different. Section 127A imposes a prohibition on unauthorised disclosure rather than a positive duty to prevent unauthorised use or disclosure as with s127. Additionally, the categories of disclosure of confidential information which are permitted in s127A are markedly different to those in s127. However, the content of procedural fairness in relation to proposed releases is the same. ASIC proposes to administer s127A consistently with s127, as far as possible.

Part II: ASIC's disclosure powers

RG 103.15 ASIC has express power under s25, 37 and 127 to disclose certain information for certain purposes. ASIC will exercise its powers and functions in the light of the decision of the High Court in *Johns v ASC* (1993) 178 CLR 408 and other authorities and, where there are no decisions, analogies from the decided cases. ASIC's powers may be exercised either on the application of a relevant party or at the discretion of ASIC. The following paragraphs outline the nature of each of these powers.

[*Historical note:* RG 103.15 amended 26/2/1996 by adding before the last sentence the words, "ASIC's powers may be exercised either on the application of a relevant party or at the discretion of ASIC".]

Release of transcripts and related books

RG 103.16 ASIC may release transcripts or related books as an authorised disclosure under s127 or under s25(1). Under s25(1) ASIC may release transcripts of examinations conducted by it under s19 and related books to a person's lawyer if the lawyer satisfies ASIC that the person is carrying on, or is contemplating in good faith, a proceeding in respect of a matter to which the examination related. Subsection 25(2) limits the use which may be made of copies released under s25(1). ASIC may also impose additional conditions on the release of documents: see RG 103.37. In ASIC's view plaintiffs/applicants and defendants/respondents to an action are entitled to apply for transcripts as well as intending plaintiffs and applicants: see *Wardley v ASC* (1991) 9 ACLC 1565.

RG 103.17 ASIC considers that the words "related books" refer to documents formally identified and incorporated in the record of examination, and also to documents referred to directly or indirectly in the record which would help people to understand the record. For example, if an officer of a company refers to a meeting which occurred on a particular day, the minutes of that meeting would constitute a related book.

RG 103.18 In exercising its discretion as to whether it should release copies of transcripts using the power in s25(1), ASIC:

- (a) must be satisfied that the person is carrying on, or contemplating, a proceeding;

- (b) must be satisfied that the proceeding is in respect of a matter to which the examination (or part of an examination) is related;
- (c) will consider whether any of ASIC's enforcement requirements — relating to the continued investigation, prosecution, instituting or intervening in civil proceedings or taking of administrative action — would be jeopardised by the release of the transcripts; and
- (d) will consider whether other persons may be adversely affected by the release of the transcripts (see RG 103.52).

ASIC will also have a general discretion, taking into account factors such as:

- (a) its functions and powers;
- (b) the objects of the Corporations Law and ASIC Law;
- (c) interpretations by the court in decisions such as *Wardley* and *Johns*; and
- (d) the public interest generally.

While ASIC will take all these factors into account, in the absence of compelling reasons to the contrary ASIC will generally assist litigants by disclosing transcripts as contemplated by s25(1).

RG 103.19 Section 25(3) provides ASIC with a general ability to release transcripts and related books. In *Johns v ASC* (1993) 178 CLR 408, the High Court held that s25(3) is a machinery or facultative provision: it merely enables the provision of transcripts and books and the imposition of conditions, where the release is for a purpose authorised in some other way (eg by one of the provisions of s127). ASIC may impose conditions on releases under s25(3). A contravention of a condition imposed under s25(3) is an offence against s26.

Release of books produced under notice or warrant

RG 103.20 Section 37(4) provides that where ASIC has books obtained under notice or warrant it may use them, or permit the use of them, for the purposes of a proceeding. Section 37 is within Div 3 of Pt 3, and the exercise of powers within this division is *prima facie* to be exercised only for the purposes provided in s28. However, s37(4) appears not to be affected by s28 because s37(4) itself states the

purposes for which ASIC may use the power which that subsection confers.

RG 103.21 A person has a right to inspect documents which are in ASIC's possession if the person would otherwise be entitled to inspect the documents (s37(7)(a)). The right may be exercised at any reasonable time. Thus, for example, a liquidator would be able to rely on the power to inspect given in s477(3) of the Corporations Law. The right to inspect in s37(7)(a) also includes the right to obtain copies of documents.

RG 103.22 Section 37(7)(b) gives ASIC a general power to allow any person to inspect documents in its possession. ASIC applies the High Court's conclusion on s25(3)–(7)(b), that is, it is a machinery or facultative power which may only be used where the inspection is for a purpose authorised in some other way.

Disclosure permitted or required by other laws

RG 103.23 Section 127(2) authorises use and disclosure of information as permitted or required under other laws of the Commonwealth (and prescribed laws of the states, but none have been prescribed). This provision authorises release for purposes to which other Commonwealth laws relate. These other provisions may confer discretions on ASIC which are wide or narrow, or no discretion at all.

Disclosure for ASIC's functions

RG 103.24 ASIC can disclose information for the purposes of performing the functions of ASIC: s127(3). The effect of this subsection is that where ASIC obtains information in the course of the exercise of one of its statutory functions, it is entitled to use that information for any of its other functions and powers. This provision authorises release for purposes to which other national scheme law provisions relate which may confer discretions which are wide or narrow or no discretion at all. Section 127(3) is the power by which ASIC is authorised to disclose confidential information to the Director of Public Prosecutions (DPP).

RG 103.25 Section 11 of ASIC Law delineates the functions and powers of ASIC. In general terms the functions and powers of ASIC are those which are conferred on it by the Corporations Law and ASIC Law. Subsection 1(2) sets out the broad goals for which ASIC must strive in performing its functions and exercising its powers. In

addition to functions specifically authorised by statute (eg s815 and 1181 of the Corporations Law) ASIC may disclose information in the performance of various incidental powers and duties such as fulfilling obligations to provide documents for administrative review processes: see *FCT v Nestle* (1986) 69 ALR 445 at 448; or providing information to a person for the purpose of satisfying the requirements of procedural fairness: *Martin v Pharmacy Restructuring Authority* (1994) 34 ALD 534 at 536.

Disclosure to other agencies

RG 103.26 ASIC can disclose information to Australian and overseas governments and their agencies, to enable or assist them to perform their functions and exercise their powers (s127(4)). In *Johns v ASC* (1993) 178 CLR 408, the High Court held that s127(4) specifies a proper purpose for which information may be released. This means that s127(1) does not prevent ASIC from releasing information in accordance with a decision properly made under s127(4). “Agency” is defined in s5 of ASIC Law as “an agency, authority, body or person” and will include most requesting parties connected with a government.

RG 103.27 Information may be disclosed under s127(4) only if it would “enable or assist” the performance or exercise of a function or power of a government or agency. Where ASIC is aware that information in its possession falls within the functions or powers of a government or agency it will be able to determine whether this requirement has been met. However, in most circumstances ASIC will ask the requesting agency to confirm that the disclosure of the information will enable or assist the agency to perform or exercise one or more of its functions or powers: see RG 103.56. ASIC has signed Memoranda of Understanding with a number of Australian and overseas agencies to facilitate the operation of s127(4).

Disclosure to securities exchanges and futures exchanges

RG 103.28 Section 127(4B) permits disclosure to a stock market or futures market or a securities clearing house or the clearing house of a futures exchange. Disclosure is permitted where the information will enable or assist an exchange to monitor compliance with, enforce or perform functions or exercise powers under the Corporations Law or the

business rules, or listing rules of the exchange. The same principles apply to a release under s127(4B) as to a release under s127(4).

Part III: Procedural fairness

Generally

RG 103.29 Use or disclosure of information for the purposes mentioned above is for a proper purpose. However, if ASIC must make a decision before it can use or disclose the information, a person directly and materially adversely affected by the decision should normally be accorded procedural fairness.

RG 103.30 The content of procedural fairness will differ widely between different cases, depending on the effect on the person and the use or disclosure proposed to be made. Since use or disclosure which a person has authorised does not adversely affect their rights and expectations, no question of procedural fairness arises before ASIC may act on the authorisation. Where ASIC has no discretion whether or not to release information, and thus the content of procedural fairness is nil, it may be required to inform the person of the forthcoming disclosure in order that the person can take whatever action may be necessary to protect their interests: *Marcel v Commissioner for Police* [1992] 1 All ER 72.

Person affected

RG 103.31 In ASIC's view a person whose reputation or confidences (among other things) would be directly adversely affected is entitled to procedural fairness. The person could be affected by disclosure of personal or business secrets, injury to their reputation or in other ways. However procedural fairness does not oblige ASIC to notify and hear every person whose economic interests may be affected by a particular decision: *Pharmacy Restructuring Authority and Anor v Martin* (1994) 53 FCR 589 at 597. The person affected is not always the person who provided the information. For instance, information obtained from an employee or bank may relate to the affairs of the employer or the bank's client, but not to those of the employee or bank. Alternatively another person could be the subject of comments by an examinee which could cause damage to their reputation. In this case, ASIC would consider the interests of the person affected and accord that person procedural fairness.

Matters affecting ASIC's procedural fairness obligations

Nature of the decision

RG 103.32 The purpose of giving a hearing to a person potentially directly and materially adversely affected by an ASC decision is to enable that person to make submissions on how ASIC should exercise its discretion. There is no purpose in giving a person a hearing if the person's interests would be an improper consideration in making a decision, or if ASIC has no discretion to exercise.

RG 103.33 Even if the person affected has no right to a hearing by ASIC, the person's interests should not be affected any more than is necessary. ASIC may impose conditions on the use which may be made of the information which is disclosed. It may be obliged to ensure that the person is informed of the proposed publication: *Marcel v Commissioner for Police* [1992] 1 All ER 72.

Conditions

RG 103.34 Whenever ASIC has a discretion to release confidential information it also has the power to impose conditions.

Sections 127(4A) and 127(4D) provide specifically that ASIC may impose conditions in relation to releases under s127(4) and 127(4B) respectively. Section 25(3) allows ASIC to impose conditions on the release of transcripts and related books. In *Johns v ASC* (1993) 178 CLR 408 the High Court decided that part of the requirement for procedural fairness was that the person be able to make submissions concerning the conditions which should be imposed in the event that ASIC decides to release information. The Court also held that the relaxation of any condition is subject to the same requirements to exercise discretion and provide procedural fairness as is the release of information.

RG 103.35 A person who has a copy of a transcript or related book provided under s25(1) must not use or disclose it except in connection with the relevant proceeding: s25(2). Also, a person who has custody of a copy of a transcript or related book provided under s25(3) must not contravene a condition ASIC has imposed under that subsection: s26. In addition, a person must comply with conditions imposed in relation to a release under s127(4B): s127(4E). Each of these provisions creates an offence for misuse of the relevant information.

RG 103.36 The conditions ASIC imposes may relate to the manner in which the information may be used or may require an undertaking that ASIC be notified before the information is published (for example, used in open court). Additionally, ASIC may first delete those portions of the information which contain confidences of other persons. The conditions or deletions may nullify the potential for the release to have a direct and material adverse effect on any person, in which case no obligation of procedural fairness will arise.

RG 103.37 When releasing information to a statutory authority ASIC may rely on statutory provisions imposing restrictions on the use which the agency, or its staff, may make of information provided to it. Alternatively, ASIC may release information on condition that the agency only uses the material internally. In these circumstances the release may not cause any detriment to any interested person, thus averting any need to consult that person. If the agency later wishes to use the information for other purposes or ASIC relaxes a condition limiting its use, ASIC may have to accord procedural fairness to the affected person or notify them of the intended use of the information.

RG 103.38 When ASIC discloses documents for use in proceedings under s37(4), it will impose conditions similar to those in s25(2).

Publication

RG 103.39 A person is usually more directly and materially adversely affected by the general publication of information affecting them than by the restricted disclosure of the information. ASIC will consider this when it is deciding what the requirements of procedural fairness are in relation to the release.

RG 103.40 When there is a large volume of documents in ASIC's possession which are potentially relevant to a request for disclosure, ASIC may permit the applicant to conduct a preliminary inspection of documents, for the purpose of reducing the volume of documents to be released. Before the inspection can occur, ASIC will have to be satisfied that the disclosure falls within one of the authorised categories referred to above.

RG 103.41 The person inspecting will be required to give undertakings to use the information disclosed only for the purpose of identifying those documents which are required. As this is only a restricted disclosure the ASC believes that the content of procedural fairness will generally be nil. Once the documents which are to be considered for release are identified, procedural fairness will be accorded if appropriate.

RG 103.42 ASIC usually imposes a standard condition on releases under s25(1) or s127(4). This condition is that a person who would be affected by information being published (typically, when it is produced in open court) should be given notice before it is used in court. This will allow the person to apply to the court for orders to protect their interests: *Marcel v Commissioner of Police* [1992] 1 All ER 72. This will apply to other releases where it is likely that the information would be published.

RG 103.43 Under Div 1 of Pt 3 ASIC is empowered to prepare a report to the Minister in respect of matters which it has investigated. As such a report may be published, prior to being sent to the Minister, ASIC will provide any person directly and materially adversely affected by the publication of the report an opportunity to make submissions seeking to correct or contradict any material prejudicial to them: *NCSC v News Corporation* (1984) 156 CLR 296 and *Re Pergamon Press* [1971] 1 Ch 388.

Extent of procedural fairness obligations in certain circumstances

Internal use by ASIC

RG 103.44 When ASIC uses a person's information without disclosing it to anyone but ASIC staff, it will not consider the effect on the relevant person. This is because internal use is authorised and no decision has been made to release the information. ASIC will apply the same principle when it gives information in confidence to counsel and similar outside experts retained to advise it. The principle also applies to briefs sent to the DPP, since ASIC initiates prosecutions under s49 and the DPP then takes them over.

Internal use by other agencies

RG 103.45 Disclosures to other agencies for use in the administration of Commonwealth, state or overseas law are made under s127(4), which is a discretionary power. As noted in para 37, release for the internal use of an agency may not directly and materially adversely affect any person. If, however, the use of the material by the agency would have such a material and adverse effect on a person, ASIC may give the person affected opportunity to make submissions on:

- (a) whether the conditions for release are satisfied;

- (b) whether the public interest in the disclosure of the information outweighs the prejudice to that person;
- (c) whether any information should be withheld; and
- (d) what conditions should be imposed.

Where ASIC does not consider that it has an obligation to provide an opportunity to be heard, ASIC may notify the person of the intended release of the information.

RG 103.46 However, if the administration of justice would be adversely affected by ASIC inviting the person to make submissions, or notifying them of the proposed release because it would require the disclosure of such things as:

- (a) the identity of the agency to which the material is to be disclosed;
- (b) confidential information provided by other persons;
- (c) the nature of the information to be released; and
- (d) background information which they would require in order to assess the effect on them and what submissions to make,

ASIC will not provide the person with the opportunity to be heard, or notify them of the proposed release. ASIC will however consider the person's interests in deciding what to release and what conditions to impose on its use.

Civil proceedings by ASIC

RG 103.47 Where confidential information is to be used as evidence by the ASC in civil proceedings, ASIC does not believe that a person will be adversely affected and does not believe that it is obliged to accord procedural fairness. A person's rights or reasonable expectations are not adversely affected merely because a person is required to provide evidence for court proceedings: *Shapowloff v Stirling Henry Ltd (in liq)* [1972] 2 NSWLR 691. In general the interests of a person whose evidence is to be used in litigation are adequately protected by the investigation process itself: *NCSC v News Corporation Ltd* (1984) 156 CLR 296; *Re Pergamon Press* [1971] 1 Ch 388; *Re Mining Houses of Australia Ltd* (1981) 5 ACLR 560. In addition, if ASIC believes that a person may be adversely affected by the use of information in evidence by ASIC it will either seek to have restrictions imposed on the use of the information, or notify the potentially affected party so that they are able to take steps to protect their interests.

Criminal prosecutions

RG 103.48 The use of confidential information in criminal prosecutions is authorised, since the civil courts in general will not attempt to control criminal proceedings: *Re Arrows Ltd (No 4)* [1993] 3 All ER 861; *Rank Film Distributors Ltd v Video Information Centre* [1981] 2 All ER 76; *Jarrett v Seymour* (1993) 119 ALR 10. The prosecutor's duty to disclose all material necessary to ensure a fair trial means that ASIC has little discretion as to the disclosure of information to a defendant and thus the requirement for procedural fairness is minimal. However ASIC will generally have an obligation to notify an affected party of a proposed disclosure to a defendant.

Release under s25(1)

RG 103.49 If a person would be adversely affected by a release under s25(1) and the purposes for which the material is released include use in civil litigation, the person will generally be given the opportunity to make submissions as to:

- (a) whether the pre-conditions for release are satisfied;
- (b) the scope of the release; and
- (c) the conditions, if any, that should be imposed.

The affected person will be entitled to receive all information necessary to enable them to make submissions to ASIC. However, where draft pleadings have been provided to ASIC by the applicant on a confidential basis, ASIC will not provide these to an affected party.

Provision of books to liquidators

RG 103.50 Liquidators pose a special problem, because they often approach ASIC to say they are considering legal action, but not in sufficient detail to attract s25(1). In such cases, ASIC will consider whether the information is confidential in relation to the liquidator, given that it may be the company's information and the company has no right to withhold information from the liquidator.

RG 103.51 ASIC may release information to the proper officer of the company entitled to it, because the release is an authorised disclosure at general law. Therefore, there is no question of procedural fairness, unless different persons' confidences are mixed or the reputation of another person may be affected. In this case, ASIC will seek submissions in respect of the disclosure or will consider

protecting the other person affected by imposing conditions or deleting the matter concerning the other person.

Disclosure of privileged information

RG 103.52 ASIC Law contains a legislative scheme under which ASIC may compel disclosure of certain information, although at common law it would be subject to privilege against self-incrimination or to legal professional privilege: s68 and 69. That scheme also governs how information that was obtained under compulsion may be used in proceedings: Pt 3 Div 9.

RG 103.53 In ASIC's view, the rights and reasonable expectations of a person are not adversely affected by the use of information in accordance with s68 and 69. Accordingly, it does not regard the partial loss of the benefit of privilege in those circumstances as attracting the obligation to afford procedural fairness. However ASIC may be obliged to ensure that the person is informed of the proposed use of the information to enable them to take steps to protect their interests.

Part IV: Applications

Generally

RG 103.54 Requests for the release of information should cover any of the matters mentioned above which are relevant to the particular case. Applications should:

- (a) provide a detailed description of the information sought;
- (b) explain how the applicant proposes to use the information;
- (c) set out the power under which the release is authorised and any facts necessary to substantiate that the release is within that power;
- (d) set out the purpose for which the release is authorised and any facts necessary to substantiate that the release is within the scope of that purpose;
- (e) indicate, if known, the identity of any persons whose interests may be affected by the release of the information to the applicant and, if relevant, any submissions as to why these persons should not be contacted as part of ASIC's obligation to provide procedural fairness;
- (f) undertake to give persons affected the opportunity to oppose publication of information in court where relevant; and
- (g) specify any grounds for limiting the scope of procedural fairness in relation to the release (eg prejudice to the applicant).

RG 103.55 Applications should be made in writing addressed to the Regional Commissioner of the relevant Regional Office.

Section 127(4) applications

RG 103.56 A government or agency of the Commonwealth or state seeking release under s127(4) or an exchange seeking release under s127(4B) should make an application in accordance with Pro Forma 138 and Pro Forma 139 respectively. Where ASIC has an agreement with the applicant governing the procedures for the release of information, the application should be made in accordance with that agreement. Such letters should be addressed to the Regional Commissioner of the relevant Regional Office of ASIC. An application made by a foreign government or agency should be

addressed to the Manager, International, in the Office of the Chairman, Sydney.

[*Historical note:* RG 103.56 amended 26/2/1996 by deleting the words “providing the details set out in para 54.” from the end of the first sentence, and replacing them with “in accordance with Pro Formas 138 and 139 respectively.”.]

RG 103.57 An application under s127(4) should specify which persons would be affected by the release. It should also indicate whether the administration of justice would be prejudiced by giving any person affected an opportunity to oppose the release, and if so, which person or persons. Any additional information needed to meet the policy set out in this guide should be added.

Section 25(1) applications

RG 103.58 An application under s25(1) should set out:

- (a) the applicant’s client or clients;
- (b) the persons whose records of examination and related books are required (if known);
- (c) the nature of the proceedings which the applicant is carrying on or contemplating;
- (d) a copy of the statement of claim and all other pleadings filed in those proceedings (if the proceedings identified within the request are already in progress) and an indication as to whether the applicant consents to the provision of these documents to other persons as part of the procedural fairness process;
- (e) a copy of any draft statement of claim intended to be filed on commencement of proceedings (if proceedings are being contemplated), and an indication as to whether the applicant consents to the provision of these documents to other persons as part of the procedural fairness process; and
- (f) a statement explaining why the information is relevant to those proceedings, in the opinion of the applicant.

Costs

RG 103.59 If ASIC releases documents or transcript to a person, it will normally charge the person an amount to recoup its costs (including transcription, time and copying expenses).