



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 4

Intervention

Chapter 9 — Miscellaneous

Issued 3/6/1991

From 5 July 2007, this document may be referred to as Regulatory Guide 4 (RG 4) or Policy Statement 4 (PS 4). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 4.1) or their policy statement number (e.g. PS 4.1).

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Introduction

RG 4.1 Under s1330 of the Corporations Law (Law), the ASC is entitled to intervene in any proceedings relating to a matter arising under the Law. The ASC has received various requests by parties to civil proceedings, both before the Federal Court and State Supreme Courts, that it intervene and it was thought appropriate that the ASC publish its policy in relation to intervention. This policy is for the assistance of litigants and their advisers, but will be reviewed on a case by case basis subject to the merits of any particular application.

Policy considerations

RG 4.2 In many civil proceedings matters may arise which “relate to” a matter arising out of the Law. The term “relating to” in s1330(1) will be construed broadly. Proceedings may be purely commercial in nature, but may give rise to questions of law, including as to the construction of the Law, which make the proceedings those “relating to a matter arising” under the Law. The ASC may consider that the matter is of sufficient importance that it should intervene.

RG 4.3 The ASC will be reluctant to intervene in proceedings of a pure commercial nature, where the various parties of those proceedings are well able properly to make submissions on all relevant facts to the court. However, the ASC will consider intervention in the following circumstances:

(a) *Matter of national significance*

Certain cases will raise issues which affect the integrity of the financial markets or are of such financial or commercial significance that the ASC would wish to make submissions.

For example: The ASC has indicated that it will intervene in proceedings between the liquidator of The Duke Group Ltd, as plaintiff, and Ernst & Young, as defendant, because those proceedings concern the role of an independent expert providing a report to shareholders in the context of a takeover offer. The ASC is concerned that the role of the expert, which is fundamental to various provisions of the Law, should be clearly defined and would make submissions to the court in relation to these matters.

(b) *Construction of the Corporations Law*

As a regulator responsible for enforcement of the Corporations Law, the ASC believes that it is important that judicial interpretation of the Law occurs consistently and with the benefit of submissions from the ASC, when the ASC can make pertinent and useful submissions. Where matters in issue will be determined by interpretation of a provision of the Law, in respect of which it is contended there is an ambiguity, the ASC will often wish to make submissions as to its interpretation of that provision.

(c) *Knowledge acquired through investigations*

In certain cases, the ASC will have information which could assist the court which is acquired through its investigative procedures. This information may include information acquired through

examination of witnesses, under s21 of the Australian Securities Commission Act (ASC Act), through its review of documents acquired by the ASC in exercise of its powers, or through the assistance of foreign regulators. Much of this information may be confidential and the ASC may elect only to disclose this information to the court through formal intervention. Whenever the ASC holds information which is relevant to the determination of an issue before the court, by reason of its own investigations, it will seek to ensure that the court is informed of those matters.

(d) *Protection of minorities*

Under s50 of the ASC Act the ASC may cause proceedings to be carried on in the name of a company, or any other person with that person's consent, where it appears to the Commission to be in the public interest for those proceedings to be brought as a result of an investigation or examination under that Act. If civil proceedings to which the ASC is not a party concern matters, by reason of which the ASC would otherwise cause proceedings to be commenced under s50, and the court would in the usual circumstances order joinder of those two sets of proceedings, the ASC will seek to intervene and exercise its powers pursuant to s50 as a party to the first proceedings. In this manner, the ASC can ensure, to the extent practicable, that the court makes orders for the benefit of all parties who should properly be joined in the proceedings.

RG 4.4 The ASC believes that the private plaintiff is best able to assess the costs and benefits of litigation. The ASC is reluctant to undertake civil proceedings, where there is a potential plaintiff with sufficient funds to bring those proceedings, but is not prepared to do so. However, where the ASC is satisfied that civil proceedings which may be justified by reason of a contravention of the Corporations Law cannot be brought, because of the financial circumstances of a potential plaintiff, the ASC will consider an application for assistance. The ASC may be prepared to undertake a greater role in ensuring the prosecution of those proceedings if it appears to be in the public interest for the proceedings to be brought.

For example: If the ASC was satisfied that the affairs of a corporation were being conducted in a manner oppressive to minority shareholders, and those minority shareholders had insufficient resources to bring appropriate proceedings, the ASC may consider a request for intervention under s1330 of the Law.

Principles on which intervention will occur

RG 4.5 The ASC does not regard intervention as a method by which it may subsidise litigation brought by a private party. The ASC will not agree to bear the cost of any party to civil proceedings. Rather, the ASC will exercise its right of intervention on the following basis:

- (a) The ASC will bear its own costs in relation to intervention and to the extent that certain costs can be shared with some other party where the ASC sees a community of interest (eg experts' fees, consultants' reports etc) and the ASC may consider a request for a cost sharing arrangement.
- (b) The ASC will appear through its own staff member or legal adviser and will not agree to be represented as an intervening party by any other party to the proceedings.
- (c) Where the ASC supports submissions being made by another party to the proceedings, the ASC will, to the extent permitted by s127 of the ASC Act, agree to exchange information with that other party. However, any information which the ASC provides to another party to the proceedings will be on a confidential basis and subject to the agreement of the other party that the ASC will exercise an overriding discretion as to whether that information is put before the court by the ASC as an intervening party.
- (d) Where the ASC has conducted examinations, in relation to matters arising in the proceedings, the ASC will consider favourably a request to provide to other parties to the proceedings a copy of the record of examination and all related "books" (as defined by the ASC Act) pursuant to s25 of that Act. The ASC believes that, notwithstanding intervention, it is entitled to continue an investigation conducted under Pt 3 of the ASC Act. However, the ASC will generally prefer to intervene in any civil proceedings only after it has completed an investigation, in order that it can put before the court all relevant information disclosed by reason of that investigation.

Submission requesting intervention

RG 4.6 The ASC will assess any request for intervention, on the basis of a written request by the party to the proceedings or its solicitors, containing the following information:

- (a) a copy of all pleadings filed in the proceedings;

- (b) legal advice (whether by the solicitors or counsel) concerning the likelihood of succeeding in those proceedings and identifying, to the extent practicable, matters where submissions by the ASC could assist; and
- (c) a summary of the matters which would recommend ASC intervention, conforming to the policies stated above.

RG 4.7 Any request for intervention should be sent to the Regional General Counsel in the jurisdiction in which the proceedings are to be brought. Where intervention is sought on the basis of the significance of the proceedings, the Regional Office will liaise with the Office of the Chairman. It is unnecessary and inappropriate for any submission to be made directly to the Office of the Chairman.

Attraction of federal jurisdiction

RG 4.8 The ASC regards itself as an instrumentality of the Crown in right of the Commonwealth. Accordingly, when the ASC intervenes in civil proceedings, a party suing on behalf of the Commonwealth will be a party to those proceedings and the original jurisdiction of the High Court of Australia under s75 of the Constitution is thereby invoked. Accordingly, where a matter under the Corporations Law is being heard before a State Supreme Court, the jurisdictional basis will alter from that of State jurisdiction to Federal jurisdiction from the time the ASC intervenes.