



**ASIC**

Australian Securities & Investments Commission

REGULATORY GUIDE 73

# **Continuous disclosure obligations: infringement notices**

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**Important note:** This guide is based on the CLERP 9 Bill as introduced into Parliament on 4 December 2003. It refers to proposed amendments to the Corporations Act set out in the CLERP 9 Bill. Details of the infringement notice remedy depend on the timing of the CLERP 9 Bill's progress through Parliament and whether amendments are made to it during the legislative process. ASIC will amend this guide if the infringement notice provisions of the CLERP 9 Bill are changed before enactment.

## What this guide is about

**1** The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (the CLERP 9 Bill) strengthens the existing legislative regime, particularly the audit regulation and general corporate governance framework. The CLERP 9 Bill also introduces a new remedy in the form of an infringement notice for breaches of the continuous disclosure obligations set out in s674(2) and s675(2) of the *Corporations Act 2001* (the Corporations Act). The Government has announced it intends the new legislation to come into force (subject to any particular transitional arrangements) on 1 July 2004.

**2** This guide has been written for anyone who is potentially subject to continuous disclosure obligations, including listed and unlisted disclosing entities. Our aim is to tell interested parties about:

- (a) our general approach to the infringement notice remedy (see **Section A**); and
- (b) the stages in the infringement notice process (see **Section B**).

**3** We may revise this guide after the remedy has been in operation to reflect any changes we feel are necessary for the effective administration of the remedy.

## **A An overview**

**4** The CLERP 9 Bill aims to improve ASIC's ability to administer Ch 6CA of the Corporations Act by introducing, in what will be Pt 9.4AA, a new remedy to address breaches of the continuous disclosure obligations. As the underlying obligations to disclose material information have not changed, these obligations should be familiar to disclosing entities. The new remedy is intended only to be used for less serious breaches of the obligations.

### **Our overall approach**

**5** ASIC's key role in administering Ch 6CA is to ensure that listed and unlisted disclosing entities disclose material information on a timely basis and comply with any relevant listing rules. Our approach is based on the principle that the continuous disclosure obligations are fundamental to maintaining the integrity of the market by ensuring transparency and equal access to information.

### **Why the need for an additional remedy?**

**6** We have been given an additional remedy to address less serious breaches of the continuous disclosure obligations, which fills a gap in the current enforcement framework. Infringement notices are designed to provide a fast and effective remedy so that redress is proportionate and proximate in time to the alleged breach. The matter will be dealt with in a timely and efficient way, while still providing significant protection to the disclosing entity.

## B The infringement notice process

7 The process for issuing infringement notices for breaches of s674(2) or s675(2) of the Corporations Act consists of the ten stages listed in Table 1. We will generally aim to complete stages 1–6 within three months.

**Table 1: The 10 stages of the infringement notice process**

Stage	Description
1. Investigation of alleged breach	If a possible breach of the continuous disclosure obligations has been identified we may conduct an investigation using our compulsory powers. In the course of the investigation we will decide whether use of the infringement notice remedy is appropriate: see paragraphs 8–11.
2. An ASIC delegate is briefed	If we consider that the issue of an infringement notice may be an appropriate remedy, an ASIC delegate is briefed on the matter to determine if there has been a breach. The delegate will not have been involved in the investigation of the suspected breach, and will look at the matter for the first time when receiving the brief: see paragraph 12.
3. The ASIC delegate examines the matter	The delegate examines the matter and forms a belief as to whether or not there may have been a breach. In forming that belief, the delegate must have regard to the views of the relevant market operator: see paragraph 13.
4. A hearing notice is issued	If the delegate believes there has been a breach, a written statement (the hearing notice) will be issued to the disclosing entity. The notice will set out the reasons for believing there has been a breach: see paragraphs 14–15.
5. The hearing is conducted	The delegate will hold a hearing to determine whether to issue an infringement notice (in the hearing the disclosing entity may give evidence and make submissions): see paragraphs 16–22.
6. An infringement notice may be issued	The delegate takes all submissions and evidence into account and may decide to issue an infringement notice if there are reasonable grounds to believe there has been a breach: see paragraphs 23–27.
7. The infringement notice is served	The infringement notice is served on the disclosing entity, with a compliance period of 28 days: see paragraphs 28–30.

Stage	Description
8. The disclosing entity responds to the notice	The disclosing entity may comply with the notice <i>or</i> seek an extension of time to comply <i>or</i> seek to have the notice withdrawn <i>or</i> choose not to comply with the notice: see paragraphs 31–32.
9. Action following response to the notice	If the infringement notice is complied with, we cannot begin proceedings against the entity. If the notice is not complied with, we may commence civil proceedings against the entity under Pt 9.4B and/or s1324B of the Corporations Act. If the notice is withdrawn, ASIC is not restricted in the action it may take against the entity: see paragraphs 33–39.
10. Publication by ASIC	If the infringement notice is complied with, we will publish details of the notice. If we begin proceedings against the entity following withdrawal of, or failure to comply with, a notice we will publish that fact: see paragraphs 40–42.

## Stage 1: Investigation of alleged breach

**8** We have a number of mechanisms for identifying and receiving information about possible failures by entities to comply with the continuous disclosure obligations. When we identify or receive such information, we conduct an initial analysis to determine if the matter needs to be investigated. We may use our compulsory powers to obtain relevant documents and examine people who may be able to provide relevant information.

**9** In the course of our investigation we will decide whether use of the infringement notice remedy may be appropriate. We will consider all of the relevant facts and circumstances of the matter and we will generally have regard to:

- (a) the seriousness of the alleged breach; and
- (b) the view of the relevant market operator.

**10** In determining the seriousness of an alleged breach, ASIC will have regard to a number of different factors depending on the circumstances of the matter. The impact of the alleged breach on the market for the entity's securities may be a relevant consideration (including, for example, any change in price of the securities and/or the number of securities traded during the period of the alleged breach). ASIC may also have regard to the materiality of the information the subject of the alleged breach, such as whether the information went to the heart of the entity's continued operations. The factual circumstances giving rise to the alleged breach

(such as whether the conduct giving rise to the alleged breach was negligent, reckless or deliberate) will be considered by ASIC in determining its seriousness. The adequacy of the entity's internal controls, and whether they were complied with, may be a relevant consideration. The conduct of the entity before the alleged breach (including whether the entity sought and followed professional advice in relation to disclosure) and after the alleged breach (for example whether the entity took immediate steps to correct the failed disclosure) will be considered by ASIC in most cases.

**11** We must consult with the relevant market operator before issuing a notice of hearing to a listed disclosing entity for an alleged breach of s674(2) or s675(2) of the Corporations Act, although we are not bound by the opinion of the market operator.

## **Stage 2: An ASIC delegate is briefed**

**12** If we consider, as a result of our investigation, that an infringement notice may be an appropriate remedy, we will provide a brief to an ASIC delegate for their consideration. The brief will consist of all the material that the investigation team believes is relevant to establishing the suspected breach. The delegate will not have been involved in ASIC's investigation of the suspected offence, and will look at the matter for the first time when receiving the brief.

## **Stage 3: The ASIC delegate examines the matter**

**13** The delegate considers the brief provided by the investigation team and forms a belief as to whether or not the disclosing entity has contravened s674(2) or s675(2) of the Corporations Act. In forming the belief the delegate will consider the view of the relevant market operator.

## **Stage 4: A hearing notice is issued**

**14** If the delegate believes that the disclosing entity has breached s674(2) or s675(2) of the Corporations Act, the entity must be notified in writing of the basis for issuing the infringement notice. The delegate provides a written statement (the hearing notice) that sets out the reasons for their belief that there has been a breach. The hearing notice will include:

- (a) the sections of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) or Corporations Act under which the hearing is being conducted;
- (b) the purpose of the hearing;
- (c) the issues of concern (i.e. why the delegate believes that the entity has breached s674(2) or s675(2));

- (d) details of the disclosing entity's opportunity to appear at a private hearing before the delegate, and give evidence to the delegate and make submissions;
- (e) the date, time and place of the hearing, and how long the delegate estimates it will take (21 days is considered adequate time to prepare for the hearing);
- (f) that, if a representative of the disclosing entity does not want to appear, the entity may make a written submission that will be taken into account;
- (g) what happens if the disclosing entity does not respond to the notice (i.e. the delegate will make a decision on the basis of the information available); and
- (h) a copy of ASIC's information sheet *Administrative Hearings*, which provides an outline of how we conduct our administrative hearings, and how to obtain a more detailed copy of ASIC's *Hearings Procedures Manual*.

15 We will keep the fact of the hearing notice confidential.

## **Stage 5: The hearing is conducted**

16 An ASIC delegate must hold a hearing to determine whether to issue an infringement notice (at the hearing a representative of the entity is permitted to give evidence and make submissions). The hearing will be run as closely as possible in accordance with ASIC's *Hearings Practice Manual*. There will only be departures from the Manual where it is necessary for the hearing to proceed promptly and fairly. Where relevant, Div 6 of Pt 3 of the ASIC Act applies to the hearing process: see s51 and s54–62. Further information about how we administer these provisions and the ASIC delegate's responsibilities when conducting hearings are set out in the Manual. There are a number of important points to note about the hearing process.

### **There is no obligation to appear**

17 Although the Act requires the delegate to issue an invitation to appear at the hearing, the entity is not obliged to appear. An entity may simply provide written submissions to the delegate, or it may decline to appear or take part in the process in any way. In the latter case the delegate will still make a decision.

### **A right to representation**

18 The entity has a right to legal representation. Other people, such as a corporate officer, may also appear as a representative. The delegate has the discretion to allow people other than the representative of the entity to appear at the hearing.



### **The hearing is fact-finding, not adversarial**

**19** In accordance with our *Hearings Practice Manual*, the hearing is a fact-finding one. It is not an adversarial exercise, such as in a court. Hearings are conducted informally and as expeditiously as possible.

### **Rules of evidence do not apply**

**20** The rules of evidence and the usual court rules of procedure and practice do not apply to ASIC hearings: see s59(2)(a) of the ASIC Act. A delegate will base their decision on material that is relevant, credible and logically proves the facts.

### **Procedural fairness**

**21** We are obliged by the rules of procedural fairness to ensure that an entity appearing before us at a hearing has an opportunity to put its submissions. We consider that, as a matter of general principle, it will not be necessary to call witnesses. In most instances a written statement will be adequate.

### **Expert witnesses**

**22** We may rely on the written report of an independent expert witness to establish some elements of the breach. The ASIC delegate may ask the expert to be present to assist at the hearing.

## **Stage 6: An infringement notice may be issued**

**23** After a hearing has taken place, or a delegate has received written submissions, or been notified that the entity does not wish to participate in a hearing, the delegate is required to take all submissions and evidence into account and make a decision. For a listed entity, the delegate must also consider any guidelines issued by the relevant market operator that relate to the listing rules referred to in s674(1) of the Corporations Act, although the delegate is not bound by these.

**24** If the delegate has reasonable grounds to believe that a disclosing entity has breached s674(2) or s675(2), they may issue an infringement notice. (The fact that the delegate issued the hearing notice does not mean that they are biased in their determination of whether to issue the infringement notice: see *McLachlan v ASIC* (1999) 85 FCR 286.)

**25** The issue of an infringement notice, and subsequent satisfaction of it, is not an admission of liability, nor does it represent a finding that the Corporations Act has been breached. It simply signals our view of the alleged conduct and provides a manner in which the issue may be dealt with, without engaging in lengthy and expensive court proceedings.

**26** The infringement notice will set out what is required for compliance. It will include details (as required by s1317DAE), such as:

- (a) the day on which it was issued;
- (b) that it is issued by ASIC;
- (c) a description of the alleged breach, including the date of the alleged breach, and the provision that was breached;
- (d) a statement that if the entity complies with the infringement notice, we may publish details of the disclosing entity's compliance with the infringement notice in accordance with s1317DAJ;
- (e) the amount of the penalty—this will be \$33,000, \$66,000 or \$100,000, depending on the circumstances and whether there has been a previous breach of s674(2) or s675(2) (The levels of penalty that are to be imposed are set out in s1317DAE(2)–(7). We have no discretion as to the amount of the penalty);
- (f) the maximum pecuniary penalty that a court could impose under Pt 9.4B of the Corporations Act (civil penalty provisions) for the alleged breach (this is increased to a maximum of \$1 million by the CLERP 9 Bill);
- (g) an explanation that under s1317DAF, the compliance period is 28 days beginning on the day after the notice is issued, and that the period may be extended once by ASIC if appropriate (s1317DAH sets out certain requirements for the extension);
- (h) an explanation of the effect of s1317DAF, which provides protection from certain other proceedings during the compliance period (if the notice has not been withdrawn) and after the notice is complied with;
- (i) an explanation of the effect of s1317DAG, which sets out the effects of a failure to comply with an infringement notice that is not withdrawn (although certain proceedings are not available, a civil penalty action by ASIC is available); and
- (j) a statement that the entity may make written representations to ASIC seeking the withdrawal of the infringement notice, in accordance with s1317DAI.

**27** We will generally aim to issue an infringement notice within 3 months of identifying the alleged breach. We will not make the fact of the issue of the infringement notice public.

## **Stage 7: The infringement notice is served**

**28** The infringement notice is served on the disclosing entity by leaving it at, or posting it to, the entity's registered office, or delivering a copy personally to a director residing in Australia.

**29** The compliance period for an infringement notice is 28 days beginning on the day after the notice was issued, unless it is extended by ASIC, in which case the extension must not be for longer than 28 days.

**30** During the compliance period, provided the infringement notice is not withdrawn, the proceedings that we may begin or continue against the entity are limited. We cannot begin proceedings for the alleged breach specified in the infringement notice or for an offence constituted by that conduct. However, some proceedings may be commenced or continued against the entity by third parties: see s1317DAF(6) of the Corporations Act. The most significant of these are referred to in paragraph 34 below.

## **Stage 8: The disclosing entity responds to the notice**

**31** The disclosing entity has several options when it receives the infringement notice. It may:

- (a) satisfy the infringement notice within the compliance period by paying the specified penalty and disclosing to the market or lodging a document about any specific information referred to in the notice;
- (b) seek an extension for the compliance period (see s1317DAH);
- (c) make written representations to ASIC seeking the withdrawal of the notice (see s1317DAI); or
- (d) decline to satisfy the infringement notice within the compliance period.

**32** Decisions to issue and withdraw infringement notices are excluded from review by the Administrative Appeals Tribunal (AAT). The AAT merits review does not apply because there is no obligation on an entity to comply with the notice.

## **Stage 9: Action following response to the notice**

### **Effect of compliance with an infringement notice**

**33** Generally compliance with the infringement notice will conclude the action ASIC will take on a matter. If the infringement notice is satisfied, we cannot take civil or criminal proceedings against the entity for the alleged breach specified in the infringement notice. Compliance

with the infringement notice does not, however, preclude ASIC from taking civil penalty proceedings under s674(2A) or s675(2A) of the Corporations Act against people involved in the alleged breach.

**34** Compliance with the infringement notice does not affect the right of third parties, who have been adversely affected by the entity's conduct, to bring certain proceedings against the entity in relation to the alleged breach. Proceedings that individuals may take against the entity are set out in s1317DAF(6) of the Corporations Act. They include proceedings brought under s1317HA, s1101B and s793C of the Corporations Act.

### **Effect of failure to comply with an infringement notice**

**35** If an entity does not comply with the infringement notice, we cannot enforce the notice. However, if the notice is not withdrawn, we may take the following action against the entity:

- (a) We may begin civil penalty proceedings against the entity under Pt 9.4B of the Corporations Act seeking a declaration that the entity breached the provision specified in the infringement notice and a pecuniary penalty order. The size of the pecuniary penalty is not limited to the amount specified in the infringement notice and we may ask the Court to impose a penalty of up to \$1 million.
- (b) We may (if applicable) begin proceedings under s1324B of the Corporations Act seeking an order that specified information be disclosed in the manner required by the infringement notice.
- (c) Where a Court has made any of the orders set out in paragraphs 35(a) and (b) above, we can make an order under s91 of the ASIC Act for recovery of expenses of our investigation into the breach specified in the infringement notice. We can also bring proceedings to enforce that order.
- (d) We can make a determination under s708A(2), s713(6), s1012DA(2) or s1013FA(3) of the Corporations Act, accept an enforceable undertaking under s93AA of the ASIC Act and bring proceedings to enforce the undertaking.

**36** We cannot, otherwise, begin or continue any proceedings against the disclosing entity for the alleged breach specified in the infringement notice.

**37** Failure to comply with the infringement notice does not affect the right of third parties to bring proceedings against the entity for the alleged breach. Proceedings that individuals may take against the entity are set out in s1317DAG(4) of the Corporations Act.

### **Withdrawal of an infringement notice**

**38** The entity may seek the withdrawal of the infringement notice by making a written request to ASIC. We may withdraw the infringement notice (whether or not the entity has sought its withdrawal) if the infringement notice has not been satisfied. We will advise the entity in writing if the notice is withdrawn. If a notice is withdrawn, we are not restricted in the action we may take against the disclosing entity for the alleged breach. We may consider criminal proceedings against the entity.

### **Limit on use of information given to ASIC**

**39** If we begin proceedings after withdrawal of, or failure to comply with, an infringement notice, any evidence or information given to us by a representative of the entity at a private hearing under s1317DAD, or in the course of making written representations to ASIC seeking the withdrawal of the notice, is not admissible in evidence against:

- (a) the entity in any proceedings; or
- (b) the representative of the entity in any proceedings (other than proceedings for an offence based on the evidence or information given being false or misleading).

## **Stage 10: Publication by ASIC**

### **Publication of compliance with an infringement notice**

**40** If the disclosing entity complies with an infringement notice we will publish details of the notice. Publication is limited to one or both of the following:

- (a) publishing a copy of the infringement notice in the *Gazette* together with statements that:
  - (i) the disclosing entity has complied with the infringement notice;
  - (ii) compliance with a notice is not an admission of guilt or liability; and
  - (iii) the disclosing entity is not regarded as having breached the provision specified in the notice; and/or
- (b) issuing a statement (whether written or oral) about the disclosing entity's compliance with the infringement notice, where the statement is limited to an accurate summary of the infringement notice including:
  - (i) the name of the entity;
  - (ii) the amount of the penalty payable;

- (iii) the conduct specified in the notice for which the infringement notice was issued;
- (iv) a statement that the disclosing entity has complied with the infringement notice;
- (v) a statement that compliance with the notice is not an admission of guilt or liability; and
- (vi) a statement that the disclosing entity is not regarded as having breached the provision specified in the notice.

**41** We are restricted from otherwise publishing details of an infringement notice or a disclosing entity's compliance with an infringement notice. This does not prevent us from publishing information on an aggregate and anonymous basis, including for example the number of infringement notices issued and the number resulting in fines or civil penalty proceedings in a given period.

#### **Publication of commencement of proceedings**

**42** If we begin proceedings against the entity following withdrawal of, or failure to comply with, an infringement notice we will publish the fact of commencement of the proceedings and details of the outcome of the proceedings in a media release.

## Key terms

In this guide, terms have the following meaning:

**ASIC** Australian Securities and Investments Commission.

**ASIC Act** The *Australian Securities and Investments Commission Act 2001* (Cth).

**Ch 6C** (for example) A chapter of the Corporations Act (in this example, numbered 6C).

**CLERP 9 Bill** The Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003, as introduced into the House of Representatives on 4 December 2003.

**Corporations Act** The *Corporations Act 2001* (Cth).

**disclosing entity** or **entity** The meaning given by s9 of the Corporations Act.

**hearing** The meaning given by s5 of the ASIC Act.

**hearing notice** A written notice issued under s1317DAD(1) of the Corporations Act.

**infringement notice** An infringement notice issued under s1317DAC of the Corporations Act.

**Manual** The ASIC *Hearings Practice Manual*.

**s311** (for example) A section of the Corporations Act (in this example, numbered 311).