



**ASIC**

Australian Securities & Investments Commission

## INFORMATION SHEET 152

### Public comment

This information sheet explains:

- when ASIC may comment publicly on investigations and enforcement actions, and
- who are our authorised spokespersons.

### When ASIC may comment publicly

#### Limitations on informing the public of our activities

ASIC is Australia's corporate, markets and financial services regulator. We strive to ensure that there are confident and informed financial consumers who can participate in fair and efficient markets while being supported by efficient registration and licensing.

We are accountable to Parliament and the public for our investigations and the enforcement actions arising from our investigations.

Informing the public of our activities is important as it:

- promotes public confidence in ASIC's administration of the law—that is, there is transparency around what we are doing about people who break the law, and
- promotes compliance with the law by informing the public about the standards we expect and the consequences of failing to meet these standards.

Notwithstanding the importance of informing the public of our activities, we cannot always do so. Importantly, if a matter is still in the investigation stage and an enforcement action has not commenced, it is generally accepted that a regulator such as ASIC must balance the public interest benefits of making a statement against the rights of the individual subject to the investigation. For example, the International Organization of Securities Commissions (IOSCO) principles note that:

Any publication of a report must be consistent with the rights of an individual to a fair hearing and the protection of personal data, factors that will often preclude publicity where a matter is still the subject of an investigation.<sup>1</sup>

<sup>1</sup> IOSCO, Objectives and Principles of Securities Regulation (2003), page 11.

Specific factors that limit our ability to comment about investigations include:

- legislative restrictions (certain material cannot be disclosed under the *Australian Securities and Investment Commission Act 2001* (ASIC Act))
- the need to safeguard confidential or sensitive information (such as confidential information that may affect the price or the market for that product)
- the potential to jeopardise investigations through the untimely release of information
- privacy legislation and guidelines
- ensuring a person's right to a fair trial is not prejudiced
- the risk of defamation or other legal proceedings against complainants, ASIC officers or other entities
- compliance with court orders not to disclose information in certain circumstances, and
- the need to use our resources efficiently. ASIC must allocate resources across a wide range of priorities and responsibilities.

### **Comment on investigations**

We may make a statement about an investigation when it is in the public interest to do so. There are a range of factors that we take into account when considering if making a statement about an investigation is in the public interest. Most importantly we will consider whether making a statement would promote confidence in the integrity of the market, or facilitate the protection of consumers and investors in relation to the financial system. For example, there may be circumstances where making a statement could prevent widespread misconduct, or allay public concern about a matter having a significant negative impact on the operation of the market.

When considering whether to make a statement we will weigh up any potential public benefits of it against the potential prejudice that we believe may be caused to any individuals who are, or who are likely to be, a subject of the investigation. Where the risk of damage to an individual from the publicising of an investigation is high, that will often result in a decision not to confirm or deny that we are investigating a matter until further facts about the alleged misconduct can be gathered, analysed and tested.

Where it is appropriate to comment on an investigation, it should be remembered that the simple fact of an investigation does not mean that a person will necessarily be the subject of any legal or other proceedings. No adverse inference should be drawn from an investigation involving that person.

Where we do confirm the existence of an investigation we will generally make no further comment until the investigation is concluded. However, we may provide updates on the progress of the investigation if it is in the public interest to do so. In determining whether updates are in the public interest we will have regard to the principles set out in this paper.

In some circumstances third parties may suggest that we are investigating a matter. We will only verify these comments if it is in the public interest to do so. In determining this we will have regard to the principles set out in this information sheet.

If we conclude an investigation without taking enforcement action, we will tell that to people previously identified as a person of interest, if possible. This notification is not, however, a guarantee that we will not take action in the future. We will also generally advise any person who reported the alleged misconduct of this result.

## Comment on enforcement actions<sup>2</sup>

We will normally only comment on action we are taking against an individual when the enforcement action has begun—that is:

- no earlier than the time of arrest, or of the first court appearance where no arrest is made
- when the civil proceeding has begun, or
- when the administrative proceeding, which involves a public hearing, has begun.

However, we may comment before the first court appearance where the accused is outside Australia with no real prospect of imminent return at the time charges are laid.

## Comment on matters with Commonwealth Director of Public Prosecutions (CDPP)

Generally, we will not comment on whether a matter is referred to the CDPP prior to a prosecution being commenced.

We may confirm that an investigation is concluded and the appropriate enforcement action (if any) is being considered where:

- we have previously confirmed the existence of an investigation
- the matter is with the CDPP for consideration, and
- there is a public interest in making such a statement.

## Media releases and media advisories

We will generally issue a media release or media advisory:

- at the time of a person's arrest, or of the first court appearance on the charges commenced by summons
- when significant civil actions and administrative actions that involve public hearings commence, and
- when we refer a case to the Takeovers Panel.

We will not generally publicise matters which are the subject of private hearings, such as Companies Auditors and Liquidators Disciplinary Board (CALDB) references, when they commence.

Where we have publicised the laying of charges, we will generally publicise the outcome, including withdrawal of charges, acquittal or successful prosecution. If a matter is appealed, we will ordinarily publicise the outcome of the appeal. This may occur by an editorial note to original media release.

In the same way, where we are a party to civil litigation, we will issue a media release on the outcome of that litigation.

We will generally issue a media release or media advisory on the outcome of administrative proceedings, including merits reviews by the Administrative Appeals Tribunal. In these cases, the media release or media advisory will include the name of the person against whom the proceeding was taken and the outcome.

We will issue the media release or media advisory even where the person has a right to appeal against or otherwise seek review of the decision. This is because there is a significant public interest in ensuring that consumers are aware of and informed about action taken by us. A

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<sup>2</sup> In this information sheet, 'enforcement actions' includes prosecutions, civil actions and administrative actions.

relevant court or tribunal will have jurisdiction to suppress a decision pending the outcome of an appeal or review. We will normally oppose applications for orders to this effect.<sup>3</sup>

Media releases or media advisories following licensing and banning decisions will not be issued until we have gazetted the decision or updated the relevant register in accordance with the time frames specified in Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98) at RG 98.56–RG 98.58 and Regulatory Guide 218 *Licensing: Administrative action against persons engaging in credit activities* (RG 218) at RG 218.63–RG 218.65.

Given statutory restrictions, media releases or media advisories following the issue of an infringement notice by the Markets Disciplinary Panel will not be issued until at least 28 days after the notice is given: see reg 7.2A.15(1) of the Corporations Regulations 2001 (Corporations Regulations).

We will always assert the right to make an enforcement outcome public, unless legal considerations require otherwise. We will not agree to keep enforcement outcomes secret. This is important for regulatory transparency and effective deterrence.

We may, at our discretion, give advance notice of a public statement about an enforcement outcome to an interested party. However, we will not provide any draft public statement before an enforcement outcome is reached (e.g. the terms of a settlement being agreed).

## Who are our authorised spokespersons

Our authorised spokespersons for investigations and enforcement actions are listed below.

Circumstance	ASIC spokesperson
All matters	Members of the Commission Senior Executive Leader, Corporate Affairs Senior Executive Specialist, Corporate Affairs ASIC Media Unit
Matters relevant to their responsibilities	Senior Executive Leaders
Matters relevant to their region	Regional Commissioners

## Where can I get more information?

- Email [media.unit@asic.gov.au](mailto:media.unit@asic.gov.au).
- Contact ASIC on 1300 300 630.

## Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. Omission of any matter in this information sheet will not relieve a company or its officers from any penalty incurred by failing to comply with the statutory obligations of the Corporations Act.

You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.

<sup>3</sup> The Full Court of the Federal Court has confirmed the importance of the public being informed about ASIC's banning decisions even where application for review is pending: *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCFCFA 185.