



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 151

ASIC's approach to enforcement

This information sheet is for:

- people who report misconduct by entities we regulate;
- people asked to assist in ASIC investigations; and
- the general public.

It explains how we approach our enforcement role and why we respond to particular types of breaches of the law in different ways.

Enforcement action is one of several regulatory tools available to us. We use enforcement to deter misconduct. Other regulatory tools that we use are engagement with industry and stakeholders, surveillance, guidance, education, and policy advice. This document only discusses enforcement action.

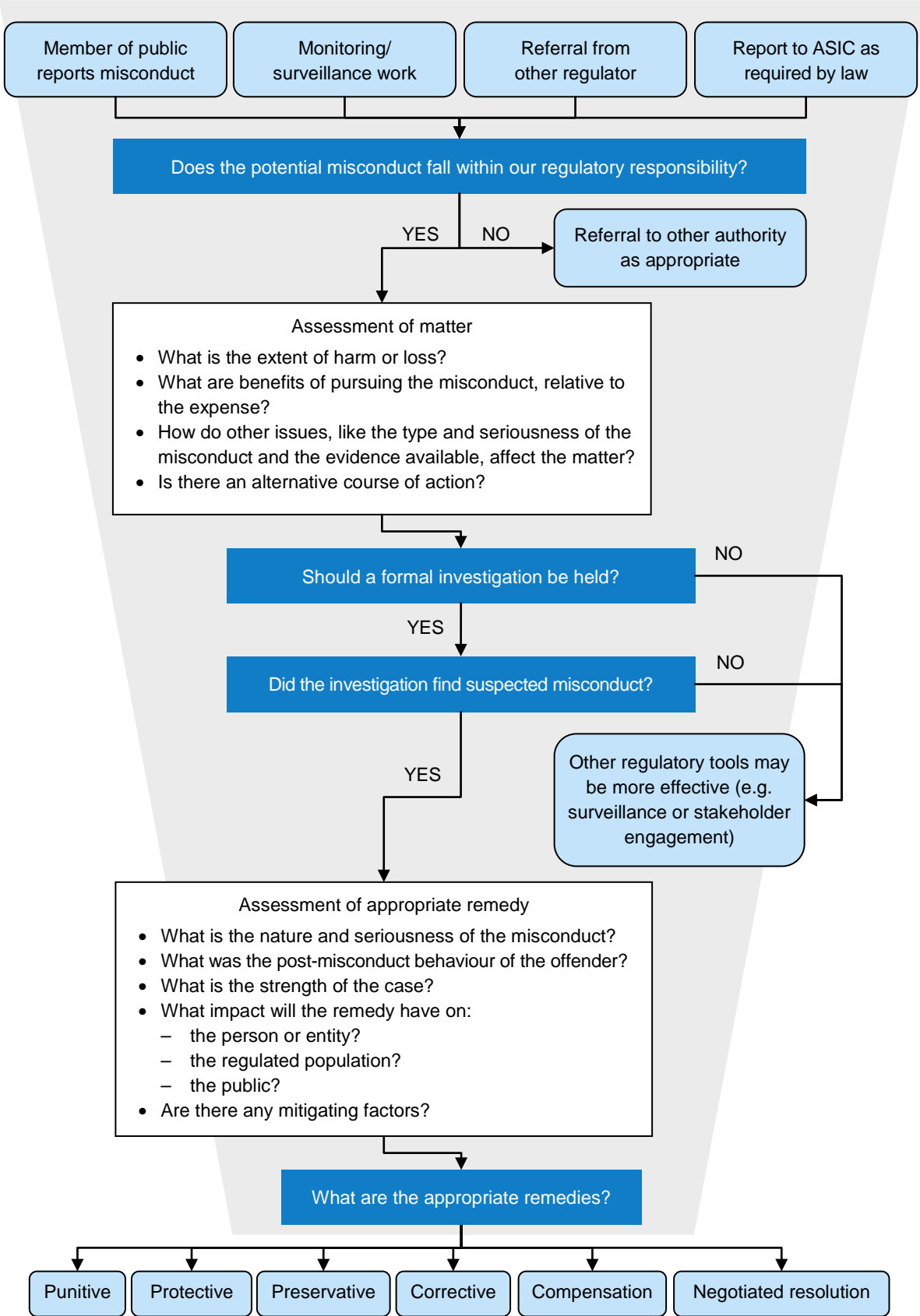
It covers the following topics:

- our regulatory powers;
- how we select matters for formal investigation;
- what enforcement 'tools' are available to ASIC;
- how we decide which enforcement 'tools' to use;
- how we interact with people during investigations and enforcement actions; and
- cooperating with ASIC.

Figure 1 sets out our general approach to taking enforcement action.

Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Figure 1: ASIC's approach to enforcement



Our regulatory powers

Our strategic priorities are to ensure that Australia has:

- confident and informed investors and financial consumers;
- fair and efficient financial markets; and
- efficient registration and licensing.

We regulate corporations, managed investment schemes, participants in the financial services industry and people engaged in credit activities under a number of Commonwealth laws. These laws include the *Corporations Act 2001* (Corporations Act), the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and the *National Consumer Credit Protection Act 2009* (National Credit Act).

The ASIC Act directs ASIC to 'take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it'.

We use our enforcement powers to detect and deal with unlawful conduct, to recover money in appropriate circumstances and sometimes to prevent unlawful conduct before it happens. By doing this we deter future misconduct. We respond to breaches of laws within our regulatory responsibility, ranging from minor regulatory offences through to serious misconduct. Our credibility as an effective regulator, across all our areas of responsibility, depends in part on how well we use our enforcement powers.

How we select matters for formal investigation

Potential breaches of the law are brought to our attention in a number of ways, such as:

- reports of misconduct from members of the public;
- referrals from other regulators;
- statutory reports from auditors, insolvency practitioners and licensees; and
- through our monitoring and surveillance work.

We carefully consider how to respond to all potential breaches of the law, but we do not undertake a formal investigation of every matter that comes to our attention. We consider a range of factors when deciding whether to investigate and possibly take enforcement action, to ensure that we direct our finite resources appropriately.¹

The specific factors we consider will vary according to the circumstances of the case. Our priorities will necessarily evolve and change over time and that influences our enforcement focus. Broadly, however, we consider the following four issues in deciding to take enforcement action.

Strategic significance (e.g. what is the extent of harm or loss?)

Some types of matters may require us to focus on deterrence in preference to other tools to achieve ASIC's strategic priorities, which are outlined above in 'Our regulatory powers'.

¹ A number of ASIC's compulsory information-gathering powers can only be used when we are conducting, or intending to conduct, a formal investigation. We have published a separate information sheet about ASIC's compulsory information-gathering powers: see Information Sheet 145 *ASIC's compulsory information-gathering powers* (INFO 145).

We assess the seriousness of the alleged misconduct and particularly its market impact, which includes its impact on market integrity or the confidence of investors and financial consumers. We also look at the consequences of the misconduct for investors and others—for example, the amount of money lost and the impact of that loss on the people affected. We may consider the impact of a matter on the market is so far-reaching that we must investigate it.

Benefits of pursuing misconduct (e.g. is enforcement cost-effective?)

We look for the regulatory benefits of pursuing misconduct. This means we consider issues such as whether the misconduct is widespread or part of a growing trend, and whether taking enforcement action will send an effective message to the market or whether an alternative course of action is more appropriate.

We are prepared to pursue matters if an important legal obligation could be tested or clarified, and we have the necessary evidence. However, a relevant consideration for us is also the cost and time required to achieve an appropriate remedy through enforcement action.

Issues specific to the case (e.g. what evidence is available?)

These cover a wide variety of factors, which will vary according to circumstances, such as:

- the seriousness of the misconduct (e.g. was it dishonest or deliberate, or did it lead to widespread public harm?);
- the time since the misconduct occurred (e.g. action taken for old misconduct may have a reduced impact on the market);
- whether it was an isolated instance of misconduct or whether it is continuing; and
- whether evidence that is admissible in a court is in our possession or known to be available, to prove our allegation of misconduct.

Alternatives to formal investigation

We are less likely to investigate matters that would be better addressed by another agency or by private dispute resolution between those involved.

In many cases we decide it is more effective to deal with our concerns using other regulatory tools, such as engagement with stakeholders, surveillance, guidance, education, and policy advice, instead of enforcement action. In some cases, we may decide that no further action at all should be taken (e.g. because of a lack of evidence).

What enforcement tools are available

We can pursue a variety of enforcement remedies, depending on the seriousness and consequences of the misconduct. Some remedies involve relatively minor consequences while others will be serious, such as imprisonment and high monetary penalties. We will pursue the enforcement remedies best suited to the circumstances of the case and what we want, and are able, to achieve.

We can take enforcement action designed to punish wrongdoers, protect investors, preserve assets, correct disclosures or compensate people. We can also try to resolve matters through negotiation or issuing infringement notices.

We will always assert the right to make an enforcement outcome public, unless the law requires 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).

Punitive action

We can seek a remedy that punishes a person or entity in response to a wide variety of types of misconduct, from minor regulatory offences (e.g. failure to file a form) through to serious offences involving dishonesty or that have a large impact (e.g. through loss of investor funds or damage to the integrity of our markets).

Examples of punitive actions are:

- prison terms and court orders, such as community service orders; and
- financial penalties, such as financial penalties or fines under criminal law or pecuniary penalties under civil law.

Prison terms and court orders

We pursue substantial criminal remedies for the most serious misconduct—for example, misconduct that has a widespread negative impact on investors or creditors. We will generally consider criminal action for offences involving serious conduct that is dishonest, intentional or highly reckless, even where there is a civil remedy available for the same breach.

The evidence we gather to support a criminal conviction must meet a higher standard than is required in civil matters, because the consequences for the defendant of a criminal conviction are more serious. For example, an individual convicted of a serious criminal offence, such as insolvent trading or breach of the statutory duty of good faith by a company director or officer, could be imprisoned for up to five years. In the case of serious market offences, such as market manipulation or insider trading, the term of imprisonment is up to ten years.

In most cases, if we believe that we have gathered sufficient evidence to support the view that a criminal offence has been committed, we refer the matter to the Commonwealth Director of Public Prosecutions (CDPP). However, we are authorised to prosecute some minor regulatory offences on our own behalf.

If a matter is referred to the CDPP, the CDPP determines whether the evidence is sufficient to commence criminal proceedings and whether prosecution is in the public interest after consulting with us. If criminal proceedings are commenced the case is then prosecuted by the CDPP.

Criminal financial penalties

Many breaches of our laws attract criminal fines. These are ordered by a court and may be relatively small, in response to regulatory offences that disrupt the smooth functioning of the regulatory regime. The lowest maximum penalty is \$850. More serious offences attract significant fines. These cases are heard in superior courts before a jury if contested. For example, dishonest breach of the statutory duty of good faith by a company director or officer is punishable by a fine of up to \$340,000. An individual convicted of a serious market offence such as market manipulation or insider trading can be fined up to \$765,000 or, potentially, three times the value of the benefit obtained by the conduct.

Civil financial penalties

We are also able to pursue civil penalties in court for certain breaches of the law, including as an alternative to prosecution under the criminal law. In a civil penalty proceeding, a lesser standard of proof applies to the evidence. However, the court must be satisfied to a higher degree of some matters in civil penalty cases, because of the greater seriousness of these allegations and the high penalties that apply if the case is proved. There is an extensive

range of penalties available, such as orders of disqualification, compensation or pecuniary penalties. A pecuniary penalty can be up to \$200,000 for individuals.

Protective action

We may pursue a remedy that is primarily designed to protect investors and financial consumers, rather than to punish those involved in breaches of the law. Examples of these remedies are:

- disqualification from managing a corporation or a ban on providing financial services or engaging in credit activities;
- revocation, suspension or variation of conditions of a licence; and
- public warning notices.

These are known as 'administrative' actions. We do not need to go to court for an administrative action.² However, we may also seek a disqualification order from a court as part of court action that we take.

A person who is the subject of an administrative action imposed by ASIC may generally appeal against our decision in the Administrative Appeals Tribunal (AAT). If not satisfied by the AAT's decision, some cases can be further appealed in the Federal Court.

More information about administrative actions that we can take in regulating financial services and credit activity can be found in Regulatory Guide 98 *Licensing: Administrative action against financial services providers* (RG 98) and Regulatory Guide 218 *Administrative action against persons engaging in credit activities* (RG 218).

Preservative action

We can take court action to protect assets (e.g. by preventing assets being moved or used) or to compel someone to comply with the law. An example is an injunction, which is a court order that a person should do (or not do) a particular thing. We can also work with the CDDP or Australian Federal Police to prevent dealings in or confiscate proceeds of crime under the *Proceeds of Crime Act 2002*.

Corrective action

We can seek a court order for corrective disclosure—for example, to correct a misleading or deceptive advertisement or other disclosure.

Compensation action

We have powers under s50 of the ASIC Act to begin a representative action to recover damages or property for persons who have suffered loss. We will ordinarily only take action to recover damages or property on a person's behalf if this would be in the public interest, beyond the interests of the affected consumers. We encourage investors to consider alternative options to recover damages or property from wrongdoers where possible, such as by lodging a dispute with the Financial Ombudsman Service or taking private legal action.

Negotiated resolution

We may also use negotiated alternatives to remedies where these can achieve an effective regulatory outcome—such as an improved compliance program or a better (e.g. quicker) outcome for investors.

² Usually, administrative actions are decided by an ASIC delegate independent of the ASIC officer who recommends the action.

One option is an enforceable undertaking. We may accept an enforceable undertaking as an alternative to court action, other administrative actions or an infringement notice. We may also, in appropriate circumstances, accept an enforceable undertaking to complement other remedies we are seeking.

Enforceable undertakings do not involve a court making a finding against a person, but they may include other beneficial regulatory outcomes, such as providing compensation or outlining a process to monitor a person's continuing compliance with the law.

We have set out how we use enforceable undertakings in Regulatory Guide 100 *Enforceable undertakings* (RG 100).

Infringement notices

Infringement notices are administrative actions administered by ASIC or, with ASIC's authority, the Markets Disciplinary Panel (MDP). There are a number of different infringement notice regimes with differing levels of potential penalty.

Table 1: Types of infringement notice

| For contraventions of: | Features | Issued by |
|--|---|-----------|
| ASIC Act (unconscionable conduct and consumer protection provisions) | These notices are intended to facilitate payment of relatively small financial penalties in relation to relatively minor contraventions. | ASIC |
| National Credit Act | | ASIC |
| Market integrity rules | These notices can impose higher financial penalties, reflecting the potentially greater impact on the market of the conduct involved. They can only be issued after a formal opportunity to present their case is offered to the recipient. Notices for breaches of the market integrity rules can extend to compliance and conduct directions. | MDP |
| Corporations Act (continuous disclosure obligations) | | ASIC |

If an infringement notice is complied with (e.g. the penalty is paid), no further regulatory action can be taken against the recipient for that breach. If the infringement notice is not complied with, ASIC is entitled to bring a civil penalty action against the notice recipient.

More information about administrative remedies available for breaches of market integrity rules and the associated disciplinary framework is set out in Regulatory Guide 216 *Markets Disciplinary Panel* (RG 216). Guidance on infringement notices for breaches of continuous disclosure obligations is set out in Regulatory Guide 73 *Continuous disclosure obligations: Infringement notices* (RG 73).

How we decide which enforcement tools to use

In deciding which enforcement tools to use we consider the circumstances of each case. This may result in our pursuing one or several enforcement remedies, or pursuing a non-enforcement outcome.

What we decide will depend on the facts of each matter and will be heavily influenced by the evidence that is available to establish those facts. We will consider all the relevant facts and circumstances of the matter and, particularly, the seriousness of the alleged contravention. Table 2 sets out some of the factors that we may take into account in determining the appropriate regulatory response.

We will generally consider criminal action for serious conduct that is dishonest, intentional or highly reckless. Alternatively, we can pursue a civil penalty. We have the option of pursuing a civil penalty even where there are elements of criminal conduct, if that is the most appropriate action in the circumstances. For example, we can seek an injunction to stop misconduct in future, obtain a declaration that there has been misconduct (which can help consumers pursue a remedy) or obtain an order to wind up a company.

Table 2: Some factors we may consider in deciding which remedy to pursue

| Factors | Examples |
|--|--|
| Nature and seriousness of the suspected misconduct | <ul style="list-style-type: none"> • Whether there is evidence that the contravention involved dishonesty or was intentional, reckless or negligent • The amount of any benefit and detriment caused as a result of the contravention • The impact of the misconduct on the market, including potential loss of public confidence • The amount of any loss caused to investors and consumers • Whether the conduct is continuing • Whether the misconduct indicates systemic compliance failures • Whether the subject has a poor compliance record (e.g. the subject has previously engaged in the misconduct) |
| Conduct of the person or entity after the alleged contravention | <ul style="list-style-type: none"> • When and how the breach came to the attention of ASIC • The level of cooperation with our investigation • Whether remedial steps have been taken |
| The strength of our case | <ul style="list-style-type: none"> • What evidence is available or is likely to become available, to prove the alleged misconduct • The prospects of the case |
| The expected level of public benefit | <ul style="list-style-type: none"> • Whether the case is likely to clarify the law and help participants in financial markets to better understand their obligations • The length and expense of a contested hearing and the remedies available compared with other remedies that may be available more quickly (e.g. improved compliance under an enforceable undertaking) |

| Factors | Examples |
|---|--|
| <p>Likelihood that:</p> <ul style="list-style-type: none"> • the person's or entity's behaviour will change in response to a particular action • the business community is generally deterred from similar conduct through greater awareness of its consequences | <ul style="list-style-type: none"> • The compliance history of the person or entity • Whether behaviour (of an entity or broader industry) is more likely to change if the person or entity suffers imprisonment or a financial penalty • Whether the compliance of the person or entity will improve if they give ASIC a public enforceable undertaking • Whether the behaviour is systemic or part of a growing industry trend |
| <p>Mitigating factors</p> | <ul style="list-style-type: none"> • Whether the misconduct relates to an isolated complaint and consumers have generally not suffered substantial detriment • Whether the misconduct was inadvertent and the person undertakes to cease or correct the conduct |

How we interact with people in investigations and enforcement actions

Principles governing our approach to persons of interest

We have developed a number of principles to govern our approach to potential defendants (called 'persons of interest') in the course of investigations and enforcement actions:

- In general, we will not advise a person that they are a potential defendant during the investigation.
- A person relevant to ASIC's investigation may be compelled to answer questions at a compulsory examination and can use this opportunity to put forward their version of events. They may have legal representation during these processes.
- Prior to laying criminal charges, we will generally give persons of interest the opportunity to explain their conduct and put forward their version of events. This could happen, for example, by asking them to participate in a voluntary interview (sometimes described as a 'record of interview'). In these formal voluntary interviews, we will administer a caution, warning that any answers the person gives may be used in evidence against them.
- In cases where we have informed persons of interest about the existence of an investigation and that they are a person of interest, we will notify those people, if possible, when the investigation has been terminated.
- When making an administrative decision that directly and materially affects a person, such as a decision to ban a person from providing financial services, we will generally give the person an opportunity to be heard before making the decision.

Our obligations regarding the information we receive

Confidentiality and privacy

We must protect the confidentiality and privacy of information we receive, although members of the public can seek access to information in our possession under the *Freedom of Information Act 1982*.

In some circumstances we may be required to disclose information—for example, a court may require us to produce documents. We may give access to a record of an examination to government departments or other parties who are litigating a matter to which the examination relates. We may also confidentially disclose material to third parties during an investigation if necessary for the investigation.

Legal privileges

In some circumstances, persons interviewed by ASIC are able to claim legal privileges excusing them from disclosing information to ASIC or limiting the use that can be made of information which is required to be provided. The most common legal privileges are:

- the privilege against self-incrimination;
- the privilege against exposure to a penalty; and
- legal professional privilege, protecting communications between a client and their legal adviser from disclosure, if made for the dominant purpose of obtaining legal advice.

An examinee compelled to appear at an interview generally must answer all questions that are relevant to the matter being investigated. This requirement to answer a question overrides any duty of confidentiality and the privilege against self-incrimination and exposure to a penalty. However, if that privilege is effectively claimed when answering a question, then the privilege is maintained, limiting the use we can make of that answer in future proceedings. If a person does not provide relevant information during the investigation but then produces it in the course of civil legal proceedings, they can expect that we will make the court aware that this information was not provided to us during the investigation.

Voluntary interviews

Where a voluntary interview has been conducted, a record of that interview (e.g. a tape or video recording or a transcript of such a recording) may, if it complies with requirements of the law, be admitted into evidence.

Your rights when dealing with ASIC

A person of interest may have a right to complain to the Commonwealth Ombudsman or to seek other independent review of our decisions.

For further information about your rights in dealing with ASIC, see our information sheets *ASIC decisions—your rights* (INFO 9) and *Guidelines for managing allegations of misconduct against ASIC officers* (INFO 107).

Cooperating with ASIC

A cooperative approach to dealings with ASIC may benefit a person of interest in many ways. Early notification of a breach or a cooperative approach to an investigation will often be relevant to ASIC's consideration of which remedy or combination of remedies should be pursued. However, as the CDPP conducts most criminal prosecutions investigated by ASIC, it is the CDPP that ultimately determines (after consultation with ASIC) whether or not charges should be laid and the appropriate charges for most criminal matters. Early notification of breaches and cooperation may be relevant to the CDPP's considerations as set out in the *Prosecution policy of the Commonwealth* (see www.cdpp.gov.au/Publications/ProsecutionPolicy/).

Examples of cooperation with civil investigations that may lead us to seek less severe remedies include:

- early notification of breaches and submitting a plan for rectifying it to ASIC; and
- voluntarily participating in interviews with ASIC officers.

A person who cooperates with us in these matters may benefit through discussions with ASIC about the most appropriate remedies to be sought. In relation to criminal matters, the practice of 'charge negotiation' is discussed further in the *Prosecution policy of the Commonwealth*.

Further, the law recognises in a number of ways that a person who cooperates with us and ultimately admits criminal offences is entitled to benefit from that cooperative approach. For example:

- in sentencing a person for an offence against Commonwealth law, a court must take into account 'the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences' (s16A(2)(h) of the *Crimes Act 1914*); and
- generally, the law relating to sentencing provides for significant 'discounts' in cases where there is an early guilty plea and/or where an offender cooperates with authorities and promises future assistance such as giving evidence at the trial of a co-accused.

We may similarly recognise the ways that a person has cooperated with us before commencing civil proceedings and will take into account the degree of cooperation provided by the person during our investigation when determining the type of remedies sought, the content of our submissions to the court, or whether to negotiate a resolution of the matter.

Additionally, people may choose to cooperate with ASIC regardless of whether they are directly responsible for the conduct. Part 9.4AAA of the Corporations Act provides some protection for whistleblowers. For more information on protection for whistleblowers, see Information Sheet 52 *Protection for whistleblowers* (INFO 52).

Where can I get more information?

- Read INFO 152 *Public comment*, INFO 52 *Protection for whistleblowers*, and INFO 145 *ASIC's compulsory information-gathering powers*.
- Read RG 73 *Continuous disclosure obligations*, RG 98 *Licensing: Administrative action against financial services providers*, RG 100 *Enforceable undertakings*, RG 103 *Confidentiality and release of information*, RG 216 *Markets Disciplinary Panel*, and RG 218 *Administrative action against persons engaging in credit activities*.
- Read *Prosecution policy of the Commonwealth*.
- Call ASIC on 1300 300 630.
- Submit a question online at www.asic.gov.au/question.

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 on 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.