
ASIC shifts to “user pays” model for costs of its regulatory investigations

6 August 2015

Authors: Tony O'Malley, Robert Babb

In brief

Last week the Australian Securities and Investments Commission ('ASIC') announced that it will now use its statutory powers to recover expenses and costs of its investigations where it can.

Under the Australian Securities and Investments Commission Act 2001 (Cth) (the 'ASIC Act'), ASIC has the power to make an order to recover investigation expenses and costs where that investigation has led to a criminal or civil judgment in favour of the regulator.

Up to this point, however, ASIC has rarely exercised its power in this area.

This policy shift could have a significant impact on the costs of a regulatory investigation which are ultimately borne by the subject of an investigation, particularly an investigation which is complex and resource-intensive.

Clients should factor the risk of this additional cost burden into their strategic thinking in response to any regulatory investigation.

This announcement from ASIC also highlights the need for clients to have comprehensive insurance which covers investigation costs in addition to litigation costs.

In detail

On 29 July 2015, ASIC announced via media release and information sheet INFO 204 that it will now use its statutory powers to recover expenses and costs of its investigations where it can.

Under section 91 of the ASIC Act, ASIC has the power to make an order to recover investigation expenses and costs where that investigation has led to a criminal or civil judgment.

From 29 July 2015, ASIC intends to generally use this power in investigations which (i) commence from 29 July 2015 onwards and (ii) commenced before 29 July 2015, but where proceedings have not yet commenced, charges have not yet been laid or a settlement has not yet been reached.

What is covered?

The ASIC Act explicitly includes reimbursement of remuneration of a staff member as an outcome, but otherwise does not provide helpful detail on the categories of expenses which can be recovered. INFO 204 sets out that ASIC will seek to recover investigation expenses and costs, including, for example:

- salary costs for ASIC staff who have worked on the investigation;
- travel expenses when we have needed to interview witnesses;
- the cost of external legal counsel; and
- the cost of employing an expert to perform an analysis.

ASIC makes clear that investigation expenses and costs are not the same as litigation costs that may be awarded by a court.

This change highlights the need for people to have comprehensive insurance which covers investigation costs as well as litigation costs.

Why the change?

ASIC is continually seeking ways to expand its regulatory options and be seen as a tougher regulator. This move could have significant cost implications for a defendant in an ASIC proceeding if judgment is made against that defendant. It is also a tool for ASIC to leverage enhanced cooperation and settlement terms. ASIC has stated that it hopes the policy shift towards using this power will result in shorter and less costly investigations. However, we will have to wait and see the practical result, as ASIC may now have further incentive to pursue longer and more complex regulatory investigations.

We note that there is an imbalance between the rights of the regulator and the rights of a person under investigation, as there is no equivalent ability for people that are subject of an investigation to recover their investigation costs from ASIC where ASIC is unsuccessful in its prosecution or civil proceedings.

Why now?

This shift in policy fits in with general cost pressure at ASIC and its slow march to an overall user pays system. However, this announcement comes at a time when ASIC's two ongoing and significant investigations into benchmark manipulation are reaching maturity, particularly the investigation into the bank bill swap rate (BBSW). The investigation into BBSW has been running since 2012 and the investigation into foreign exchange has been on foot since 2014. This is another signal that ASIC is seeking to obtain an outcome in one or both of these high profile investigations.

ASIC has already expended considerable internal and external resources on the benchmarks investigations. ASIC Chairman Greg Medcraft has publicly said that more than 15% of ASIC's total enforcement staff are engaged in these investigations. This does not include other groups within ASIC, experts, outsourced legal and other services. The resource count will only increase as these matters progress, particularly if one or both of these matters are taken to court.

The takeaway

Clients need to continually consider a variety of risks and costs during the lifecycle of an investigation. One of the factors requiring attention is the costs of ASIC in conducting an investigation.

Our team has considerable experience in complex regulatory investigations and in dealing with regulators.

We would be happy to assist you with your strategic and legal thinking in relation to investigations.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

Tony O'Malley, Partner
+61 (2) 8266 3015
tony.omalley@au.pwc.com
[Tony on LinkedIn](#)

Murray Deakin, Partner
+61 (2) 8266 2448
murray.deakin@au.pwc.com
[Murray on LinkedIn](#)

Robert Babb, Director
+61 (3) 8603 0779
robert.babb@au.pwc.com

Yolanda Chora, Director
+61 (2) 8266 2471
yolanda.chora@au.pwc.com

© 2014 PricewaterhouseCoopers. All rights reserved. In this document, "PwC" refers to PricewaterhouseCoopers a partnership formed in Australia, which is a member firm of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity. This publication is a general summary. It is not legal or tax advice. Readers should not act on the basis of this publication before obtaining professional advice. PricewaterhouseCoopers is not licensed to provide financial product advice under the Corporations Act 2001 (Cth). Taxation is only one of the matters that you need to consider when making a decision on a financial product. You should consider taking advice from the holder of an Australian Financial Services License before making a decision on a financial product.