



Recovery of expenses of investigation – section 91 ASIC Act 2001

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Introduction

1. Under section 91 of the *Australian Securities and Investments Commission Act 2001* (“the Act”), the Australian Securities and Investments Commission (“ASIC”) may make an order to recover its investigation expenses and costs¹ if, as a result of its investigation:
 - a person is convicted of an offence against a law of the Commonwealth, or of a State or Territory, or
 - judgment is awarded, or a declaration or other order is made against a person in a proceeding in a court.
2. ASIC may make an order that the person pay, or reimburse ASIC:
 - for the whole, or a specified part, of the expenses of the investigation
 - for the whole, or a specified part, of the costs to ASIC of making the investigation, including the remuneration of ASIC staff concerned in the investigation.
3. ASIC has a similar power to recover the expenses and costs of its investigations under section 319 of the *National Consumer Credit Protection Act 2009*.
4. It should be noted that s 91 orders do not involve the making of any formal orders by a court but are based on ASIC exercising its legislative powers, albeit such a decision by ASIC can be the subject of an application for review to the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977*.

Types of expenses and costs that can be the subject of a s 91 order

5. This power allows ASIC to make an order to recover investigation expenses and costs, including, for example:
 - salary costs for ASIC staff who have worked on the investigation
 - travel expenses when ASIC have needed to interview witnesses
 - the cost of external legal counsel
 - the cost of employing an expert to perform an analysis.

¹ ASIC’s official position on the Recovery of investigation expenses and costs is contained in information sheet (INFO 204), published on its website - <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/recovery-of-investigation-expenses-and-costs/>

6. Investigation expenses and costs are not the same as litigation costs that may be awarded by a court.
7. ASIC's published policy is to consider making an order for the recovery of its investigation expenses and costs in each case where the legislative requirements are met.

Factors ASIC will consider

8. ASIC will consider all the circumstances of a case in deciding whether to make an order to recover its investigation expenses and costs and, if so, the amount of the order. The factors ASIC will consider and the weight that it will afford to each of those factors will vary according to the circumstances of the case.
9. Broadly, however, ASIC will consider the following factors:
 - Impecuniosity of the person
 - Exceptional hardship to the person
 - The amount recoverable under an order
 - Extent of ASIC's success in the proceedings
 - Likely effect on victims
 - Degree of culpability
 - Degree of cooperation
 - Scope of the investigation
10. The factors are not listed in order of importance and this is not an exhaustive list. ASIC's Information Sheet, referred to in footnote 1 provides an explanation of the factors.
11. In cases where there are multiple defendants, the form of orders ASIC will make will depend on the circumstances of the matter.
12. ASIC's policy is to notify the person, prior to any sentence hearing or hearing on penalty or other relief, if it is considering making an order to recover the expenses and costs of its investigation. ASIC will also inform the person of the proposed amount of any order.
13. The person will be given a reasonable period of time to consider the proposed order and to make written submissions to ASIC about whether the order should be made, the amount and the form of the order. ASIC will consider any submissions before making a decision.
14. An order to recover the expenses or costs of its investigation is enforceable in court as a debt due to ASIC.

15. A person who fails to comply with an order to pay costs, may be liable to a penalty of 120 penalty units – see s91(3).

Prosecutions being conducted by the CDPP

16. In ASIC investigated matters which are being prosecuted by the CDPP, ASIC's starting point, subject to the factors listed in paragraph 9 is to make an order under s 91.
17. However, ASIC's position is not to make a s 91 order in matters which have resulted in a defendant pleading guilty pursuant to the ASIC/CDPP Best Practice Guideline on '[Assessing pre-brief guilty plea proposals in ASIC matters](#)'. These guidelines set out the procedures to be adopted where a guilty plea is proposed in a matter being investigated by ASIC before ASIC has referred a full brief of evidence to the CDPP.
18. In all ASIC investigated matters being prosecuted by the CDPP ASIC will inform the CDPP, as soon as it is in a position to, of its intention to make a s 91 order and its relevant terms, such as quantum.
19. However, as the details of several of the factors listed in paragraph 9 may not be known until a matter has resolved or is close to finalisation, while ASIC will endeavour early in proceedings to indicate its intention to seek a s 91 costs order, a final decision as to whether such an order may be sought and the quantum may not be determined until shortly before (or even possibly even after) a plea of guilty is entered or in some cases even possibly after a defendant's conviction.
20. In the absence of formal advice from ASIC about whether it intends to make a s 91 costs order at the time of an approaching hearing date, it is advisable for CDPP case officers to seek instructions from ASIC about whether ASIC intends to make such an order.
21. The CDPP will, as soon as it receives instructions from ASIC and well before any sentencing hearing, formally advise the solicitors acting for the defendant of ASIC's intention to make a s 91 order.
22. The CDPP will also inform the sentencing judge/magistrate of the proposed order at the time of the sentencing hearing.
23. The possibility of ASIC making a s 91 order in the event that a conviction is recorded by the court may be regarded by a sentencing court as a mitigating factor. While this question has not yet arisen for consideration by an appellate court in Australia, the following comments by Judge Blackmore SC of the NSW District Court, when sentencing *John Lindsay Merity* on 14 February 2020 for breaches of section 1308(2) of the *Corporations Act*, provide a good indication of how sentencing courts are likely to view this factor:

A matter of perhaps more significance is the fact that ASIC intends to recover the cost of their investigation from the offender. To date he has not been asked to pay any money. It may be that he

will not be required to refund any money but the prospect of repayment continues. It is perhaps best regarded as an additional factor of stress that does not apply to the average offender. I recognise the prospect of repayment in that way, that is as an additional stress for the offender and I will mitigate the sentence to be applied, although again such mitigation might only be relatively modest.

24. CDPP case officers should formally advise the CFC Practice Group Coordinator of the details of any matters where the sentencing Judge/Magistrate refers to the likelihood of ASIC making a s 91 order as a factor in sentencing.



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