



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 216

Markets Disciplinary Panel

July 2010

About this guide

This regulatory guide is aimed at those who are obliged to comply with the market integrity rules, including the operators of, and participants in, licensed markets.

The aim of the guide is to provide interested parties with:

- an overview of the disciplinary framework for the market integrity rules;
- an outline of the constitution, role and independence of the Markets Disciplinary Panel (MDP);
- our general approach to administering the remedies available for breaches of the market integrity rules;
- details of the stages in the infringement notice and enforceable undertaking processes; and
- the policies that will be applied by the MDP in determining the penalties payable, and other remedial action that may be applied, for particular breaches of the market integrity rules.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

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

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This regulatory guide was issued on 29 July 2010 and is based on legislation and regulations as at 1 August 2010.

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Contents

A	Overview	4
	Establishment of the Markets Disciplinary Panel.....	4
	Remedies for breaches of the market integrity rules	4
	The MDP's processes.....	5
	The policies the MDP will apply in determining penalties and other remedies sought under infringement notices and enforceable undertakings	5
B	Establishment of the Markets Disciplinary Panel	6
	Constitution of the MDP	6
	Legal underpinnings of the MDP	7
	Independence of the MDP	7
C	Remedies for breaches of the market integrity rules	9
	Civil penalties and other civil remedies	9
	Infringement notices	9
D	The MDP's processes	12
	Infringement notices	12
	Enforceable undertakings	25
	Other remedies for conduct contravening the market integrity rules.....	27
E	The policies the MDP will apply in determining penalties and other remedies sought under infringement notices and enforceable undertakings	29
	Remedial action available under the infringement notice and enforceable undertakings processes.....	29
	Guidelines for determining remedies to be applied by the MDP under the infringement notice and enforceable undertakings processes	30
	Appendix: Markets Disciplinary Panel breach process	37
	Key terms	38
	Related information	40

A Overview

Key points

From 1 August 2010, ASIC is responsible for supervising domestic licensed financial markets. In doing so, we make market integrity rules.

We are able to take civil proceedings to seek a range of remedies for breaches of these rules. As an alternative to such proceedings, we are able to issue infringement notices and accept enforceable undertakings.

If we believe a breach can be established, the matter may be referred to the Markets Disciplinary Panel (MDP), which has been set up by ASIC as an independent body to make decisions on issuing infringement notices and accepting enforceable undertakings.

When an assessment of penalties is made under the infringement notice and/or enforceable undertakings processes, these penalties will be determined according to the criteria specified in this guide.

Establishment of the Markets Disciplinary Panel

- RG 216.1 We have established the Markets Disciplinary Panel (MDP) as a peer review body. Its members largely comprise people who currently hold senior roles in the markets.
- RG 216.2 Sitting panels of the MDP make decisions about whether to issue infringement notices or accept enforceable undertakings for breaches of the market integrity rules.
- RG 216.3 The MDP, as far as practicable, operates independently of ASIC.

Remedies for breaches of the market integrity rules

- RG 216.4 There are a range of remedies that deal specifically with breaches of the market integrity rules. They include civil penalties, compensation orders and publication orders. Infringement notices and enforceable undertakings are also available as alternatives to civil proceedings (including civil penalty proceedings).
- RG 216.5 Additional remedies may also be available where conduct constituting a breach of the rules also constitutes a breach of other provisions of the *Corporations Act 2001* (Corporations Act). If so, that conduct may be a basis

for administrative action (licensing and banning action) and criminal action under other provisions of the Corporations Act.

RG 216.6 For each breach of a market integrity rule, ASIC will determine the action that is most appropriate. We are not obliged to follow the infringement notice process or to accept an enforceable undertaking instead of pursuing the other forms of action available to us.

RG 216.7 If we pursue the infringement notice and/or enforceable undertakings processes, and the notice/undertaking are complied with, we will generally not take any further action against the recipient of the notice or the giver of the undertaking for the event(s) in question. In these circumstances, we will only take further action if the recipient or giver has provided false or misleading information to, or withheld evidence or information from, ASIC and/or the MDP in relation to the alleged breach.

The MDP's processes

- RG 216.8 We have put processes in place to facilitate either:
- (a) the prompt settlement of a matter, with the approval of the MDP, via an enforceable undertaking and/or the issue of an infringement notice on agreed terms; or
 - (b) the prompt determination of the matter by the issue of an infringement notice by the MDP (which may require an enforceable undertaking to be given by the recipient), following a hearing if required.
- RG 216.9 These processes ensure that participants are given the opportunity to assess the case against them and to give evidence and make submissions to the MDP on the matter.

The policies the MDP will apply in determining penalties and other remedies sought under infringement notices and enforceable undertakings

- RG 216.10 The MDP takes into account a number of general principles and specific factors when determining the penalties and other remedies that it seeks under infringement notices and enforceable undertakings for breaches of the market integrity rules: see Section E.

B Establishment of the Markets Disciplinary Panel

Key points

The MDP functions as a peer review body. Its members are largely drawn from the markets.

Sitting panels of the MDP make decisions about whether infringement notices should be issued or enforceable undertakings should be accepted for breaches of the market integrity rules.

We have put in place measures to ensure that, as far as practicable, sitting panels of the MDP make their decisions independently of ASIC.

Constitution of the MDP

RG 216.11 We have established the MDP as a peer review body. The MDP is a pool of people from which sitting panels are drawn to make decisions about whether infringement notices should be issued or enforceable undertakings should be accepted for alleged breaches of the market integrity rules.

Note: Regulatory Guide 214 *Guidance on ASIC market integrity rules for ASX and ASX 24 markets* (RG 214) provides information about the nature of these rules and our approach to making them.

RG 216.12 The members of the MDP, including its Chairman, are appointed by us. All members are people with appropriate market or professional experience. Most of them have current senior roles with broking firms or investment banks. We do not appoint ASIC staff members to the MDP.

RG 216.13 The Chairman of the MDP provides strategic leadership to the MDP and is its main spokesperson. The Chairman advises on the composition of sitting panels to deal with particular matters. In doing so, they take into account the nature of the matter and the expertise and experience of the available MDP members. They assess any potential conflicts of interest of MDP members in deciding who is available to form a sitting panel. Unless the Chairman of the MDP has a conflict in relation to a matter, they may, but will not necessarily, be a member of the sitting panel considering the matter.

RG 216.14 A sitting panel consists of three members. If the Chairman of the MDP is not a member of the sitting panel, a member of the panel is designated as its Chairman. Sitting panels make decisions by majority vote. Each member of the panel, including its Chairman, has one vote.

RG 216.15 We appoint legally qualified members of our staff (Counsel to the MDP) to provide support to the MDP. These staff members are operationally separate

from our Deterrence teams, which are involved in investigating suspected breaches of the market integrity rules and presenting matters to the MDP.

Legal underpinnings of the MDP

RG 216.16 The MDP is not established by statute. As a matter of law, the power to issue infringement notices and accept enforceable undertakings is vested in us. To enable sitting panels of the MDP to independently make these decisions:

- (a) a Division of ASIC consisting of three of our Commissioners has been established to exercise the powers in question;
- (b) each Commissioner delegates their functions and powers as a member of the Division to a member of the sitting panel formed to deal with a matter;
- (c) the delegation:
 - (i) directs the MDP member to have regard to our published policies in making a decision; but
 - (ii) does not direct the MDP member on how to decide a particular matter; and
- (d) the members of the sitting panel constitute the Division of ASIC in dealing with the matter and, as such:
 - (i) they are able to conduct hearings under Div 6 of Pt 3 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act); and
 - (ii) their decisions are the decisions of ASIC.

Note: Division 2 of Pt 4 of the ASIC Act deals with the establishment of Divisions of ASIC. Members of ASIC may delegate their functions and powers under s119A. Under s119A(3), a delegate of a member is subject to the member's direction.

Independence of the MDP

RG 216.17 Under established administrative law principles, the members of a sitting panel have to independently exercise powers and perform functions as delegates of the relevant ASIC Commissioner.

RG 216.18 We also, as far as practicable, ensure the operational independence of the MDP. In addition to the measures already mentioned:

- (a) Our contracts with MDP members expressly provide that the delegations from our Commissioners will not include direction about a particular matter.

- (b) Sitting panels of the MDP do not communicate with ASIC staff involved in investigating suspected breaches of the market integrity rules except in the presence of the proposed recipient of the infringement notice. Any written correspondence from sitting panels of the MDP is copied to the proposed recipient of the infringement notice and the Deterrence team that has carriage of the matter. Similarly, any correspondence to the MDP should be addressed to Counsel to the MDP and copied to the relevant Deterrence team. Correspondence from the Deterrence team to the MDP will be copied to the proposed recipient of the infringement notice.
- (c) Our Commissioners who are members of the Division of ASIC do not play any role in the consideration of a particular matter apart from making an appropriate delegation to an MDP member on the advice of the Chairman of the MDP.

RG 216.19 While, as a matter of law, we may exercise the power to issue infringement notices and accept enforceable undertakings ourselves, or have our staff do so as our delegate, we do not intend to proceed in this way. We will refer to the MDP all matters that we consider to be appropriately dealt with by an infringement notice and/or enforceable undertaking. This is similarly the case for decisions about the withdrawal of a notice or the withdrawal or variation of an undertaking.

RG 216.20 That said, the transfer of the market supervisory function from the market operators to ASIC necessarily has implications for the independence of any disciplinary process. For example, we were previously not privy to the evidence and information that a market participant put before the ASX Disciplinary Tribunal. Our Deterrence teams will now have access to the material put before a sitting panel of the MDP (this is unavoidable as due process requires that the team has the opportunity to make submissions to the panel about the material). While the regulations preclude such material being used in proceedings against the participant, it may be used against other persons—for example, an employee of the participant.

C Remedies for breaches of the market integrity rules

Key points

There are a range of remedies that deal specifically with breaches of the market integrity rules. They include civil penalties, compensation orders and publication orders (obtained by way of civil penalty and/or civil proceedings). Infringement notices and enforceable undertakings are also available as alternatives to civil proceedings.

For each breach of a market integrity rule, we will assess and determine the action that is most appropriate to address the breach. We are not obliged to follow the infringement notice process or to accept an enforceable undertaking instead of pursuing the other forms of action available to us.

Civil penalties and other civil remedies

- RG 216.21 A breach of the market integrity rules will result in the breach of a civil penalty provision. A court may order a person to pay to the Commonwealth a pecuniary penalty if a declaration of contravention is made. The maximum penalty payable for the breach of a particular rule is the penalty amount set by ASIC in the market integrity rules for the rule: s1317G(1D). That amount cannot exceed \$1 million.
- RG 216.22 The Corporations Act provides for a range of civil orders, including the payment of compensation and publication orders, to be made for a breach of the market integrity rules.
- RG 216.23 We will determine whether a breach warrants civil penalty or other civil proceedings, or whether an infringement notice or, if offered, an enforceable undertaking is an appropriate regulatory outcome. Generally, civil penalty and other civil action will be appropriate for more serious breaches of the market integrity rules.

Infringement notices

- RG 216.24 Under s798K, the regulations may provide for a person who is alleged to have contravened a market integrity rule to do one or more of the following as an alternative to civil proceedings:
- (a) pay a penalty to the Commonwealth;

- (b) undertake or institute remedial measures (including education programs);
 - (c) accept sanctions other than the payment of a penalty to the Commonwealth (including public censure, suspension for no more than six months from performing certain financial services in relation to a licensed market, or disgorgement of profits); and/or
 - (d) enter into a legally enforceable undertaking.
- RG 216.25 The Corporations Regulations 2001 (Corporations Regulations) set out an infringement notice scheme under which a person who is alleged to have breached a market integrity rule may do any one or more of the things referred to in RG 216.24. The regulations provide that, if we have reasonable grounds to believe that a person has contravened a market integrity rule, we may, at our discretion, give the person an infringement notice in relation to the alleged contravention.
- RG 216.26 Any penalty payable under an infringement notice must not exceed three-fifths of the penalty amount set out in the market integrity rules for the rule: s798K(2).
- RG 216.27 When an infringement notice is issued, the recipient has the option of complying with the notice (which may involve any or all of the items in RG 216.24), or defending civil or civil penalty proceedings should we pursue them.
- RG 216.28 Infringement notices are designed to provide a fast and effective remedy so that redress is proportionate and close 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 proposed recipient of the notice. If an infringement notice is issued and complied with, no further regulatory action may be taken against the recipient for the breach, unless the recipient has provided false or misleading information to, or withheld information from, ASIC and/or the MDP in relation to the breach.
- RG 216.29 Our approach to infringement notices for breaches of market integrity rules, to the extent that there is consistency in the structure of the underlying processes, is modelled on:
- (a) Regulatory Guide 73 *Continuous disclosure obligations: Infringement notices* (RG 73); and
 - (b) ASX guidance on the operation of the ASX Disciplinary Tribunal.
- RG 216.30 Modifications have been made to accommodate differences between the processes that arise from:
- (a) the Corporations Regulations;
 - (b) the requirements of administrative law; and

- (c) ASIC's approach to making, and setting penalties for, the market integrity rules: see Consultation Paper 131 *Proposed ASIC market integrity rules: ASX and SFE markets* (CP 131), *Response to submissions on CP 131 Proposed ASIC market integrity rules: ASX and SFE markets* (REP 204), and RG 214.

D The MDP's processes

Key points

We endeavour to follow a clearly defined process in dealing with possible breaches of the market integrity rules.

We encourage market participants to self-report breaches and enter into discussions with us to settle matters. Negotiated settlements are subject to the approval of the MDP.

Under the processes for issuing infringement notices or accepting enforceable undertakings, participants will have the opportunity to assess the material being relied on by the ASIC Deterrence team and give evidence and make submissions if they wish to do so.

Infringement notices

RG 216.31 The process for issuing infringement notices for breaches of the market integrity rules consists of the 11 stages listed in Table 1. We will generally aim to complete Stage 4 within six months of identifying an alleged breach, and Stage 7 within nine months. A flowchart illustrating the process is set out in the Appendix: see Figure 1.

Table 1: The 11 stages of the infringement notice process

Stage	Description
1. Investigation and ASIC forms belief on whether there has been a breach of the market integrity rules and whether an infringement notice is appropriate	If a possible breach of the market integrity rules has been identified, we may conduct an investigation using our compulsory powers. In the course of the investigation, the relevant ASIC Deterrence team may form the belief that a person has breached those rules. That team will also decide whether using the infringement notice remedy is appropriate: see RG 216.32–RG 216.37.
2. A statement of reasons, an opportunity to be heard by the MDP and relevant material are given by ASIC to the proposed recipient of an infringement notice	If the ASIC Deterrence team believes there has been a breach and that an infringement notice is appropriate, it will give the proposed recipient of the infringement notice a statement of reasons which sets out the reasons for believing that there has been a breach. An opportunity to be heard and a copy of relevant material will also be provided to the recipient: see RG 216.38–RG 216.42.
3. Ascertain whether the breach is to be contested	A person may not wish to contest an alleged breach and may, instead, propose a settlement of the matter. If approved by the MDP, a settlement may occur by negotiating the terms of an infringement notice and/or the provision of an enforceable undertaking to ASIC: see RG 216.43–RG 216.48.

Stage		Description
4.	Sitting panel of the MDP is convened and briefed	Three members of the MDP will be nominated to form a sitting panel to consider the matter. The sitting panel will be given the statement of reasons and other accompanying information that has been provided to the recipient: see RG 216.49–RG 216.50.
5.	Notification is provided of the MDP members who are to determine the matter and, if a hearing is to be held, of the hearing date	Counsel to the MDP will inform the person of the identity of the MDP members who have been nominated to determine the matter. If a hearing is to be held, Counsel to the MDP will arrange and inform the person, in writing, of the date fixed for the hearing: see RG 216.51–RG 216.52.
6.	The hearing is conducted by the MDP	When required, the MDP will hold a hearing to determine whether to issue an infringement notice (during the hearing the proposed recipient of the infringement notice may give evidence and make submissions): see RG 216.53–RG 216.61.
7.	An infringement notice may be issued by the MDP	Regardless of whether a hearing is conducted, the MDP takes into account all submissions and evidence and decides whether to issue an infringement notice. It may decide to issue an infringement notice if there are reasonable grounds to believe there has been a breach: see RG 216.62–RG 216.67.
8.	The infringement notice is served	The infringement notice is served on its recipient, with a compliance period of 28 days: see RG 216.68.
9.	The notice recipient responds to the notice	The recipient 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 RG 216.69–RG 216.71.
10.	Action following response to the notice	If an infringement notice is fully complied with, we cannot, generally, bring proceedings against the recipient. If the notice is not complied with, we may take civil (including civil penalty) and administrative proceedings under the Corporations Act. If the notice is withdrawn, we are not restricted in the action we can take against the recipient: see RG 216.72–RG 216.83.
11.	Publication by ASIC	If an infringement notice is issued, ASIC may, at the end of the compliance period, publish details of the notice with a statement of whether the recipient has complied. If we begin proceedings against the recipient after the withdrawal of, or failure to comply with, a notice, we will publish that fact: see RG 216.84–RG 216.85.

Stage 1: Investigation and ASIC forms belief on whether there has been a breach of the market integrity rules and whether an infringement notice is appropriate

RG 216.32 We have a number of mechanisms for identifying and receiving information about possible breaches of the market integrity rules. When we identify or receive such information, we conduct an initial analysis to determine whether the matter needs to be investigated.

- RG 216.33 We may use our compulsory powers to obtain relevant documents and examine people who may be able to provide relevant information. Documents and/or information will always be sought by us from persons who are alleged to have breached the market integrity rules. We encourage these persons to be forthcoming with the provision of all relevant documents and information to us so that we may be fully informed of the facts of a matter. These persons may consider providing documents and information to us voluntarily.
- RG 216.34 Section D in RG 214 provides information about the relevant guidance we will follow to assess whether there has been compliance with the market integrity rules.
- RG 216.35 In the course of our investigation, our Deterrence team may form the belief that a person has breached the market integrity rules. In such cases, we will decide whether seeking a remedy through the issue of an infringement notice may be appropriate. We will consider all the relevant facts and circumstances of the matter and, particularly, the seriousness of the alleged breach.
- RG 216.36 In determining the seriousness of an alleged breach, we will consider a number of different factors depending on the circumstances of the matter, including:
- (a) whether it involved dishonesty;
 - (b) whether it was deliberate, reckless or negligent, or inadvertent;
 - (c) the duration of the breach;
 - (d) the amount of any benefit gained or detriment caused as a result;
 - (e) the impact on the financial market, including whether public confidence may have been damaged;
 - (f) the amount of any loss caused to investors;
 - (g) where relevant—the adequacy of the person’s internal controls, and whether they were complied with;
 - (h) the conduct of the person after the alleged breach—for example, whether the alleged breach was immediately drawn to our attention, the degree of cooperation with our investigation, and whether remedial steps were taken; and
 - (i) the disciplinary/regulatory history of the person.
- RG 216.37 A person who reports their own breach of a market integrity rule may wish to negotiate a settlement of the matter at that time. In such cases, we will generally proceed as outlined under Stage 3, unless the matter is of a kind that would not suitably be dealt with by the infringement notice or enforceable undertaking processes.

Stage 2: A statement of reasons, an opportunity to be heard by the MDP and relevant material are given by ASIC to the proposed recipient of an infringement notice

- RG 216.38 Before giving an infringement notice to a person who is alleged to have breached the market integrity rules, we must:
- (a) give the person a written statement that sets out our reasons for believing that the person has breached the market integrity rules; and
 - (b) give the person, or their representative, an opportunity to:
 - (i) appear at a private hearing before us;
 - (ii) give evidence to us; and
 - (iii) make submissions to us,in relation to their alleged breach.
- RG 216.39 When providing the written statement of reasons, we will also give the person:
- (a) a copy of all the material that our Deterrence team believes is relevant to establishing the alleged breach and any penalty, remedial action or sanction that should be applied to the alleged breach;
 - (b) notice
 - (i) of the person's right to a hearing in relation to the matter;
 - (ii) that, if the person does not want to appear, a written submission may be made to the MDP that will be taken into account; and
 - (iii) of what happens if the person does not indicate within seven days whether they wish to be heard or make a written submission in relation to the matter (i.e. the MDP will make a decision on the basis of the information available); and
 - (c) a copy of our information sheet *Administrative hearings* (INFO 1), which provides an outline of how we conduct our administrative hearings, and how to obtain a copy of Regulatory Guide 8 *Hearings practice manual* (RG 8), which gives more detailed information.
- RG 216.40 When a proposed recipient is a natural person, we will provide the statement of reasons and accompanying information by leaving them at, or posting them to, the person's address. For a corporate entity, that material is served by leaving it at, or posting it to, the entity's registered office, or delivering a copy personally to a director residing in Australia.
- RG 216.41 If a liquidator or administrator has been appointed to the company, we may serve the statement of reasons and accompanying information by leaving it at, or posting it to, the address of the liquidator's office or administrator's office in the most recent notice of that address lodged with us: s109X(1)(c) and (d).

- RG 216.42 We will not make any public announcement of the fact of giving the written statement and the accompanying information.

Stage 3: Ascertain whether the breach is to be contested

- RG 216.43 If a person who receives a statement of reasons in relation to an alleged contravention of the market integrity rules does not wish to contest the alleged breach, they should contact, as soon as possible and in any event within seven days, the ASIC Deterrence team that has carriage of the matter. Notwithstanding Regulatory Guide 52 *Enforcement action submissions* (RG 52), discussions may be held, on a ‘without prejudice’ and confidential basis, to explore a possible settlement by negotiating the terms of an infringement notice and/or the provision of an enforceable undertaking to ASIC under the Corporations Regulations.
- RG 216.44 An enforceable undertaking may be negotiated either as part of, or as an alternative to, an infringement notice. RG 216.89–RG 216.99 provide guidance on the circumstances in which an enforceable undertaking will be acceptable (including when it will be accepted to assist compliance with an infringement notice or as an alternative to an infringement notice).
- RG 216.45 Any negotiated infringement notice or enforceable undertaking will be subject to approval by the MDP which will be convened as referred to in Stage 4.
- RG 216.46 To approve a negotiated infringement notice or enforceable undertaking, the MDP must have reasonable grounds to believe that the alleged breach has occurred, and consider the appropriateness of the proposed penalty/remedies. The MDP will consider all the material that is provided to it by the ASIC Deterrence team and the person who allegedly breached the market integrity rules.
- RG 216.47 If the MDP approves a negotiated infringement notice, an infringement notice will be issued by the MDP on these terms. Similarly, the MDP may accept a negotiated enforceable undertaking.
- RG 216.48 If the MDP declines to accept a negotiated infringement notice or enforceable undertaking, the matter will proceed to a hearing before the MDP.

Stage 4: Sitting panel of the MDP is convened and briefed

- RG 216.49 Three members of the MDP will be nominated to form the sitting panel to consider the matter.
- RG 216.50 The sitting panel will be given a copy of the statement of reasons and other material that has been provided to the recipient (as referred to under Stage 2).

Stage 5: Notification is provided of the MDP members who are to determine the matter and, if a hearing is to be held, of the hearing date

- RG 216.51 Counsel to the MDP will inform the person of the identity of the MDP members who have been nominated to determine the matter. If a hearing is to be held, Counsel will also arrange and inform the person, in writing, of the date and place for the hearing.
- RG 216.52 If the person believes that any member of the sitting panel of the MDP has a conflict of interest in relation to the matter that would prevent the member from acting impartially, the person should, as soon as reasonably practicable, notify Counsel to the MDP.

Stage 6: The hearing is conducted by the MDP

- RG 216.53 If a hearing is required, it will be conducted by the MDP as closely as possible in accordance with RG 8. Division 6 of Pt 3 of the ASIC Act applies to the hearing process: see s51 and 54–62. Further information about how we administer these provisions and the MDP delegates' responsibilities when conducting hearings are set out in RG 8. There are a number of important points to note about the hearing process.

A right to representation

- RG 216.54 The person or entity has a right to legal representation. A corporate officer of an entity may also appear as a representative. The MDP has the discretion to allow people other than the representative of the entity and their legal representative to appear at the hearing.

The hearing is fact-finding, not adversarial

- RG 216.55 In accordance with RG 8, 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

- RG 216.56 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. The MDP will base its decision on material that is relevant, credible and logically proves the facts.

Procedural justice

- RG 216.57 We are obliged by the rules of procedural fairness to ensure that a person or entity appearing before us at a hearing has an opportunity to put their submissions. This is reinforced by the Corporations Regulations. 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

- RG 216.58 The MDP may, in addition to relying on its own experience and expertise, rely on written reports of independent expert witnesses to establish some elements of the breach of a market integrity rule. The MDP may rely on an expert report that has been provided by ASIC to the recipient and the MDP (as referred to under Stage 2 and Stage 4, respectively). The MDP may also rely on any expert report that is provided to it by the recipient.
- RG 216.59 The MDP may ask that an expert, whose report has been provided to it, be present to assist at the hearing.

Confidentiality

- RG 216.60 Any confidential and commercially sensitive information that is provided to the MDP will be protected by it. Hearings of the MDP will be held in private and MDP members will be subject to confidentiality obligations. ASIC itself is required by law to take all reasonable measures to prevent the unauthorised use or disclosure of confidential information.

Transcript

- RG 216.61 The MDP may record or make a transcript of the hearing of a matter before it. If a record or transcript is made, a copy of it will be provided, on request, to the person alleged to have breached the market integrity rule. Provision of the transcript will be conditional on the person undertaking only to use the transcript for the purposes of the hearing, taking legal advice in relation to any decision by the MDP following the hearing and in connection with any legal proceedings concerning the matters that are the subject of the hearing. The ASIC Deterrence team responsible for presenting the matter to the sitting panel may also be given a copy of the transcript on request.

Note: Regulation 7.2A.05 limits the admissibility into evidence, in any subsequent proceedings against a proposed recipient of an infringement notice, of information or evidence that they provided to the MDP.

Stage 7: An infringement notice may be issued by the MDP

- RG 216.62 The MDP is required to take into account all submissions and evidence and make a decision after:
- (a) a hearing has taken place; or
 - (b) it has received written submissions from a person who does not require a hearing; or

- (c) it has been notified that a person does not wish to participate in the process of it determining whether to issue an infringement notice.

RG 216.63 If the MDP has reasonable grounds to believe that a person has breached the market integrity rules, it may issue an infringement notice. A determination of the MDP is made by a simple majority of the votes of the three members of the sitting panel. Each member, including the Chairperson, has one vote. The Chairperson does not have a casting vote. Details of the voting will be kept confidential.

RG 216.64 An infringement notice will not be issued by the MDP if it does not have reasonable grounds to believe that the person has breached the market integrity rules. In these circumstances, we will not take further action against the person in relation to the relevant event(s) unless the person has provided false or misleading information to us or significant new evidence comes to light.

RG 216.65 The issue of an infringement notice, and any subsequent compliance with it, is not an admission of liability, nor does it represent a finding that the market integrity rules have been contravened. It simply signals the view of the MDP about the alleged conduct and provides a manner in which the issue may be dealt with, without engaging in lengthy and expensive court proceedings.

RG 216.66 The infringement notice will set out what is required for compliance. It will include details, as required by the Corporations Regulations, such as:

- (a) the date on which it is given;
- (b) that it is given by ASIC;
- (c) details of the alleged breach of s798H(1), including the date on which, and place at which, it was breached, and details of each market integrity rule that is alleged to have been breached;
- (d) for each market integrity rule that is alleged to have been breached, the maximum penalty that a court could order the notice recipient to pay for that breach;
- (e) for each alleged breach of the market integrity rules, the penalty payable for the breach (as well as the total penalty payable under the infringement notice) (if any), the remedial measures (if any) that the recipient must undertake or institute, the sanctions (if any) that the recipient must accept and the terms of any enforceable undertaking that the recipient must enter into with ASIC;
- (f) a statement that the recipient may choose not to comply with the infringement notice, but that if they do not comply, civil proceedings may be brought against them in relation to the alleged breach;
- (g) an explanation of what the recipient must do to comply with the infringement notice and the effect of compliance with the notice;

- (h) a statement that the recipient may apply to ASIC for a withdrawal of the notice or for an extension of time to comply with it; and
- (i) a statement that ASIC may publish details of the infringement notice.

RG 216.67 We will generally aim to issue an infringement notice within nine months of identifying the alleged breach.

Stage 8: The infringement notice is served

RG 216.68 The infringement notice is served on a recipient using the methods referred to under Stage 2.

Stage 9: The notice recipient responds to the notice

Compliance period for an infringement notice

RG 216.69 The compliance period for an infringement notice is 28 days beginning on the day the notice is given to the recipient, unless it is extended by ASIC, in which case the extension must not be for longer than an additional 28 days. If the recipient applies for an extension of the compliance period, and the application is refused, the compliance period ends on the later of the 28-day period, or seven days after the recipient is given notice of ASIC's refusal of the application: reg 7.2A.08.

Response to an infringement notice

RG 216.70 The recipient has several options when they receive the infringement notice. They may:

- (a) satisfy the infringement notice within the compliance period by doing the following:
 - (i) paying the penalty specified in the notice (if any);
 - (ii) undertaking and instituting the remedial measures specified in the notice (if any);
 - (iii) accepting the sanctions specified in the notice (if any); and
 - (iv) entering into an enforceable undertaking with ASIC in the terms specified in the notice (if any);
- (b) seek an extension to the compliance period (reg 7.2A.9);
- (c) apply in writing to us to withdraw the infringement notice (reg 7.2A.11); or
- (d) decline to satisfy the infringement notice within the compliance period.

RG 216.71 Decisions to issue and withdraw infringement notices are excluded from review by the Administrative Appeals Tribunal (AAT). Merits review by the

AAT is not available because a recipient is not obliged to comply with the notice.

Stage10: Action following response to the notice

Effect of compliance with an infringement notice

- RG 216.72 Generally, compliance with an infringement notice will conclude the action ASIC will take against the recipient of the notice for the event(s) in question. If that notice is satisfied, we cannot take civil, civil penalty or criminal proceedings against the recipient for the conduct specified in the infringement notice. In addition, we cannot take administrative licensing or banning action (under s914A, 915B, 915C or 920A) against the recipient for the conduct specified in the infringement notice. This restriction does not apply if the recipient has provided false or misleading information to, or withheld evidence or information from, us and/or the MDP in relation to the alleged breach of the market integrity rules.
- RG 216.73 Compliance with an infringement notice by its recipient does not, however, preclude us from taking action against other persons who were involved in the misconduct. For example, if an infringement notice is issued to and complied with by a market participant, we are not precluded from taking action (including civil, civil penalty and criminal proceedings) against an employee, representative, agent or contractor of the participant who was involved in the misconduct. Action against such a person may be taken where the misconduct amounts to a breach of legislation that is actionable by us. For example, the misconduct may amount to a breach of the Corporations Act and/or the ASIC Act.
- RG 216.74 Compliance with an infringement notice does not affect the rights of third parties, who have been adversely affected by the recipient's conduct, to bring proceedings against the recipient in relation to the alleged breach (including under s1101B). We are not prevented from applying for an order on behalf of a plaintiff in accordance with the Corporations Act.

Effect of failure to comply with an infringement notice

- RG 216.75 If a recipient does not comply with an infringement notice by doing all things required by the notice, we cannot enforce the notice. However, we may take the following action against the recipient:
- (a) We may begin civil penalty proceedings against the recipient, under Pt 9.4B, seeking a declaration that the recipient has breached the market integrity rules 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. We may ask the court to

impose a penalty up to the maximum amount payable for a breach of the relevant rule.

- (b) Compensation may also be sought in either civil proceedings (under s1325) or in civil penalty proceedings (under Pt 9.4B) to compensate a person who has suffered damage as a result of the alleged breach of the market integrity rules.
- (c) We may undertake civil proceedings under s1101B seeking such orders as the court thinks fit in relation to the alleged breach of the market integrity rules.
- (d) We may (if applicable) begin proceedings under s1324B seeking an order that specified information be disclosed in the manner required by the infringement notice.
- (e) Where a court has made any of the orders set out in the preceding paragraphs (a)–(d), 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. These expenses do not include any costs or expenses incurred by the MDP in determining whether to issue an infringement notice.

We can bring proceedings to enforce an order made by us under s91 of the ASIC Act.

- (f) We may accept an enforceable undertaking, under reg 7.2A.01, and bring proceedings to enforce the undertaking.

RG 216.76 Failure to comply with an infringement notice does not affect the rights of third parties, who have been adversely affected by the recipient's conduct, to bring proceedings against the recipient in relation to the alleged breach (including under s1101B). We are not prevented from applying for an order on behalf of a plaintiff in accordance with the Corporations Act.

Withdrawal of an infringement notice

RG 216.77 The recipient of an infringement notice may seek its withdrawal by making a written request to the MDP. Requests of this kind should be addressed to Counsel to the MDP.

RG 216.78 The MDP may also initiate the withdrawal of an infringement notice, even if a withdrawal is not sought by the recipient. However, if an infringement notice has been satisfied, the MDP may only withdraw the notice if the recipient agrees in writing. The MDP does not require the consent of the recipient to withdraw a notice before it is satisfied.

RG 216.79 Generally, however, the MDP will neither initiate, nor agree to a recipient's request for, a withdrawal of an infringement notice unless compelling new material becomes available after the determination of the matter. Requests

for withdrawal based on such material will be considered and determined by the MDP.

- RG 216.80 We will inform the recipient in writing if an infringement notice is withdrawn. If a notice is withdrawn, we are not restricted in the action that we can take against the recipient for the alleged breach. We may, where appropriate and where the conduct constitutes a breach of a criminal provision in the Corporations Act, consider criminal proceedings against the recipient.
- RG 216.81 If a notice is withdrawn after:
- (a) a penalty specified in it has been paid, the Commonwealth must refund the penalty; or
 - (b) a recipient has complied with a requirement to institute remedial measures, accept sanctions and/or enter into an undertaking, then these remedial measures, sanctions and undertakings are taken to no longer be enforceable by ASIC.
- RG 216.82 If an infringement notice that has been publicised is withdrawn by the MDP following a request for its withdrawal by the recipient, we will publish the fact of that withdrawal as well as details of any penalty that has been refunded to the recipient.

Limit on the use of information given to ASIC

- RG 216.83 If we begin proceedings against a recipient after the withdrawal of, or failure to comply with, an infringement notice, any evidence or information given to the MDP by the recipient in the course of exercising their right to make representations on whether the notice should be issued is not admissible in evidence in the proceedings (unless the proceedings relate to the evidence or information being false or misleading).

Stage 11: Publication by ASIC

Publication of compliance with an infringement notice

- RG 216.84 If we give an infringement notice to a recipient, we may, at the end of the compliance period, 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:
 - (i) as to whether the recipient has complied with the infringement notice;
 - (ii) if the recipient has complied with the infringement notice, a statement that:

- A compliance is not an admission of guilt or liability; and
 - B the recipient is not taken to have contravened the market integrity rules under s798H(1); or
- (iii) if the recipient has not complied with the infringement notice, a statement that:
- A giving an infringement notice to a recipient is only an allegation that the recipient has contravened the market integrity rules under s798H(1); and
 - B the recipient is not taken to have contravened the market integrity rules under s798H(1); and/or
- (b) issuing a statement (whether written or oral) that:
- (i) includes an accurate summary of the details of the infringement notice, including:
 - A the name of the recipient;
 - B the amount of the penalty specified in the notice (if any);
 - C the remedial measures specified in the notice (if any);
 - D the sanctions specified in the notice (if any);
 - E the terms of any undertaking specified in the notice (if any); and
 - F the conduct specified in the notice that made up the alleged breach of the market integrity rules; and
 - (ii) includes statements:
 - A as to whether the recipient has complied with the infringement notice; and
 - B if the recipient has complied with the infringement notice, a statement that:
 - I compliance is not an admission of guilt or liability; and
 - II the recipient is not taken to have contravened the market integrity rules under s798H(1); or
 - C if the recipient has not complied with the infringement notice, a statement that:
 - I giving an infringement notice to a recipient is only an allegation that the recipient has contravened the market integrity rules under s798H(1); and
 - II the recipient is not taken to have contravened the market integrity rules under s798H(1).

Publication of commencement of proceedings

- RG 216.85 If we begin proceedings against a recipient of an infringement notice following the withdrawal of, or failure to comply with, an infringement notice, we will publish the fact of the commencement of proceedings and details of the outcome of proceedings in a media release.

Enforceable undertakings

What is an enforceable undertaking?

- RG 216.86 An enforceable undertaking is a means of giving effect to an administrative settlement. We may accept an enforceable undertaking as an alternative to court action, other administrative actions and an infringement notice. We may also, in appropriate circumstances, accept an enforceable undertaking to complement, and assist compliance with, other remedies, such as an infringement notice.
- RG 216.87 Under s798K, the regulations may provide for, among other things, the following kinds of undertakings in relation to contraventions of the market integrity rules:
- (a) an undertaking to take specified action within a specified period;
 - (b) an undertaking to refrain from taking specified action; and
 - (c) an undertaking to pay a specified amount within a specified period to the Commonwealth or to some other specified person.

Note: See reg 7.2A.01.

- RG 216.88 While, as a matter of law, we may exercise the power to accept enforceable undertakings ourselves, or have our staff do so as our delegate, we do not intend to proceed in this way. We will refer to the MDP all matters that we consider to be appropriately dealt with by an enforceable undertaking. This is similarly the case for decisions about the withdrawal or variation of an undertaking.

When will we consider accepting an enforceable undertaking?

- RG 216.89 We see enforceable undertakings as an important component in our array of enforcement remedies to influence behaviour and encourage a culture of compliance for the benefit of all participants in licensed markets.
- RG 216.90 Regulatory Guide 100 *Enforceable undertakings* (RG 100) sets out the factors that we might consider when deciding whether to accept enforceable

undertakings under s93A and 93AA of the ASIC Act. These factors will also be considered by the MDP when deciding whether to:

- (a) accept an enforceable undertaking available for breaches of the market integrity rules; or
- (b) require an enforceable undertaking under an infringement notice.

RG 216.91 Our approach to accepting enforceable undertakings in relation to breaches of the market integrity rules, to the extent that there is consistency in the structure of the underlying processes, is modelled on RG 100.

RG 216.92 Modifications have been made to accommodate the differences between the processes that arise from:

- (a) the Corporations Regulations; and
- (b) our approach to making, and setting penalties for, the market integrity rules: see CP 131, REP 204 and RG 214.

RG 216.93 The MDP will generally only consider accepting an enforceable undertaking when it:

- (a) considers the enforceable undertaking to be an appropriate regulatory outcome, taking into account the significance of the issues to the market and community;
- (b) considers the person is likely to comply with the enforceable undertaking (any history of complaints may be relevant); and
- (c) has considered the nature of the alleged breach and the regulatory impact of the enforceable undertaking compared to that of other available remedies.

Enforceable undertakings as an alternative to infringement notices

RG 216.94 An enforceable undertaking that is offered as an alternative to the infringement notice process being pursued may require the market participant to take, or refrain from taking, the same actions that may be required for compliance with an infringement notice. Pursuing an enforceable undertaking may be preferable to an infringement notice where it is anticipated that this would resolve the matter more expeditiously. It may also provide a more flexible means by which to produce the most appropriate outcome for an alleged breach.

RG 216.95 To achieve consistent and appropriate outcomes for alleged breaches of the market integrity rules, enforceable undertakings that are proposed as an alternative to the infringement notice process will be submitted to the MDP for its review, approval and, if approved, acceptance. The MDP may require the undertaking to be amended in order for its approval to be given.

Enforceable undertakings in compliance with infringement notices

- RG 216.96 Enforceable undertakings may relate to an infringement notice that is given by the MDP for an alleged breach of the market integrity rules. An infringement notice may require a recipient to enter into specified undertakings. Such undertakings may be appropriate and necessary where it is not possible for a recipient to comply, within the compliance period for an infringement notice, with a particular action they are required to take. For example, the implementation of remedial measures may require a greater period than provided by the compliance period for an infringement notice.
- RG 216.97 The MDP will determine the terms that are appropriate for an enforceable undertaking that relates to an infringement notice.

Enforceable undertakings following withdrawal of, or non-compliance with, an infringement notice

- RG 216.98 Generally, the MDP will not accept enforceable undertakings as an alternative to compliance with an infringement notice. Similarly, the MDP will generally not accept an enforceable undertaking after non-compliance with an infringement notice.
- RG 216.99 The MDP may depart from this general practice when it is warranted in all the circumstances of the matter. For example, it may be appropriate to accept an enforceable undertaking after the issue of an infringement notice, even if the undertaking is not contemplated by the notice, where matters come to light that were not evident at the time of the hearing. These matters may relate, among other things, to the facts in issue or to the inability of the recipient to comply with an infringement notice, where they otherwise wished to do so. In these circumstances, the MDP will determine the terms that are acceptable to it for an enforceable undertaking.

Other remedies for conduct contravening the market integrity rules

- RG 216.100 Other remedies are available to ASIC. We may pursue these where a matter is not being pursued through the MDP processes or where an infringement notice issued by the MDP is not complied with.

Overlap between market integrity rules and the Corporations Act

- RG 216.101 The market integrity rules may deal with the same or similar subject matters as those dealt with by other provisions of the Corporations Act and ASIC Act. Accordingly, these rules may overlap with or supplement obligations created by Australian financial services (AFS) licence conditions and other

Corporations Act and ASIC Act provisions. If so, certain misconduct may constitute a breach of the market integrity rules as well as a breach of other Corporations Act or ASIC Act provisions. In that case, for entities subject to the rules, remedies beyond those specifically dealing with contraventions of the market integrity rules may be available for the same contravening conduct. These remedies may include penalties that differ from those that apply to the market integrity rules. The remedies may also include ASIC administrative action.

ASIC administrative action

- RG 216.102 Persons who are licensed to carry on a business of providing financial services in Australia in relation to Australia's licensed markets are subject to obligations imposed on them under their licences and the Corporations Act. We are responsible for licensing these persons and for monitoring compliance with their licence and other legal obligations. We are also responsible for regulating persons who provide financial services on behalf of these licensees.
- RG 216.103 We are responsible for taking action to enforce the law when it is breached by a licensee or a person who provides financial services on behalf of a licensee. If appropriate, that enforcement action may involve the use of an administrative remedy, such as the suspension or cancellation of a licence or the banning of a person from providing financial services. These administrative remedies may sometimes be used in addition to civil and criminal remedies. We will use the remedy, or a combination of remedies, that best achieves the aims of promoting compliance with the law and raising the ethical standards of business conduct.
- RG 216.104 *Regulatory Guide 98 Licensing: Administrative action against financial service providers* (RG 98) sets out the administrative remedies available to us against financial service providers (including participants in licensed markets) and the factors that we might consider when deciding whether to take administrative action against them.
- RG 216.105 An administrative hearing may be required, to give a person their statutory right to be heard, before an administrative remedy is applied. Hearings are usually conducted by one of our staff members who has been delegated the power to hold hearings (the delegate). The delegate has all the powers given to us under Div 6 of Pt 3 of the ASIC Act.
- RG 216.106 The administrative hearings delegate is distinct from members of the MDP who determine infringement notice matters and whether to accept enforceable undertakings for breaches of the market integrity rules.

E The policies the MDP will apply in determining penalties and other remedies sought under infringement notices and enforceable undertakings

Key points

This section provides information on the principles and factors the MDP will consider when determining penalties and other remedies under infringement notices and enforceable undertakings for breaches of the market integrity rules. While these penalties and remedies may be sought, a person may choose whether to accept them by complying with the notice and/or giving the undertaking under which these penalties and remedies are applied.

For market integrity rules that include a penalty amount, the principles and factors dealt with in this section will help determine both the amount of any penalty and what, if any, other remedial action should be sought by us. For rules where a pecuniary penalty is not available, the principles and factors considered will determine the remedial action that we should seek to remedy a breach.

Table 4 to Table 6 indicate the general range of possible outcomes, under the infringement notice and enforceable undertakings processes, for the three tiers of market integrity rules that have been made by ASIC.

Remedial action available under the infringement notice and enforceable undertakings processes

- RG 216.107 The remedial action available under the infringement notice and enforceable undertakings processes includes the payment of a pecuniary penalty.
- RG 216.108 Any penalty payable under an infringement notice must not exceed three-fifths of the penalty amount set out in the market integrity rules for the rule in question: s798K(2).
- RG 216.109 For market integrity rules that include a penalty amount, ASIC has categorised these rules as Tier 1, Tier 2 or Tier 3: see CP 131, REP 204 and RG 214.
- RG 216.110 The maximum penalty amounts for these tiers are set out in Table 2.

Table 2: Maximum pecuniary penalty amounts for breaches of the market integrity rules

	Penalty amount set for rule	Maximum penalty that the court may order a person to pay	Maximum penalty that a person may pay under an infringement notice
Tier 1	\$20,000	\$20,000	\$12,000
Tier 2	\$100,000	\$100,000	\$60,000
Tier 3	\$1,000,000	\$1,000,000	\$600,000

- RG 216.111 The fourth column of Table 2 sets out the maximum penalties payable for each tier under the infringement notice process.
- RG 216.112 Where we think a contravention of a particular market integrity rule could warrant the maximum (Tier 3) penalty, we have categorised the rule as Tier 3. In certain cases, this has been determined for rules that may not typically attract penalties of this magnitude but for which it would be appropriate for the courts or the MDP to have the flexibility to apply.
- RG 216.113 The maximum penalty for each tier would only be applied by the MDP for the most serious breach of a market integrity rule within that tier. For less serious breaches a lower penalty would be applied. The level of the penalty will be determined by reference to (among other considerations set out below) the particular circumstances of the breach and any other remedial action that is to be, or has been, pursued in respect of the breach.
- RG 216.114 RG 216.119–RG 216.131 set out the general principles and specific factors that the MDP will take into account when considering the amount of a penalty, and any other remedial action that it should apply in relation to a breach. These principles and factors are applied in the specific context of the infringement notice and enforceable undertakings processes that operate in relation to the market integrity rules. Accordingly, while we would anticipate that a court might apply similar considerations when determining remedies for a breach of the market integrity rules, the considerations of the court might in fact differ.

Guidelines for determining remedies to be applied by the MDP under the infringement notice and enforceable undertakings processes

- RG 216.115 The remedies that will be applied by the MDP will be determined according to the facts of each matter. In making that determination, the MDP will consider a number of general principles and specific factors. While it is not possible to identify all factors that will be relevant to the determination, Table 3 sets out the factors that may be taken into account. These factors are not exhaustive. The MDP must give proper consideration to all the relevant circumstances of each matter.

- RG 216.116 For those market integrity rules where a pecuniary penalty is available, the relevant principles and factors will be considered in determining both the amount of any penalty and what, if any, other remedial action is appropriate. For those rules where a pecuniary penalty is not available, the principles and factors will be considered in determining whether, and what, other remedial action is necessary to remedy the breach.
- RG 216.117 The application of the general principles and specific factors to individual matters is designed to promote consistency in decision making by the MDP. These principles and factors also enable affected persons to obtain a general indication of the range of possible outcomes for breaches of the market integrity rules.
- RG 216.118 Table 4 to Table 6 set out how the factors specified in Table 3 may operate in favour of remedies in the lower, middle and higher ranges of severity for each of the three tiers of the market integrity rules: see Table 2.

General principles guiding the MDP's determination of remedies to be sought under the infringement notice and enforceable undertakings processes

- RG 216.119 The MDP will take into account the following principles in determining the remedies that should be sought under the infringement notice and enforceable undertakings processes:
- (a) the remedies should promote market integrity and the confident and informed participation of investors in financial markets;
 - (b) the remedies should be tailored to address the particular breach in issue in the circumstances of the breaching party;
 - (c) the remedies should protect investors and compensate them for any damage suffered as a result of a breach;
 - (d) the remedies should act as a deterrent to any future misconduct by the subject person. They should also act as a general deterrent to others from engaging in the same or similar conduct;
 - (e) the remedies should remove any benefit derived from a breach so as to remove the incentive to engage in contravening conduct;
 - (f) the MDP will consider the seriousness of the breach and the circumstances in which it occurred;
 - (g) the MDP will consider the subject person's history of compliance with the market integrity rules and will apply greater sanctions for repeat contraventions; and
 - (h) lesser sanctions will be applied to inadvertent breaches. Sanctions will generally increase in severity to reflect greater culpability.

Factors guiding the MDP's determination of remedies to be sought under the infringement notice and enforceable undertakings processes

RG 216.120 The factors specified in Table 3 will, where relevant, be considered by the MDP in determining the appropriate remedies to be applied under the infringement notice and enforceable undertakings processes.

Table 3: Key factors the MDP will consider in determining appropriate remedies under infringement notices and enforceable undertakings

Factors	Relevant considerations
Nature and seriousness of the suspected breach	<p>Whether the misconduct involved dishonesty</p> <p>Whether the misconduct was deliberate, reckless, negligent or inadvertent</p> <p>Whether the person had relied on any professional, including legal or accounting, advice in determining whether to engage in the relevant conduct</p> <p>The duration of the misconduct</p> <p>The number of alleged breaches</p> <p>Whether the misconduct was systemic or indicative of a pattern of non-compliance with the market integrity rules</p> <p>The amount of any benefit gained or detriment caused, or potentially caused, as a result of the misconduct</p> <p>The impact of the misconduct on the financial market, including whether public confidence in the market may have been damaged</p> <p>The amount of any loss caused to investors</p> <p>Whether the misconduct involved a breach or loss of confidentiality</p> <p>The remedies previously applied by the MDP and/or ASX for the same or comparable types of breaches or in comparable circumstances</p>
Internal controls of the market operator, participant or other subject entity	<p>Whether the person had in place effective internal procedures to ensure compliance with the market integrity rules and to detect any breaches of them</p> <p>Whether these procedures were complied with and whether any breaches of the market integrity rules were detected</p> <p>Where the breach was by an officer, employee, agent or representative of, or a contractor to, a market operator or market participant, whether it indicates a systemic compliance failure</p> <p>Whether a corporate culture conducive to compliance with the rules is evident (e.g. effective educational and compliance programs)</p>

Factors	Relevant considerations
Conduct of the market operator, participant or other subject entity after the breach occurred	<p>Whether the person informed ASIC of the breach in a timely and comprehensive manner, or whether there was a failure to inform or an attempt to conceal the breach</p> <p>The nature of any action that was taken by the person to deal with the breach and its consequences, including:</p> <ul style="list-style-type: none"> • whether the breach was self-reported to ASIC • any steps taken to prevent any recurrence of the breach • remedial steps taken, or intended to be taken, to minimise harm or loss from the breach, including appropriate complaints-handling procedures and compensation to affected clients and investors • the extent of any assistance and cooperation provided during our investigation of the breach and whether that affected the duration and cost of our investigation • whether the person made an early decision not to dispute the breach and whether that affected the time and cost incurred by us in either issuing an infringement notice or agreeing on an enforceable undertaking <p>Whether the person demonstrated any contrition, and the likelihood that the same type of breach may recur</p>
Previous regulatory record of the market operator, participant or other subject entity	<p>Whether action has previously been taken against the person in respect of their obligations under the market integrity rules, the operating rules of a financial market, the Corporations Act or any licence conditions</p> <p>Whether the person has previously given any undertakings not to take a particular action or engage in a particular behaviour</p> <p>The general compliance history of the person, including their history of compliance with the market integrity rules</p>
RG 216.121	<p>The regulations envisage that the sanctions sought under an infringement notice may include the disgorgement of profits. They also envisage that an enforceable undertaking may involve making payments to a person other than the Commonwealth. While it is open to the MDP to seek remedies that involve third parties being compensated for loss, it is not expected that the MDP would do so as a matter of course.</p>
RG 216.122	<p>The MDP may seek compensation where it is appropriate to do so in all the circumstances.</p>
RG 216.123	<p>The MDP's consideration of whether a breach was self-reported to ASIC is not limited by any breach reporting obligations that may apply to the recipient under the Corporations Act. The MDP may consider it relevant that a recipient self-reported a breach that they were not obliged to report.</p>
RG 216.124	<p>When considering the regulatory record of the market operator, participant or other subject entity, the MDP may take into account action and events that took place both before and after the transfer of supervisory responsibility to ASIC.</p>
RG 216.125	<p>Where multiple breaches have occurred and penalties are considered an appropriate remedy, the MDP will determine whether to apply a separate penalty for each breach or, alternatively, an overall penalty for all the</p>

breaches. In either case, the MDP will seek to ensure that the final penalty (whether it is an aggregate of separate amounts or an overall amount) is just and appropriate, and not excessive, having regard to the totality of the conduct. Applying the ‘totality principle’, it may be appropriate for the final penalty to be set at a level that is lower than the sum total of separate penalties that may have otherwise been applied to each breach.

- RG 216.126 The MDP will determine any penalty that is appropriate for multiple breaches and the recipient will not be required to demonstrate why the sum total of separate penalties should not be applied to them.
- RG 216.127 Where we consider applying more than one type of remedy for one or more breaches, the MDP will consider the aggregate effect of these remedies and determine whether it is appropriate or whether the remedies should be varied to be proportionate to the severity of the breaches.
- RG 216.128 Where two or more breaches of the same market integrity rule are the subject of an infringement notice or enforceable undertaking process, the MDP may apply separate penalties for each of these breaches which, in total, exceed the maximum penalty payable for a single breach of that rule. The MDP may do so even where the breaches were of the same, or substantially similar, nature and where they occurred at the same time, or about the same time, or as part of a single course of conduct.

Factors that may operate in favour of sanctions in lower, middle and higher ranges of available remedies

- RG 216.129 Table 4 to Table 6 set out how any one or more of the factors specified in Table 3 may operate in favour of remedies in the lower, middle and higher ranges of severity for each of the three tiers of the market integrity rules.
- RG 216.130 The groupings of the factors in Table 4 to Table 6 are indicative only. They are provided solely as a guide to the potential consequences that may follow from breaching the market integrity rules in circumstances where these factors apply. The outcome of each breach will depend on its particular circumstances and will be determined on a case-by-case basis. Accordingly, the MDP may consider it appropriate, for some breaches, to apply remedies that fall outside the range that Table 4 to Table 6 indicate may be appropriate for those breaches.
- RG 216.131 Table 4 to Table 6 set out how the factors specified in Table 3 may operate in favour of remedies in the lower (Table 4), middle (Table 5) or higher (Table 6) ranges of severity for each of the three tiers of the market integrity rules: see Table 2. The second column in each table respectively specifies an indicative range of pecuniary penalty that we consider falls within the lower, middle or higher ranges of penalty available for each of these tiers. The third column indicates other remedies that the MDP may consider appropriate among available remedies within each range of severity.

Table 4: Lower range pecuniary penalties and other remedies

Factors	Lower range of penalties for each of Tier 1, Tier 2 and Tier 3 breaches	Other possible remedies
Breach due to carelessness or inadvertence	Tier 1: Nil to \$4,000	Issue infringement notice
Isolated breach	Tier 2: Nil to \$20,000	Remedial sanctions, including but not limited to:
Minor nature of breach	Tier 3: Nil to \$200,000	<ul style="list-style-type: none"> • public censure • implementing/improving education and compliance program • payment of compensation • disgorgement of benefit received from breach
No or minimal damage, actually or potentially caused, to any third party		
No or minimal actual or potential benefit derived from breach		
Breach self-reported to ASIC		
Attempt to remedy the breach and person has fully cooperated with us		
No or minimal previous history of breaches		
Indications, by demonstrated behaviour, of clear intentions to comply with market integrity rules		
Reliance reasonably placed on professional, including legal and accounting, advice		
No breach of confidentiality involved		

Table 5: Middle range pecuniary penalties and other remedies

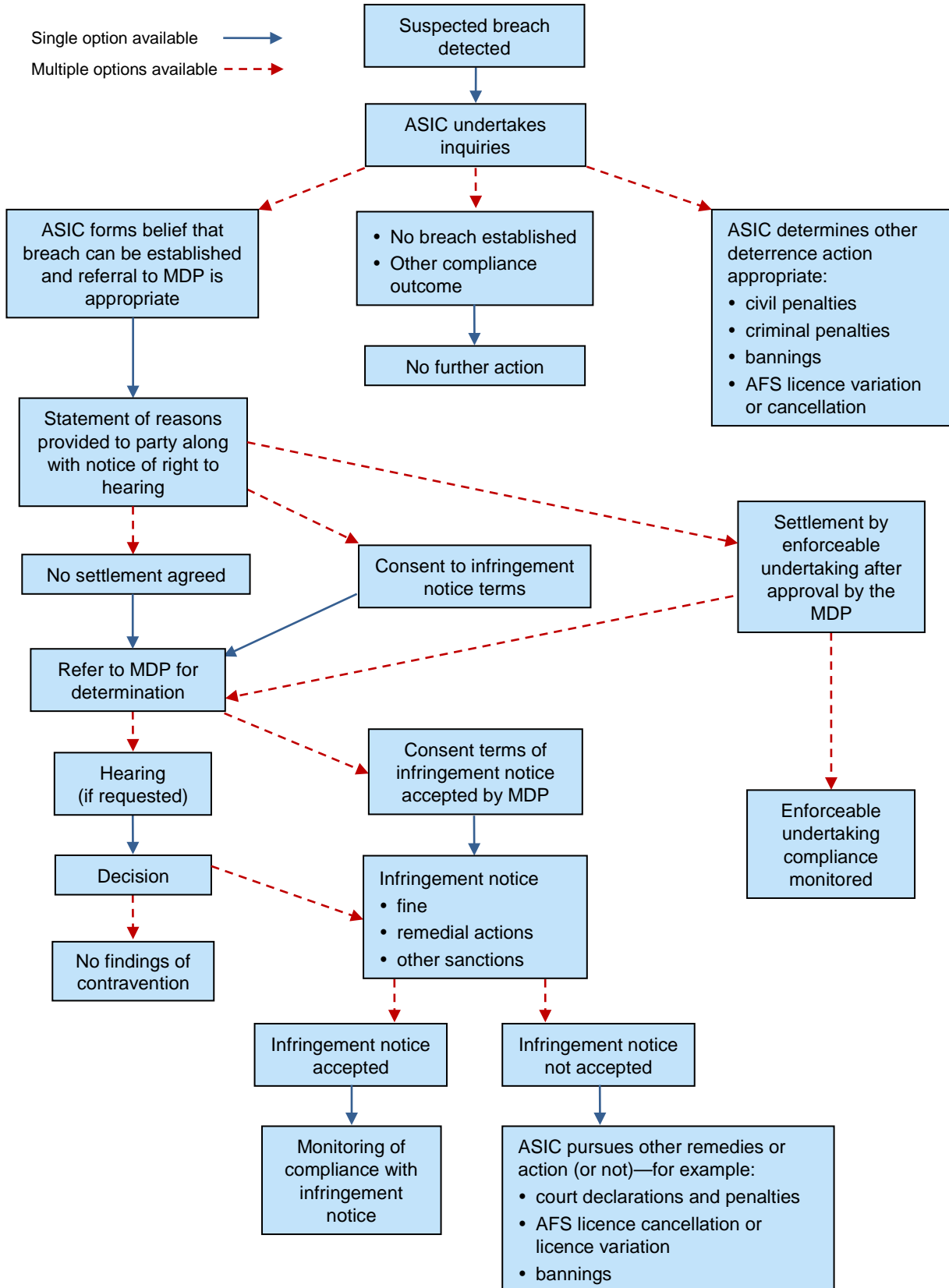
Factors	Middle range of penalties for each of Tier 1, Tier 2 and Tier 3 breaches	Other possible remedies
Breach was intentional or due to recklessness	Tier 1: Nil to \$8,000	In all cases consider other possible remedies, including but not limited to:
Incompetence and irresponsibility but with the possibility that the person may develop requisite skills and abilities	Tier 2: Nil to \$40,000	<ul style="list-style-type: none"> • public censure • implementing/improving education and compliance program • payment of compensation • disgorgement of benefit received from breach • suspension from performing certain financial services • order person to terminate involvement/change role of breaching individual
One or more breaches	Tier 3: Nil to \$400,000	
Serious nature of breach		
Breach not self-reported to ASIC		
No attempt to remedy breach		
No assistance to and cooperation with ASIC		
History of previous breaches		
Breach indicates systemic problem or a pattern of non-compliance		
Actual or potential damage to third party		
Actual or potential benefit derived from breach		
Misconduct involved a breach or loss of confidentiality		

Table 6: Higher range pecuniary penalties and other remedies

Factors	Higher range of penalties for each of Tier 1, Tier 2 and Tier 3 breaches	Other possible remedies
Breach was intentional	Tier 1: Nil to \$12,000	In all cases consider other possible remedies, including but not limited to: <ul style="list-style-type: none"> • implementing/improving education and compliance program • payment of compensation • disgorgement of benefit received from breach • suspension/permanent ban from performing certain financial services • order person to terminate involvement/change role of breaching individual
Dishonesty and intention to defraud	Tier 2: Nil to \$60,000	
Incompetence and irresponsibility but with the possibility that the person may develop requisite skills and abilities	Tier 3: Nil to \$600,000	
Disregard for market integrity rules		
Serious incompetence and irresponsibility		
One or more breaches		
Serious nature of breach		
Breach damaged or detrimentally affected the fair and orderly operation of the market		
Conduct threatened confidence in and the integrity and efficiency of the market		
Attempt to conceal breach		
No attempt to remedy breach		
No assistance to and cooperation with ASIC		
History of previous breaches		
A likelihood that the person will engage in similar contravening conduct in the future		
Breach indicates systemic problem or a pattern of non-compliance		
Substantial actual or potential damage to third party		
Substantial benefit derived from breach		
Misconduct involved a breach or loss of confidentiality		

Appendix: Markets Disciplinary Panel breach process

Figure 1: Flowchart illustrating Markets Disciplinary Panel (MDP) breach process



Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services
AFS licensee	Holder of an AFS licence
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	The market known as the Australian Securities Exchange, operated by ASX Limited
ASX 24	The market formerly known as the Sydney Futures Exchange (SFE), operated by Australian Securities Exchange Limited
Australian domestic licensed financial market	A financial market licensed under s795B(1) of the Corporations Act
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
enforceable undertaking	An enforceable undertaking that may be accepted by ASIC under reg 7.2A.01 of the Corporations Regulations
Financial Market Supervision Act	<i>Corporations Amendment (Financial Market Supervision) Act 2010</i>
hearing	The meaning given by s5 of the ASIC Act
infringement notice	An infringement notice issued under reg 7.2A.04 of the Corporations Regulations
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
MDP	ASIC's Markets Disciplinary Panel, through which ASIC exercises its power to issue infringement notices and to accept enforceable undertakings in relation to breaches of the market integrity rules
Pt 9.4B (for example)	A Part of the Corporations Act (in this example, numbered 9.4B), unless otherwise specified
reg 7.2A.01 (for example)	A regulation under the Corporations Regulations (in this example, numbered 7.2A.01), unless otherwise specified

Term	Meaning in this document
RG 214 (for example)	An ASIC regulatory guide (in this example, numbered 214)
s795B (for example)	A section of the Corporations Act (in this example, numbered 795B), unless otherwise specified

Related information

Headnotes

enforceable undertakings, financial markets, hearings, infringement notices, licensed financial markets, market integrity rules, market operators, Markets Disciplinary Panel, MDP, participants, pecuniary penalties, penalties, remedial action, remedies, sitting panels, statement of reasons, supervision, transitional arrangements

Regulatory guides

RG 8 *Hearings practice manual*

RG 52 *Enforcement action submissions*

RG 73 *Continuous disclosure obligations: Infringement notices*

RG 98 *Licensing: Administrative action against financial service providers*

RG 100 *Enforceable undertakings*

RG 214 *Guidance on ASIC market integrity rules for ASX and ASX 24 markets*

Legislation

ASIC Act, s51, 54–62, 59(2)(a), 91, 93A, 93AA, 119A, 119A(3)

Corporations Act, s109X(1)(c), 109X(1)(d), 798H(1), 798K, 798K(2), 914A, 915B, 915C, 920A, 1101B, 1317G(1D), 1324B

Corporations Regulations, reg 7.2A.01, 7.2A.05, 7.2A.08, 7.2A.9, 7.2A.11

Corporations Amendment (Financial Market Supervision) Act

Consultation papers and reports

CP 131 *Proposed ASIC market integrity rules: ASX and SFE markets*

CP 136 *Markets Disciplinary Panel*

REP 204 *Response to submissions on CP 131 Proposed ASIC market integrity rules: ASX and SFE markets*

REP 207 *Response to submissions on CP 136 Markets Disciplinary Panel*

Media and information releases

INFO 1 *Administrative hearings*