



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 225

Markets Disciplinary Panel practices and procedures

May 2011

About this guide

This guide is for people and their advisers who may find themselves involved with the Markets Disciplinary Panel (MDP).

It sets out the principles, processes and procedures the MDP follows when conducting proceedings for alleged breaches of ASIC 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 guide was issued in May 2011 and is based on legislation and regulations as at the date of issue.

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.

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A Overview

Key points

The ASIC market integrity rules are required to be complied with by market operators and participants in licensed markets.

A breach of the market integrity rules may be dealt with by ASIC on an administrative basis instead of civil proceedings, by issuing an infringement notice and accepting enforceable undertakings.

The Markets Disciplinary Panel (MDP) is a peer review body established by ASIC to independently make decisions on issuing infringement notices and accepting enforceable undertakings.

An MDP hearing is an administrative hearing conducted in accordance with the relevant provisions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and Regulatory Guide 8 *Hearings practice manual* (RG 8).

Disciplinary obligations and powers

- RG 225.1 Under s798H(1) of the *Corporations Act 2001* (Corporations Act), operators of licensed markets and participants in those licensed markets are required to comply with the market integrity rules for that market. ASIC is responsible for making those rules and ensuring compliance with them.
- RG 225.2 The Markets Disciplinary Panel (MDP) is a peer review body. It has the power, delegated by ASIC, to issue infringement notices and accept enforceable undertakings relating to breaches of the market integrity rules as an alternative to civil proceedings.
- RG 225.3 A sitting panel of the MDP (sitting panel) is made up of three MDP members convened to hear a matter: see RG 225.24–RG 225.26. While sitting panels will take into account ASIC’s published policies, they will make decisions about particular matters independently of ASIC.
- RG 225.4 For more information, see Regulatory Guide 216 *Markets Disciplinary Panel* (RG 216), which provides:
- (a) an overview of the disciplinary framework of the market integrity rules (Section A of RG 216);
 - (b) an outline of the constitution, role and independence of the MDP (Section B of RG 216);
 - (c) ASIC’s approach to administering the remedies available for breaches of the market integrity rules (Section C of RG 216);

- (d) the stages of the infringement notice and enforceable undertaking processes (Section D of RG 216); and
- (e) the policies that will be applied by the MDP in determining penalties payable, and other remedial action that may be applied, for particular breaches of the market integrity rules (Section E of RG 216).

Objectives of the process

RG 225.5 ASIC generally aims to have a matter investigated and referred to the MDP within six months, with the matter then determined by the MDP within three months.

Purpose of an infringement notice

RG 225.6 Infringement notices are designed to provide a fast and effective remedy so that redress is proportionate and close in time to an alleged breach. Matters will be dealt with in a timely and efficient way, while still providing significant protection to the proposed recipient of the infringement notice (Recipient).

Note: For convenience of expression, Recipient is also used for persons who have received an infringement notice and also persons who have received a statement of reasons.

RG 225.7 Infringement notices may contain a pecuniary penalty. Any penalties for breaches of the market integrity rules are payable to the Australian Government and the applicable amounts are set out in those rules. However, any penalty specified in an infringement notice issued by the MDP must not exceed 60% of the penalty amount set out in the market integrity rules.

RG 225.8 Once an infringement notice issued by the MDP has been complied with, generally no further regulatory action for the breach may be taken by ASIC against the Recipient.

RG 225.9 The issue of an infringement notice, and any compliance with it, is not a determination or an admission of liability, nor does it represent a finding that the market integrity rules have been contravened. It simply signals the MDP's view of the alleged conduct and provides a manner in which the matter may be dealt with, without engaging in lengthy and expensive court proceedings.

Purpose of an enforceable undertaking

- RG 225.10 Similarly, the capacity of the MDP to accept enforceable undertakings (other than when entering into one is a requirement of an infringement notice) provides additional flexibility for resolving matters by way of negotiated settlements.

MDP hearing principles

- RG 225.11 An MDP hearing is an administrative hearing conducted in accordance with the relevant provisions of the *Australian Securities and Investments Commission Act 2001* (ASIC Act).
- RG 225.12 A hearing of the MDP must be conducted with as little formality and technicality, and with as much expedition, as the requirements of the relevant legislation and a proper consideration of the matter allows.
- RG 225.13 The MDP must conduct its hearing as closely as possible in accordance with Regulatory Guide 8 *Hearings practice manual* (RG 8), which sets out the principles and procedures applied by ASIC in conducting an administrative hearing to give a person their statutory right to be heard. As these procedures are subject to RG 216, they must also follow the policy set out in that regulatory guide. To the extent there may be any inconsistency between RG 216 and these procedures, the policy set out in RG 216 prevails.
- RG 225.14 RG 8 contains the hearing principles, as applied to MDP matters, set out in Table 1.

Table 1: MDP hearing principles

Principle	As applied to the MDP
1 The opportunity to be heard	The MDP is obliged by the rules of procedural fairness to ensure parties appearing before it at a hearing have an opportunity to be heard. This right includes the right of a party to appear before the MDP and present its submissions, either in writing or orally, and present relevant evidence.
2 Entitlement to a notice	The Recipient is entitled to: <ul style="list-style-type: none"> know the subject matter of the hearing and, in particular, the issues and circumstances which are of concern to the ASIC Deterrence team and for which there is a risk of the MDP making an adverse finding; have sufficient time to prepare a response to the matters alleged against them by the ASIC Deterrence team.
3 Right to an impartial decision maker	Each member of a sitting panel is at all times required to have an open mind about the matter before them and the decision they will be required to make.

Principle	As applied to the MDP
4 Findings of fact to be made on a sound basis	Any finding of fact made by the MDP in a hearing must be based on material that is relevant, credible and logically proves the facts.
5 There is no onus of proof	In ASIC administrative hearings there is generally no burden of proof, as such hearings are inquisitive in nature, rather than adversarial. To make a finding against a recipient, a majority of sitting panel members must have reasonable grounds to believe a contravention of the market integrity rules has been established by the material before it.
6 Court practice does not apply	The rules of evidence and the usual court rules of procedure and practice do not apply to MDP hearings, as they are not adversarial exercises such as in a court. The MDP hearing procedures give a party the opportunity to present evidence and make submissions.
7 Applying policy and precedents	The MDP will consider each matter on its merits. In doing so, the MDP will take into account ASIC policy. It will also consider the relevant Australian Securities Exchange (ASX) Disciplinary Tribunal historical precedents.

B MDP proceedings

Key points

MDP proceedings are initiated either by the ASIC Deterrence team serving a statement of reasons, to which the Recipient can make a reply, or by way of a joint request by the parties for the MDP to approve a negotiated settlement.

Once MDP proceedings are initiated, general MDP procedures will be applied; for example:

- convening the sitting panel;
- determining any conflicts of interest;
- serving a notice of hearing;
- handling communication between the MDP and parties; and
- making and communicating a decision.

Initiating MDP proceedings

- RG 225.15 MDP proceedings are initiated either by
- (a) the relevant ASIC Deterrence team serving a statement of reasons on the Recipient and Counsel to the MDP simultaneously, alleging a breach of the market integrity rules and seeking the issuing of an infringement notice by the MDP; or
 - (b) a joint request by the parties for the MDP to approve a negotiated settlement.

Statement of reasons

- RG 225.16 If the ASIC Deterrence team believes there has been a breach of the market integrity rules and that an infringement notice is appropriate, it will simultaneously give the Recipient and Counsel to the MDP a statement of reasons together with supporting information and material.
- RG 225.17 The statement of reasons will set out all of the facts and contentions on which the ASIC Deterrence team relies to establish that there are reasons to believe that the Recipient has breached the market integrity rules. It will also include, as separate annexures, all documentary evidence supporting each fact alleged and any relevant material supporting the contentions made. The penalty, remedial actions and/or sanctions that the ASIC Deterrence team considers should be applied will also be listed.

- RG 225.18 The Recipient will also be provided by the ASIC Deterrence team with a copy of this regulatory guide and a notice advising the Recipient that:
- (a) they have right to a hearing in the matter;
 - (b) if they do not want to appear at the hearing, a written statement may be made to the MDP that will be taken into account; and
 - (c) if they do not indicate within the time specified in the notice whether they wish to be heard or make a written submission on the matter, it will be assumed that a sitting panel will make a decision on the basis of the information available and in accordance with the procedures for deciding a matter on the papers (see RG 225.65–RG 225.71).
- RG 225.19 If the Recipient requires an extension of time to respond, they should apply in writing to Counsel to the MDP. The application should be copied to the ASIC Deterrence team and set out in full the reasons for the request. Counsel to the MDP will then notify the Chairman of the MDP of the application; the Chairman will decide if an extension of time will be granted on the terms requested, on alternative terms decided by the Chairman or not at all. Counsel will advise the Recipient of the Chairman’s decision in writing, copied to the ASIC Deterrence team.

Reply to the statement of reasons

- RG 225.20 Any written submissions made by the Recipient in response to the statement of reasons will be referred to as the reply to the statement of reasons. The reply should clearly indicate which facts and contentions set out in the statement of reasons are contested by the Recipient and which are not. The Recipient should set out all facts and matters which it seeks to rely on when refuting the allegations in the statement of reasons, and indicate the evidence by which those matters are sought to be established. All documentary evidence relied on by the Recipient should be attached to the reply.
- RG 225.21 All of these written submissions by the parties must be provided to Counsel to the MDP in four hard copies, also copied to the other party: see RG 225.71.

General MDP procedures

- RG 225.22 How a sitting panel conducts proceedings is generally a matter for the Chairman of the sitting panel to determine in accordance with due process and the ASIC Act, and taking into account the applicable ASIC regulatory guides, including these procedures.

- RG 225.23 All matters referred to the MDP for determination or approval, whether dealt with by an oral hearing or a meeting of a sitting panel, will proceed as set out in the rest of this section.

Convening the sitting panel

- RG 225.24 Three members of the MDP will be nominated to form the sitting panel to consider the matter.
- RG 225.25 The Chairman of the MDP recommends the composition of sitting panels, to deal with particular matters, to the relevant Commission members. In doing so, the Chairman will take into account the nature of the matter and the expertise and experience of the available MDP members.
- RG 225.26 The Chairman of the MDP will assess any potential conflicts of interest of MDP members when 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.

Conflicts of interest

- RG 225.27 Where an MDP member has an interest that could conflict with the proper performance of the member's functions in determining a matter they are to hear, or are hearing, they must disclose that interest. In these circumstances, an MDP member will not be able to hear, or continue to hear, the matter unless the Recipient consents to the member doing so.
- RG 225.28 Counsel to the MDP will inform the Recipient of the identity of the MDP members who have been nominated to determine the matter. Counsel will request that the Recipient advise of any concerns or issues about the composition of the panel. Where the circumstances warrant, Counsel to the MDP may draw the Recipient's attention to any panel member's interest that could give rise to a relevant conflict and seek the Recipient's consent to the member hearing the matter.
- RG 225.29 If the Recipient becomes aware that a panel member has an interest that may give a perception of bias or could prevent the member from acting impartially, because it could conflict with the proper performance or exercise of that member's functions or powers in the proceedings, they must notify Counsel to the MDP as soon as reasonably practicable.

Notice of hearing

- RG 225.30 Counsel to the MDP will send a notice of hearing in writing to the ASIC Deterrence team and the Recipient, which will include:
- (a) under what provisions of the relevant legislation the hearing is being conducted;
 - (b) the names of the members convened to constitute the sitting panel to determine the matter;
 - (c) details of the right of the parties to object to an MDP member sitting on the grounds of conflict of interest;
 - (d) the date, time and venue of the hearing;
 - (e) that, if the Recipient does not want to appear at the hearing, they may before the day of the hearing lodge with Counsel to the MDP, copied to the ASIC Deterrence team, a written submission that the MDP will take into account;
 - (f) that, if the Recipient does not respond to the notice, then the sitting panel will make a decision on the basis of the information available before it; and
 - (g) who can give further information about the hearing and their contact details (usually Counsel to the MDP).
- RG 225.31 Counsel to the MDP will aim to send the notice of hearing to the parties within 21 days of receiving the statement of reasons.

Delivery of the notice

- RG 225.32 When the Recipient is a natural person, Counsel for the MDP will provide the notice of hearing by leaving it at, or posting it to, the address for the Recipient set out in the statement of reasons.
- RG 225.33 For a corporate entity, the notice is provided by leaving it at, or posting it to, the entity's registered office or other address, as set out in the statement of reasons.
- RG 225.34 If a liquidator or administrator has been appointed to the company, the notice may be provided by leaving it at, or posting it to, the liquidator's or administrator's office. The address used will be that in the most recent notice of address lodged with ASIC.
- RG 225.35 If the Recipient has legal representation and the legal representative has advised in writing that they are instructed to accept any and all communications on behalf of their client in the matter, then the notice of hearing will be sent to the address of the legal representative.

Date of hearing

- RG 225.36 The MDP may change the date on which it will consider a matter. Counsel to the MDP will advise the ASIC Deterrence team and the Recipient of the change in writing and give reasonable notice of the revised date, time and venue for hearing of a matter.

Venue for hearing

- RG 225.37 The venue and time for the hearing is determined by the Chairman of the sitting panel. Written notification of the place and time of the hearing will be provided to the Recipient or their legal representative and the ASIC Deterrence team by Counsel to the MDP.

Communication between the MDP and the parties

- RG 225.38 Any written correspondence from the MDP on the matter will be copied to the Recipient and ASIC Deterrence team. Similarly, any correspondence to the MDP should be addressed to Counsel to the MDP and copied to the ASIC Deterrence team or the Recipient as applicable.

- RG 225.39 Hard-copy communications to the MDP should be mailed to Counsel to the MDP at this address:

Counsel to the Markets Disciplinary Panel
Markets Disciplinary Panel
Australian Securities & Investments Commission
Level 5, 100 Market Street
Sydney NSW 2001

- RG 225.40 Electronic communications to the MDP should be emailed to the Counsel to the MDP at mdp@asic.gov.au.

- RG 225.41 All written correspondence between a party and Counsel for the MDP must also be copied to the other party, and provided to the MDP and party concerned in hard copy. Electronic versions may accompany the hard copies of the written correspondence as required.

- RG 225.42 The parties must provide four hard copies to Counsel to the MDP and copy in the other party when submitting the following documents:

- (a) statement of reasons;
- (b) the reply to the statement of reasons; and
- (c) any other further submissions on the issues to be determined in the matter.

- RG 225.43 In all circumstances and to preserve the independence of the MDP, MDP members and sitting panels will not communicate with ASIC staff involved

in investigating suspected breaches of the market integrity rules except in the presence of the Recipient.

Decision of the sitting panel

Basis of the decision

- RG 225.44 The MDP must have reasonable grounds to believe that a Recipient has contravened s798H(1) of the Corporations Act before it may issue an infringement notice or accept an enforceable undertaking.
- RG 225.45 To have reason to believe that a market integrity rule has been breached, the sitting panel must determine:
- (a) which disputed facts are established to the reasonable satisfaction of the sitting panel; and
 - (b) whether or not the sitting panel has reason to believe the facts have established the alleged breach.
- RG 225.46 The sitting panel will base its decision on the evidence and material before it that is relevant, credible and logically proves the facts.
- RG 225.47 A sitting panel may give such weight to items of evidence put before it as it considers appropriate and fair in all the circumstances of the matter.

Communicating the decision and reasons for the decision

- RG 225.48 If a matter proceeds to hearing, the sitting panel may announce its decision at the conclusion of submissions made to it by the parties. More usually, regardless of whether a matter proceeds to a hearing or is determined on the papers, the Counsel to the MDP will inform the parties of the decision of the sitting panel in writing and provide written reasons for their determination to the parties. Generally the parties will not be notified orally of the decision.
- RG 225.49 The MDP will generally aim to notify the parties of the decision and the reasons for the decision in writing, and issue any infringement notice made within three months of receiving the statement of reasons. Where the MDP is not able to comply within this timeframe, Counsel to the MDP will advise the parties of any longer period required.

Costs

- RG 225.50 The MDP has no power or discretion to order costs in any matter before it against any party to the proceedings. The costs of any matter before the MDP will be borne by the parties to the proceedings, including the cost of witnesses and advisers.

Merits review

- RG 225.51 There is no internal review process in place within ASIC for decisions made by the MDP.
- RG 225.52 Decisions to issue and withdraw infringement notices of the MDP are excluded from review by the Administrative Appeals Tribunal: see s1317C(gcc) of the Corporations Act.

C Proceeding options

Key points

A Recipient of a statement of reasons from the ASIC Deterrence team has a number of options they may elect to pursue in deciding how to proceed with the matter. These options are:

- negotiating a settlement (RG 225.53–RG 225.64);
- determining the matter on the papers (RG 225.65–RG 225.71); and
- an oral hearing (RG 225.72–RG 225.110).

This section sets out these options and the procedures that govern each.

Negotiated settlements

- RG 225.53 Where a Recipient does not wish to contest the alleged breach, they should contact the ASIC Deterrence team as soon as possible. Discussions may then take place 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.
- RG 225.54 If the ASIC Deterrence team and the Recipient agree to settle a matter, the terms of settlement are to be submitted by that team on behalf of both parties to Counsel to the MDP for approval by a sitting panel.
- RG 225.55 The sitting panel will be selected following the procedure set out at RG 225.24–RG 225.26. The conflict handling arrangements of the MDP for panel member selection, set out at RG 225.27–RG 225.29, will be followed.
- RG 225.56 If the terms of settlement involve the issue of an infringement notice under the Corporations Regulations 2001 (Corporations Regulations), it is necessary for a notice of hearing to be given. In these circumstances, it could generally be expected that the Recipient and the ASIC Deterrence team would have agreed that the matter will be determined on the papers and that there will be a joint written submission to the sitting panel setting out why it should agree to issue an infringement notice on the terms proposed. Counsel to the MDP should be informed of this decision after they have issued a notice of hearing to the parties.
- RG 225.57 If the negotiated settlement involves the Recipient entering into an enforceable undertaking but not the issue of an infringement notice, there is no requirement for the Recipient to be given the opportunity to appear at an oral hearing. In such cases, a notice of hearing usually would not be issued.

- RG 225.58 In either case, there may be situations where the sitting panel would be assisted by hearing from the Recipient or the Deterrence team on specific matters. In these circumstances, they will be advised of the need to appear before the sitting panel by Counsel to the MDP.
- RG 225.59 The sitting panel will consider all the material that is provided to it by the ASIC Deterrence team and the Recipient, whether it is a joint submission or separate submissions. To approve a negotiated infringement notice or enforceable undertaking, the sitting panel must:
- (a) have reasonable grounds to believe that the alleged breach has occurred; and
 - (b) consider the appropriateness of the proposed penalty and/or remedies.
- RG 225.60 Also, the sitting panel will only approve a negotiated infringement notice if it complies with the mandatory Corporations Regulations content provisions for MDP infringement notices: reg 7.2A.06. Similarly, the MDP may accept a negotiated enforceable undertaking, provided it is in accordance with reg 7.2A.01, RG 216 and, to the extent relevant, Regulatory Guide *Enforceable undertakings* (RG 100).
- RG 225.61 In considering a negotiated settlement, a sitting panel may meet to conduct proceedings without all members of the panel being in the physical presence of each other, provided that all sitting panel members are able to participate in the proceedings. In particular, sitting panel members may convene in a meeting to determine a matter on the papers by way of video conference or teleconference call, or by means of a combination of methods of communication approved by ASIC.
- RG 225.62 Counsel to the MDP will advise the parties of the decision of the MDP. Where the MDP has approved the proposed negotiated settlement, an infringement notice issued by the MDP will be provided to the parties by Counsel to the MDP.
- RG 225.63 If the MDP declines to approve a negotiated infringement notice or enforceable undertaking, it may advise the parties of its reasons, but will not advise what precise terms and/or figures it would be prepared to accept as appropriate in a settlement of the matter. However, it may give an indication of its thinking at the time to facilitate the possibility of continued settlement negotiations. It is then open to the parties to consider if they wish to enter into further negotiations to see if the matter can be settled subject to MDP approval. If not, then it will proceed to a hearing before the MDP.

RG 225.64 The sitting panel members convened to consider the proposed negotiated settlement of the matter will generally be the sitting panel convened to hear and determine the matter.

Note: Nothing in RG 225.53–RG 225.64 should be taken as indicating that a person should not seek to negotiate the settlement of a matter before the formal service of a statement of reasons.

Matters determined on the papers

RG 225.65 A Recipient may elect not to present at an oral hearing, but instead contest the matter only by making written submissions. They may take this approach regardless of whether they wish to contest both whether there is reason to believe that they have breached the rules and the appropriate penalty, or just the latter.

RG 225.66 In either case, a sitting panel will be convened and a notice of hearing will be issued following the process outlined at RG 225.30–RG 225.49, including the process for dealing with possible conflicts of interests at RG 225.27–RG 225.29.

RG 225.67 The Chairman of the sitting panel will set out the timetable for filing written submissions by the Recipient and any submissions in reply by the ASIC Deterrence team. This will be given to both parties in writing by Counsel to the MDP.

RG 225.68 It would normally be expected that if the Recipient has indicated that they only wish to rely on written submissions, the sitting panel will proceed to make a decision on the basis of the submissions and documents before it.

RG 225.69 As is the case when a matter proceeds to a hearing, the panel will decide on the basis of the available evidence whether there are reasonable grounds to believe that the breach of the market integrity rules alleged in the statement of reasons has occurred.

RG 225.70 The sitting panel may, at its discretion, request the parties make submissions or appear before it to provide further information or clarify any issue raised by the documents. Counsel to the MDP will notify the parties of the panel's request, and if their appearance is sought, notify them of the date, time and venue for such appearance and the issues or further information sought by the sitting panel. The notification will be copied to the other party, who will be given the option to also attend.

RG 225.71 As with negotiated settlements, a sitting panel may need to decide a matter on the papers by way of a video or phone conference: see RG 225.61.

Matters proceeding to hearing

RG 225.72 Where the Recipient of a matter referred to the MDP elects to have the matter dealt with by an oral hearing, the hearing will be conducted in accordance with the Pt 3, Div 6 of the ASIC Act and the relevant ASIC regulatory guides, including these procedures.

Privacy and confidentiality

RG 225.73 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 (reg 7.2A.05(1)(b)(i) of the Corporations Regulations and s54 and 127 of the ASIC Act) and MDP members are 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.

Hearing directions

RG 225.74 Some general court practices or procedures may be adopted by the sitting panel in hearings, for the purpose of efficiency and effectiveness, such as setting directions for the filing of written submissions and evidence to the sitting panel and the other party to the matter.

RG 225.75 The Chairman of a sitting panel is responsible for the conduct of proceedings. Generally, the Chairman may make directions as they see fit to ensure the hearing is conducted in an efficient and expeditious manner, taking into consideration due process and the hearing obligations under the ASIC Act. Any pre-hearing directions of the Chairman will be provided to the parties in writing by Counsel to the MDP.

RG 225.76 The directions will set out a timetable for the conduct of proceedings and dates for:

- (a) delivery to Counsel to the MDP of the Recipient's reply to the statement of reasons, including an indication if they contest all or any of the alleged breaches of the market integrity rules, together with any written submissions or evidence on which they will rely; and
- (b) delivery to Counsel to the MDP by the ASIC Deterrence team of any submissions or evidence in reply.

RG 225.77 No further submissions will generally be allowed unless a request to do so is made in writing and granted by Counsel for the MDP, after consultation with the Chairman of the MDP. Provided the submissions address issues or furnish evidence not previously provided in submissions already filed by a party, such a request is likely to be granted.

- RG 225.78 Pre-hearing directions made by the Chairman may also include such matters as:
- (a) imposing deadlines for the supply to the other party (copied to the Counsel to the MDP) of copies of documents the party intends to rely on at the hearing;
 - (b) imposing deadlines for identifying any proposed witnesses for the hearing;
 - (c) setting out timeframes for preparing and submitting written outlines of arguments; and
 - (d) directions on the preparation of a statement of agreed facts.

Conduct at hearings

- RG 225.79 MDP hearings are generally conducted as the Chairman of the sitting panel considers appropriate, taking into account the relevant hearing provisions of the ASIC Act and RG 8, and with as little formality and technicality as a proper consideration of the matter permits.
- RG 225.80 The Chairman of the sitting panel will usually open the proceedings by introducing the sitting panel members and requesting the parties or their representatives name themselves and identify other persons present on their behalf. If the matter is being recorded, the Chairman will draw this fact to the attention of the parties.
- RG 225.81 The Chairman will then usually ask if there are any objections to the composition of the panel not previously raised. The Chairman will also ascertain if the Recipient elects to continue to contest the alleged contravention of the market integrity rules as set out in the statement of reasons.

Proceedings during a hearing

- RG 225.82 Normal hearing hours are 10 am–1 pm and 2 pm–4 pm on each sitting day. However, the Chairman of the sitting panel may depart from the standard hours in individual cases as required.
- RG 225.83 After introductions and the opening words from the Chairman, the representative of the ASIC Deterrence team will be invited to give an opening statement, including outlining how the evidence on which it relies supports the allegations set out in the statement of reasons.
- RG 225.84 If it is necessary, the ASIC Deterrence team may then call witnesses who may be cross-examined by the Recipient or their representative: see RG 225.95–RG 225.96. After cross-examination, the representative of the ASIC Deterrence team may apply to ask the Chairman of the Panel for leave to re-examine any witness.

- RG 225.85 The Recipient will then commence with an opening statement and have the opportunity to respond and present their case.
- RG 225.86 If necessary, the Recipient may then call witnesses who may be cross-examined by the representative of the ASIC Deterrence team. The Recipient or their representative may then apply to the Chairman of the sitting panel to re-examine any witness.
- RG 225.87 Panel members may at any stage ask their own questions of any witness called by either party to the proceedings.
- RG 225.88 If the parties have not already done so in their presentations and submissions, the Chairman of the sitting panel may invite the parties to address the panel on the question of any sanction and/or remedy that would be appropriate to impose, including pecuniary penalties.
- RG 225.89 At the end of proceedings the sitting panel will be addressed by the representative of the ASIC Deterrence team and then by the Recipient or their representative for a final summation. The representative of the ASIC Deterrence team will usually have a short right of reply. The Chairman of the sitting panel will allocate times for such oral submissions and, in certain cases, may allow written submissions to be made in addition.
- RG 225.90 The sitting panel may give an oral decision at the conclusion of the hearing or it may reserve its decision and communicate it in writing at a later date. It is more usual for the panel's decision to be reserved. In either case, the parties will be provided with written reasons.

The sitting panel may obtain advice

- RG 225.91 A sitting panel may obtain such legal advice on procedural matters as it considers appropriate. Counsel to the MDP will usually be present at hearings and the sitting panel may, where it considers appropriate, have other legal advisers present as well.

Protection of sitting panel members and representatives

- RG 225.92 A sitting panel member, in the exercise of any of their functions and powers, has the same protection and immunity as a Justice of the High Court: see s62(1A) of the ASIC Act.
- RG 225.93 A barrister, solicitor or other person appearing on a person's behalf at an MDP hearing has the same protection and immunity as they would in appearing for a party in the High Court: see s62(2) of the ASIC Act.

Contempt of the MDP

- RG 225.94 A person must not engage in conduct that results in the obstruction or hindering of ASIC or a member of ASIC, including the MDP, in the performance of any of their function and powers, or engage in conduct that disrupts an MDP hearing. To do so may make the person liable to a penalty of 50 penalty units and/or imprisonment for one year: see s66(1) of the ASIC Act.

Witnesses

- RG 225.95 Whilst the MDP has the power to summons witnesses under s58(1)(a) of the ASIC Act, the MDP considers that, as a matter of general principle, it will not be necessary to call witnesses. In most instances a written statement will be adequate.
- RG 225.96 The Chairman of the sitting panel may allow oral evidence to be given before them. The Chairman has the discretion to decide whether or not to allow a person who provides oral evidence to be cross-examined: see s58(4) of the ASIC Act.
- RG 225.97 If evidence is provided on important matters in dispute between the parties, cross-examination may be requested by the opposing party and allowed by the Chairman.
- RG 225.98 Failure to make a witness available for cross-examination will not in itself render the witness's evidence inadmissible. However, the sitting panel will determine the weight to be given to the witness's evidence, and this may be affected by whether or not the evidence was tested by cross-examination.
- RG 225.99 Witnesses called to give evidence by a party will be allowed to be present at the hearing only while they give evidence, unless the sitting panel agrees otherwise.

Expert witnesses

- RG 225.100 The sitting panel 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 sitting panel may rely on an expert report provided to it by the ASIC Deterrence team or an expert report that is provided to it by the Recipient.
- RG 225.101 The sitting panel may also ask that an expert, whose report has been provided to it, be present to assist the hearing.
- RG 225.102 The sitting panel will usually give leave for a party's expert (if one has been retained) to remain in the hearing room while the relevant evidence is being given.

Evidence

- RG 225.103 The rules of evidence and the usual court rules of procedure and practice do not apply to MDP hearings.
- RG 225.104 The parties are not entitled to be informed of the sitting panel's impression of evidence as it is being presented. The sitting panel does not comment on any views of the evidence it has formed, other than in the written reasons for its decision.

Adjournments and extensions of time

- RG 225.105 If a party to proceedings before the MDP requests an adjournment of the hearing date or an extension of time to comply with any pre-hearing directions or timetable given, the request must be made in writing to Counsel to the MDP and set out the full details of the reason for the adjournment or extension being sought.
- RG 225.106 The Chairman of the sitting panel will decide if the request will be granted. If granted, a new hearing date and/or an extension of time to comply with pre-hearing directions will then be made, taking into account the reasons for the request, to facilitate the matter proceeding as soon as possible.
- RG 225.107 Counsel to the MDP will then notify all parties in writing of the Chairman's decision and the new hearing date and/or revised timetable for the pre-hearing directions.

Transcript

- RG 225.108 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 Recipient.
- RG 225.109 Provision of the transcript will be conditional on the person using the transcript only for the purpose of the hearing, such as taking legal advice about any decision by the MDP following the hearing.
- RG 225.110 The ASIC Deterrence team responsible for presenting the matter to the sitting panel will also be given a copy of the transcript on request.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	ASX Limited (ACN 008 624 691) or the exchange market operated by ASX Limited
Chairman of the MDP	The person appointed by ASIC to chair the Markets Disciplinary Panel.
Chairman of the sitting panel	The person delegated by the Chairman of ASIC to chair a sitting panel convened to consider a particular alleged breach of the market integrity rules
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
Counsel to the MDP	A legally qualified member of ASIC staff appointed to provide support to the MDP
enforceable undertaking	An enforceable undertaking that may be accepted by the MDP under reg 7.2A.01 of the Corporations Regulations
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 <i>Corporations Act</i> , 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
notice of hearing	Notification in writing to the Recipient by Counsel to the MDP of the date, time and place for the hearing of the matter of an alleged breach of the market integrity rules. It includes the identity of the MDP members nominated to convene a sitting panel to hear the matter
Pt 3 (for example)	A Part of the Corporations Act (in this example, numbered 3), unless otherwise specified
Recipient	An entity or person who is the recipient of a statement of reasons issued by ASIC, and the proposed possible recipient of an infringement notice and/or enforceable undertaking issued by the Markets Disciplinary Panel

Term	Meaning in this document
reg 7.2A.01 (for example)	A regulation under the Corporations Regulations (in this example, numbered 7.2A.01), unless otherwise specified
RG 216 (for example)	An ASIC regulatory guide (in this example, numbered 216)
s798H(1) (for example)	A section of the Corporations Act (in this example, numbered 798H(1)), unless otherwise specified
sitting panel	Three members of the MDP convened to hear and make a decision on a matter
statement of reasons	A written statement given to the Recipient by the ASIC Deterrence team that sets out, for the purposes of reg 7.2A.05, ASIC's reasons for believing that the Recipient has breached the market integrity rules

Related information

Headnotes

conflicts of interest, hearing, Markets Disciplinary Panel (MDP), notice of hearing, proceedings, sitting panel, statement of reasons, Recipient, reply to statement of reasons

Regulatory guides

RG 8 *Hearings practice manual*

RG 100 *Enforceable undertakings*

RG 216 *Markets Disciplinary Panel*

Legislation

ASIC Act, Pt 3, Div 6, s54, 58(1)(a), 58(4), 62(1A), 62(2), 66(1), 127

Corporations Act, s798H(1), 1317C(gcc); Corporations Regulations, reg 7.2A.01, 7.2A.05(1)(b)(i) and 7.2A.06