

**Memorandum of Understanding**  
**between**  
**Australian Securities and Investments Commission**  
**and**  
**Asia Pacific Exchange Limited ABN 19 080 399 220**

**PART ONE: BACKGROUND**

1. This MOU aims to promote cooperation, sharing of information and mutual assistance between ASIC and APX to facilitate the efficient discharge of their respective roles and responsibilities under the Corporations Act.
2. ASIC is responsible (among other things) for the administration of the Corporations Act. Under subsection 1(2) of the ASIC Act, in performing its functions or exercising its powers, ASIC must strive (among other things) to:
  - (a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;
  - (b) promote the confident and informed participation of investors and consumers in the financial system;
  - (c) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
  - (d) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.
3. Under Part 7.2A of the Corporations Act, ASIC has the function of supervising financial markets the operators of which are licensed under subsection 795B(1) of the Corporations Act.
4. ASIC has a broad range of enforcement powers and may take enforcement action for contraventions of the Corporations Act (including the market integrity rules) and ASIC Act, including administrative action, civil litigation or referring a matter to the DPP for prosecution. ASIC also has the capacity to take action to enforce the operating rules of licensed markets under paragraph 793C(1)(a) of the Corporations Act.
5. APX is an operator of a licensed market under its Australian market licence. APX provides a trading facility to participants, subject to regulatory oversight by ASIC.
6. APX's operating rules have contractual force and are recognised in the Corporations Act. Among other things, APX's operating rules are given the force of a contract under seal between APX and the participants involved in the market by section 793B of the Corporations Act.
7. APX has obligations derived from its licence as set out in the Corporations Act. These obligations include (but are not limited to): to the extent it is reasonably practicable to do so, to do all things necessary to ensure that the market is a fair, orderly and transparent market; and to have adequate arrangements for operating the market, including arrangements for monitoring and enforcing compliance with the operating rules of the market. APX has powers derived from the operating rules (and recognised in the Corporations Act) to investigate and take enforcement action in respect of breaches of the operating rules.
8. There is potential for overlap and duplication between ASIC's regulatory functions and powers and APX's obligations to monitor and enforce compliance with its operating rules.
9. This MOU does not supersede or modify any law in force that applies to ASIC or APX. This MOU does not create any enforceable rights, any legally binding obligations or agreement but is instead intended to be a statement of guiding principles covering the following aspects of the ASIC-APX relationship:

- (a) the referral of matters by one party to the other where one party has reason to suspect that a person has committed, is committing or is about to commit a significant contravention of APX's operating rules or the Corporations Act;
  - (b) notification by ASIC and APX of various matters in accordance with the functions and statutory obligations (respectively) of the parties;
  - (c) the sharing of information between the parties to assist each party to carry out functions (in the case of ASIC) and comply with obligations (in the case of APX) under the Corporations Act; and
  - (d) the co-ordination of compliance and enforcement activities for efficiency and to avoid duplication of effort.
10. ASIC and APX may agree to form various joint-forums, including an ASIC-APX Compliance Liaison Committee in which to exchange information and address, at an operational level, the arrangements and understandings set out in this MOU. The nature, purpose and frequency of the ASIC-APX Compliance Liaison Committee and any other joint-forums will be:
- (a) agreed from time to time by the parties to this MOU; and
  - (b) set out in a side letter, signed by the representatives named in paragraph 48.

## **PART TWO: DEFINITIONS**

11. For the purposes of this MOU:

"ASIC" means the Australian Securities and Investments Commission

"ASIC-APX Compliance Liaison Committee" means the central coordinating committee referred to in paragraph 10 of this MOU.

"ASIC Act" means the *Australian Securities and Investments Commission Act 2001*.

"APX" means Asia Pacific Exchange Limited ABN 19 080 399 220.

"Corporations Act" means the *Corporations Act 2001*.

"DPP" means the Commonwealth Director of Public Prosecutions.

"MOU" means this Memorandum of Understanding.

"notification" means a written notification given to APX by ASIC described in paragraph 15 of this MOU.

"party" means a party to this MOU, being either ASIC or APX.

"Privacy Act" means the *Privacy Act 1988* (Cth).

"referral" has the meaning given by paragraph 12 of this MOU.

"related body corporate" has the meaning given by section 9 of the Corporations Act.

"report" has the meaning given by paragraph 18 of this MOU.

Each of the following terms has the meaning given by section 761A of the Corporations Act:

"Australian market licence"

"licensed market"

"market integrity rules"

"market licensee"

"operating rules"

"participant"

### **PART THREE: REFERRALS NOTIFICATIONS AND REPORTS**

12. Under paragraph 792B(2)(c) of the Corporations Act, APX is required to give written notice (a "referral") to ASIC as soon as practicable if it has reason to suspect that a person has committed, is committing or is about to commit a significant contravention of its operating rules or the Corporations Act (it being acknowledged for these purposes that a contravention of the market integrity rules is also a contravention of section 798H of the Corporations Act).
13. ASIC and APX may agree guidelines or protocols for inclusion of information in referrals additional to the information APX is required to give to ASIC under paragraph 792B(2)(c) of the Corporations Act. Those guidelines or protocols will seek to ensure the most efficient use of resources by both ASIC and APX in making or reviewing a referral.
14. ASIC will review all referrals from APX within a reasonable time and, where appropriate, may do the following:
  - (a) in those cases where ASIC is satisfied that a significant contravention has occurred and where sufficient evidence exists, take enforcement action or administrative action;
  - (b) decide to discuss the matter with the relevant participant, in order to encourage compliance but not take any additional action; or
  - (c) decide not to take any specific action (other than to record information relating to the matter in its files or databases for future reference).

In each case, ASIC will provide timely advice to APX as to whether ASIC proposes to take action of a type referred to in paragraph (a) in relation to the referral and, if not, the reasons for not taking action. APX acknowledges that the reasons provided to it by ASIC in accordance with this paragraph are confidential information.

15. Where ASIC has reason to suspect that a person has committed, is committing or is about to commit a significant contravention of APX operating rules, ASIC will, subject to the Privacy Act and section 127 of the ASIC Act, as soon as practicable, provide written notification ('notification') of the matter to APX, together with information and documentation to assist APX in assessing the matter. Such matters may include:
  - (a) a suspected breach of the APX operating rules, which may be more appropriately dealt with under APX's disciplinary powers, with the following information to be included:
    - (i) the name of the participant or participants involved;
    - (ii) the names of individual or individuals involved;
    - (iii) the names of clients affected (if any);
    - (iv) the dates that the suspected contravention or contraventions occurred;
    - (v) a meaningful description of the matter;
    - (vi) the ASIC team handling the matter; and
    - (vii) the name of the ASIC case officer handling the matter.

16. APX will review notifications from ASIC within a reasonable time and, where appropriate, may do the following:
- (a) in those cases where APX is satisfied that enforcement action is appropriate and where sufficient evidence exists, take enforcement action;
  - (b) subject to any obligations imposed by section 127 of the ASIC Act in relation to information disclosed to APX by ASIC, decide to discuss the matter with the relevant participant in order to encourage compliance but not take any additional action; or
  - (c) decide not to take any specific action (other than to record information relating to the matter in its files or databases for future reference).

In each case, APX will provide timely advice to ASIC as to whether APX proposes to take enforcement action or other action to encourage compliance in relation to the notification and, if not, the reasons for not taking action. ASIC acknowledges that reasons provided to it by APX in accordance with this paragraph are confidential information.

17. In the case of referrals and reports by APX to ASIC and the notification by ASIC to APX under paragraph 15, the parties agree, subject to the Privacy Act and section 127 of the ASIC Act, to undertake early discussion to:
- (a) assist ASIC or APX to decide whether to investigate the matter and/or take enforcement action;
  - (b) determine which party should undertake any investigation or enforcement action; and
  - (c) identify any necessary information and assistance (including the provision of evidence, where appropriate) that can be provided by the other party.

Such discussion should take place at the first meeting of the ASIC-APX Compliance Liaison Committee, or any other joint-forums between ASIC and APX, after the referral or notification is received if it has not taken place earlier.

18. Under subsection 792B(3) of the Corporations Act, APX is required to give a written report ("report") to ASIC if APX becomes aware of a matter which APX considers has adversely affected, is adversely affecting or may adversely affect the ability of a participant in the market, who is a financial services licensee, to meet the participant's obligations as a financial services licensee or a matter, concerning a participant in the market who is a financial services licensee, that is of a kind prescribed by regulations. APX agrees to include the following information in a report:
- (a) the licensee's name;
  - (b) all information relevant to the matter that is known to APX at the time of making the report; and
  - (c) APX's reasons for making the report.
19. ASIC and APX may agree further guidelines or protocols for:
- (a) the content of reports and referrals given to ASIC by APX;
  - (b) the content of notifications given to APX by ASIC;
  - (c) the content of written notices (however called) required to be given to ASIC by APX under the market integrity rules; and
  - (d) the data feed APX must provide to ASIC under the market integrity rules.

## **PART FOUR: INFORMATION SHARING**

20. In addition to the referrals, reports and notifications referred to in this MOU, and subject to all applicable laws including but not limited to the Privacy Act and the ASIC Act, ASIC and APX will, where appropriate, share other information. Sharing of information will usually take place by written or email communication or by communication at ASIC-APX joint-forums, which may include ASIC-APX Compliance Liaison Committee meetings. It is agreed that information sharing should occur in the following circumstances, subject to all applicable legal considerations and restrictions:
- (a) where ASIC receives a complaint alleging a significant breach of the APX operating rules by a participant and ASIC reasonably believes that APX may wish to consider taking further action in relation to the complaint (notwithstanding that ASIC may not otherwise have sufficient information about the subject matter of the complaint to give a notification under paragraph 15 of this MOU);
  - (b) where APX receives a complaint alleging a significant breach of the Corporations Act or the market integrity rules and APX reasonably believes that ASIC may wish to consider taking further action in relation to the complaint (notwithstanding that APX may not otherwise have sufficient information about the subject matter of the complaint to ground a referral);
  - (c) where one party becomes aware of information which is materially relevant to an investigation or enforcement action being conducted by the other party;
  - (d) where, through the conduct of an enforcement action, either party acquires or develops new knowledge of the interpretation or legal consequences of particular market behaviour or other knowledge which may be of assistance to the other party in current or future enforcement actions;
  - (e) where either party has reason to believe that a participant may be insolvent or may be at risk of defaulting on any of its obligations under the Corporations Act or relevant operating rules or to clients generally; and
- ASIC and APX may agree guidelines or protocols detailing the timing, nature and scope of the provision of information relating to the examples set out in this paragraph.
21. ASIC and APX also agree, subject to all applicable laws including but not limited to the Privacy Act and the ASIC Act, to share information on a real time basis on matters which are likely to assist in their respective market surveillance activities. ASIC and APX may agree guidelines or protocols detailing the timing, nature and scope for the sharing of this information.
22. The examples set out in this MOU do not limit the parties' intention or ability to share information or to cooperate with respect to other matters, where appropriate and subject to applicable legal constraints.
23. APX will publish on its website a list of the waivers it has granted to participants from the APX operating rules. The list will be updated by APX at least once a month and include:
- (a) the name of the participant receiving the waiver;
  - (b) the date the waiver was granted;
  - (c) the operating rules waived; and
  - (d) a summary of the basis for granting the waiver.

### **Limitations on information sharing**

24. The provision of any information by ASIC or APX to the other under this MOU is subject to all relevant legal considerations and restrictions including, for example, the restrictions imposed by the Privacy Act and the ASIC Act and considerations relating to legal professional privilege, natural justice, criminal contempt and breach of confidence.

25. Each party acknowledges the confidentiality requirements imposed on ASIC, and on recipients of information from ASIC, under section 127 of the ASIC Act.
26. ASIC acknowledges that APX may not be in a position to disclose information held by APX without first receiving a notice from ASIC under the ASIC Act or the Corporations Act to produce the information. Where that is the case, APX will notify ASIC in a timely manner and the parties will co-operate to ensure that an appropriate notice is issued.
27. APX acknowledges that in some circumstances, including circumstances in which a person has provided ASIC with information in confidence, ASIC may be required to afford procedural fairness prior to releasing information to APX. The rules of procedural fairness may require that ASIC advise persons who may be affected and seek submissions concerning ASIC's intention to release the information to APX as well as any conditions which may be attached to the release, and to take any submissions made into account.
28. Subject to paragraphs 29, 34 and 35 of this MOU, neither ASIC nor APX will disclose any confidential information obtained under this MOU to a third party
  - (a) unless it has obtained the prior consent of the other party to disclosing the confidential information; or
  - (b) disclosure is required, authorised or permitted by law; or
  - (c) the information is disclosed in the course of, and for the purposes of, enforcement proceedings or by that party, or administrative action by ASIC.

If paragraph (b) applies, the party seeking to disclose will, wherever practicable, notify the other party in sufficient time ahead of the intended disclosure so as to enable that party to take action to protect the release of the confidential information.

29. ASIC may disclose confidential information obtained under this MOU to its responsible Minister or in response to a request by a House or a Committee of the Parliament of the Commonwealth of Australia.

#### **PART FIVE: POTENTIAL CONFLICT SITUATIONS – SECTIONS 798DA – 798E OF THE CORPORATIONS ACT**

30. Section 798DA of the Corporations Act provides for ASIC to make decisions and take action in relation to certain matters concerning APX, its related entities and its competitors.
31. Section 798E of the Corporations Act enables regulations to be made to provide for the rules and procedures that are to apply in the case of conflicts or potential conflicts between the commercial interests of APX and the need for it to ensure that the market operates in a fair, orderly and transparent way under s792A(a) of the Corporations Act.
32. Under the Corporations Act, ASIC may reasonably request APX to provide such information and assistance as is reasonably requested by ASIC to enable ASIC to supervise any of its related entities who become participants in its market. ASIC and APX may enter into protocols under paragraph 47 to detail these arrangements.

#### **PART SIX: CO-OPERATION AROUND WHOLE OF MARKET SUPERVISION**

33. APX acknowledges that there may be circumstances where cooperation between it and other market operators, including by sharing information, may be necessary to promote market integrity.
34. Subject to the Privacy Act and section 127 of the ASIC Act, ASIC may request or obtain information from APX and disclose it to other market operators.
35. Similarly, and subject to the Privacy Act and section 127 of the ASIC Act, ASIC may disclose to APX confidential information obtained by ASIC from other market operators.
36. ASIC and APX may agree to establish joint-forums involving other market operators, for example to discuss issues relating to co-ordination and co-operation among ASIC, APX and other market operators. The purpose

and scope of any joint-forum will be set out in a side letter signed by the parties' representatives named in paragraph 48 or by other authorised representatives of each party.

37. The parties may agree to establish a protocol or protocols pursuant to paragraph 47 with other market operators to set out detailed arrangements for whole of market co-ordination and cooperation.

#### **PART SEVEN: PUBLICITY**

38. The parties acknowledge that disclosure by ASIC of a report or referral given by APX to ASIC, or disclosure by APX of a notification given by ASIC to APX, or disclosure by either party of information obtained by the other party in the course of conducting an investigation or enforcement action, is undesirable and may jeopardise investigations or enforcement actions.
39. The parties also acknowledge that in a limited number of cases, either or both of the parties may have to deal with inquiries from third parties about a matter of high public profile. In such circumstances, where time permits, each party will consult with the other before making public any information in relation to a current investigation or enforcement action or a possible future investigation or enforcement action being conducted by the other. Without limitation, this includes any matter where:
- (a) a referral has been made by APX to ASIC and ASIC has not communicated that it does not intend to conduct enforcement action in the matter; and
  - (b) a notification has been given by ASIC to APX and APX has not communicated that it does not intend to conduct enforcement action in the matter.
40. Where a party makes a public statement relating to a matter in relation to which the other party has made a referral or notification or given significant assistance, the first party will give public acknowledgment of that fact. When time permits, the wording of the acknowledgment will be settled with the other party before release.
41. Any publicity by ASIC in relation to a current ASIC investigation or enforcement action or a possible future ASIC investigation or enforcement action will be made in accordance with ASIC Information Sheet 152.
42. The parties acknowledge that it will sometimes be necessary for APX to make public information regarding an enforcement activity in order to prevent uninformed trading, or to explain a suspension of trading.
43. APX may from time to time publish:
- (a) a summary of the number and type of referrals and reports made to ASIC, provided the summary does not name the persons or entities the subject of the referrals or reports, or include other information that might allow the names of the persons or entities involved to be deduced; and
  - (b) after the conclusion of an enforcement action by ASIC, initiated following a referral from APX to ASIC, a statement about that enforcement action and the fact that APX made that referral.

#### **PART EIGHT: ADMINISTRATION**

##### **Implementation**

44. This MOU comes into effect on the date it is executed and continues in effect until terminated under paragraph 45 or 46.
45. If APX ceases to be a market licensee this MOU terminates on and from the date it ceases to be such a licensee.
46. This MOU may be terminated by written agreement of both parties, or six months after one party gives written notice to the other of an intention to terminate.

**Guidelines, protocols and side letters**

- 47. This MOU may be supplemented by guidelines, protocols or side letters specifying agreed operational arrangements to give effect to the arrangements and understandings in this MOU from time to time. These will include the guidelines, protocols and side letters foreshadowed in this MOU.
- 48. Any such guidelines or protocols and any written notices or side letters required or contemplated under this MOU may be signed by:
  - (a) The Senior Executive Leader of Financial Market Infrastructure or the Senior Executive Leader of Market and Participant Supervision, on behalf of ASIC; and
  - (b) the Chief Operating Officer or the Executive Director, on behalf of APX.

SIGNED BY 

Dated this 3 day of September 2013.

For and on behalf of ASIC

SIGNED BY 

Dated this 26 day of August 2013.

For and on behalf of Asia Pacific Exchange Limited