



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 136

Markets Disciplinary Panel

May 2010

About this paper

This consultation paper seeks feedback on a draft regulatory guide on the Markets Disciplinary Panel (MDP). The draft regulatory guide deals with the processes by which matters will be referred to the MDP, what processes will be followed by the MDP in deciding whether to issue infringement notices or accept enforceable undertakings in relation to breaches of the market integrity rules, and what the MDP will take into account in deciding what remedies are appropriate for such breaches.

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 paper was issued on 26 May 2010 and is based on the Corporations Act as at 26 May 2010.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

At the date of issue of this consultation paper, the Corporations Amendment Regulations 2010, which are intended to support the Financial Market Supervision Act, are in exposure draft form. They are, therefore, subject to change before being made final. The draft regulatory guide attached to this consultation paper has been written on the basis of the exposure draft of the regulations. Once the regulations are made final, we will update our guidance if necessary.

Contents

The consultation process	4
A Background to the consultation	5
Changes to supervision of trading on Australia's financial markets	5
Limitation on consultation	6
B Proposed guidance	7
Regulatory guide on the Markets Disciplinary Panel	7
Attachment: Draft regulatory guide	9
Key terms	45
Related information	46

The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on the Markets Disciplinary Panel.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 21 June 2010 to:

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What will happen next?

Stage 1	26 May 2010	ASIC consultation paper released
Stage 2	21 June 2010	Comments due on the consultation paper
Stage 3	mid July 2010	Anticipated release of regulatory guide subject to finalisation of regulations for the purposes of s798K of the Corporations Act.

A Background to the consultation

Key points

ASIC will be assuming responsibility for supervision of trading on domestic licensed financial markets from the relevant market operators. As part of that process, ASIC proposes to:

- make market integrity rules covering, among other things, the conduct of market operators and participants; and
- establish a Markets Disciplinary Panel (MDP) which will conduct hearings into whether those rules have been breached and if so, whether an infringement notice should be issued.

The finalisation of this consultation is subject to the final content of the regulations made for the purposes of s798K of the Corporations Act.

Changes to supervision of trading on Australia's financial markets

- 1 The *Corporations Amendment (Financial Market Supervision) Act 2010* was enacted in March 2010. That Act, which is expected to commence in the third quarter of 2010, will insert a new Part 7.2A into the *Corporations Act 2001* (Corporations Act). Under Part 7.2A, ASIC will have responsibility for the supervision of domestic licensed financial markets (i.e. those operated by persons licensed under s795B(1) of the Corporations Act).
- 2 Under the new supervisory arrangements, ASIC will be able to make market integrity rules dealing with activities and conduct in relation to licensed financial markets. These rules will bind, among others, market operators and participants. In February 2010, ASIC issued Consultation Paper 131 *Proposed ASIC Market Integrity Rules: ASX and SFE markets* (CP 131). The rules proposed at that time would have a similar effect to the operating rules of the relevant market, which they would replace.
- 3 Contraventions of the market integrity rules will give rise to a contravention of a civil penalty provision. Section 798K enables the regulations to provide for a person who is alleged to have contravened that provision to, as an alternative to civil proceedings, pay a penalty or enter into an enforceable undertaking among other things.
- 4 Proposed regulations issued for public consultation by the Minister for Financial Services, Superannuation and Corporate Law on 13 May 2010 set out a regime whereby ASIC may issue infringement notices in relation to such persons or accept enforceable undertakings from such persons. Entry into an enforceable undertaking may be required under an infringement

notice. Such undertakings may be otherwise accepted as an alternative to civil proceedings.

Note: See proposed reg 7.2A.02 and 7.2A.05 of the Corporations Amendment Regulations 2010.

- 5 A person must be given an opportunity to be heard before being issued with an infringement notice.
- 6 ASIC proposes to establish a Markets Disciplinary Panel (MDP) through which it will exercise the power to issue infringement notices and accept enforceable undertakings. The proposed MDP will consist of persons with suitable market or professional experience. The proposed disciplinary process for matters suitable to be dealt with through the MDP will essentially involve peer review.

Limitation on consultation

- 7 What processes are put in place for the MDP will depend on the terms of the regulations made for the purposes of s798K. This consultation paper has been prepared on the basis of the exposure draft of those regulations. In finalising this consultation, ASIC will have regard to your comments and the terms of the regulations as made.

B Proposed guidance

Key points

We propose to issue a regulatory guide as per the attached draft.

The attached draft regulatory guide deals with, among other things:

- which matters we propose to refer to the MDP;
- what processes we propose to follow when a matter is referred to the MDP for hearing and the possible issue of an infringement notice;
- the choices available to a person who is issued with an infringement notice;
- what approach we propose to take in relation to the possible settlement of a matter by way of either a negotiated infringement notice or the acceptance of enforceable undertakings; and
- what approach we propose to take in determining the level of penalties or other remedies under either an infringement notice or an enforceable undertaking.

Regulatory guide on the Markets Disciplinary Panel

Proposal

B1 We propose to issue a regulatory guide as per the attached draft.

Your feedback

- B1Q1 Please provide any comments which you may care to make on the draft.
- B1Q2 Do you agree with our proposed approach in not setting a cap on the maximum penalty payable for multiple breaches of the same market integrity rule? If not, please provide an explanation.
- B1Q3 Do you agree with our proposed approach to the factors that may operate in favour of remedies in the lower, middle and higher ranges of severity for each of the three tiers that we have proposed for the market integrity rules? If not, please provide an explanation.

Rationale

- 8 In material respects, the draft regulatory guide is, to the extent that there is consistency in the structure of the underlying processes, modelled on:
- (a) Regulatory Guide 73 *Continuous disclosure obligations: infringement notices* (RG 73); and
 - (b) guidance by ASX Limited (ASX) on the operation of the ASX Disciplinary Tribunal.
- 9 We are proposing modifications to accommodate differences between the processes that arise from:
- (a) the provisions of Part 7.2A of the exposure draft of the regulations for the purposes of s798K;
 - (b) the requirements of administrative law; and
 - (c) ASIC's proposed approach to making, and setting penalties for, the market integrity rules (see CP 131).
- 10 A further proposed modification has been made relating to the penalties payable for multiple breaches of the same market integrity rule: see paragraph 123 of the attached draft regulatory guide. In contrast to the approach taken by ASX, we propose that where two or more breaches of the same market integrity rule are the subject of an infringement notice or enforceable undertakings process, ASIC may apply separate penalties in relation to each of those breaches which, in total, exceed the maximum penalty payable for a single breach of that rule. We may do so even where the breaches were of the same, or a substantially similar, nature and where they occurred at or about the same time or as part of a single course of conduct. This approach is more in keeping with the normal approach to determining the appropriate penalty for multiple breaches of statutory requirements.
- 11 Subject to the above proposed modification, our aim is to have a markets disciplinary regime which is as similar to the current ASX regime as possible.



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 000

Markets Disciplinary Panel

May 2010

About this guide

This draft 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 framework for the operation of the market integrity rules;
- our general approach to administering the remedies available for breaches of the market integrity rules;
- the stages in the infringement notice and enforceable undertaking processes; and
- our approach to determining the penalties payable, and other remedial action that may be applied, for particular breaches of the market integrity rules.

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Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
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- 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 draft regulatory guide was issued on 26 May 2010 and is based on legislation and regulations as at 26 May 2010.

Disclaimer

This draft 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 draft guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

At the date of issue of this draft guide, the Corporations Amendment Regulations, which are intended to support the Financial Market Supervision Act, are in exposure draft form. They are, therefore, subject to change before being made final. This draft guide has been written on the basis of the exposure draft of the regulations. Once the regulations are made final, we will update our guidance if necessary.

Contents

A	Overview	12
	Supervision of domestic licensed financial markets	12
	Market integrity rules	12
	Remedies for breaches of the market integrity rules	13
	ASIC's approach to determining penalties and other remedies sought under infringement notices and enforceable undertakings	13
B	ASIC supervision of domestic licensed financial markets	14
	ASIC's supervisory responsibilities	14
	Responsibilities retained by Australian market licensees.....	14
	Transitional arrangements	15
C	Market integrity rules	16
	What are the market integrity rules?.....	16
	Setting of penalty for breach of a market integrity rule	17
	Consultation in relation to market integrity rules.....	17
	Ministerial consent to market integrity rules	17
	Supervision of compliance with the market integrity rules.....	17
D	Remedies for breaches of the market integrity rules	18
	Civil penalties and other civil remedies	18
	Infringement notices	18
	Enforceable undertakings	31
	Other remedies for conduct contravening the market integrity rules.....	34
E	ASIC's approach to determining penalties and other remedies sought under infringement notices and enforceable undertakings	36
	Remedial action available under the infringement notice and enforceable undertakings processes.....	36
	Guidelines for determining remedies to be applied by it under the infringement notice and enforceable undertakings processes	37
	Appendix: Markets Disciplinary Panel breach process	44
	Key terms	45
	Related information	46

A Overview

Key points

The Australian Securities and Investments Commission (ASIC) will be assuming responsibility for supervising domestic licensed financial markets. In so doing, ASIC will make market integrity rules.

ASIC will be able to take civil proceedings to seek a range of remedies for breaches of those rules. As an alternative to such proceedings, ASIC will be able to issue infringement notices and accept enforceable undertakings.

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

Supervision of domestic licensed financial markets

- RG 000.1 The *Corporations Amendment (Financial Market Supervision) Act 2010* (Financial Market Supervision Act) amends the *Corporations Act 2001* (Corporations Act) to provide that responsibility for supervising trading on Australian domestic licensed financial markets is to be transferred from the operators of those markets to ASIC. This change will mean that ASIC is responsible for supervising, among others, trading activities by broker participants that take place on domestic licensed markets.
- RG 000.2 Australian market licensees retain responsibility for the operation of their market and for monitoring and enforcing compliance with their market's operating rules, which include their listing rules.

Market integrity rules

- RG 000.3 The Financial Market Supervision Act enables ASIC to make rules covering the conduct of operators of licensed markets, participants in licensed markets and any entities prescribed by the Corporations Regulations 2001 (Corporations Regulations). These rules are known as the market integrity rules.
- RG 000.4 ASIC is responsible for supervising compliance with these rules, as well as the other market misconduct provisions of the Corporations Act. An obligation is placed on licensed market operators and participants and prescribed entities to comply with these rules. Failure to comply with a rule is a contravention of a civil penalty provision.

Remedies for breaches of the market integrity rules

- RG 000.5 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 000.6 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. 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 000.7 For each breach of a market integrity rule, ASIC will determine the action that is most appropriate. There is no compulsion on ASIC to follow the infringement notice process or to accept an enforceable undertaking instead of undertaking the other forms of action that are available to it.

ASIC's approach to determining penalties and other remedies sought under infringement notices and enforceable undertakings

- RG 000.8 ASIC will take into account a number of general principles and specific factors when determining the penalties and other remedies that it will seek under infringement notices and enforceable undertakings for breaches of the market integrity rules.

B ASIC supervision of domestic licensed financial markets

Key points

Following the commencement of the Financial Market Supervision Act, ASIC assumes responsibility for supervising trading on Australian domestic licensed financial markets.

Australian market licensees retain responsibility for monitoring and enforcing compliance with their market's operating rules, which include their listing rules.

ASIC's supervisory responsibilities

- RG 000.9 The Financial Market Supervision Act amends the Corporations Act to provide that responsibility for supervising trading on Australian domestic licensed financial markets is to be transferred from the operators of those markets to ASIC. This change will mean that ASIC is responsible for supervising, among others, trading activities by broker participants that take place on Australian domestic licensed markets. Those participants will be subject to the market integrity rules and will be directly supervised by ASIC.
- RG 000.10 The supervisory responsibilities that have been transferred to ASIC relate to trading on Australia's domestic licensed financial markets. They do not extend to foreign-based markets that are licensed to operate in Australia under s795B(2) of the Corporations Act or to markets that are exempt from being licensed.

Responsibilities retained by Australian market licensees

- RG 000.11 Australian market licensees retain responsibility for the operation of their markets.
- RG 000.12 They are required to set rules for their market, which are referred to in the Corporations Act as 'operating rules'. These operating rules govern how listing and trading can take place on the market. The content of these rules is prescribed by reg 7.2.07 (which is subject to amendment as provided in the proposed Corporations Regulations). The operating rules of a licensed market have effect as a contract under seal between the licensee and each participant, and between all participants (s793B).

- RG 000.13 Market operators retain the ability to set rules for their market in relation to operational issues. To the extent that there is an inconsistency between a market's operating rules and the market integrity rules, the market integrity rules prevail.

Transitional arrangements

- RG 000.14 ASIC will be responsible for any investigation and action in relation to an alleged breach of the market integrity rules from the handover of supervisory responsibilities to ASIC (which is anticipated to take place in the third quarter of 2010). Breaches of operating rules that occur before that handover will remain the responsibility of the market operator. ASX Limited (ASX) will continue to investigate and take enforcement action in relation to allegations of such breaches.
- RG 000.15 The proposed Corporations Regulations seek to make the transfer of supervisory responsibility to ASIC as smooth as possible. For that reason they provide that:
- (a) any written waiver, consent, recognition, accreditation, approval, determination or notification given by market operators to participants under the operating rules of a market, where such rules are incorporated into the market integrity rules, are to be taken as given by ASIC and will continue in their prior form and effect unless ASIC determines otherwise;
 - (b) any written notifications or certifications given by participants to market operators, under the operating rules of a market, where those rules are incorporated into the market integrity rules, are taken to be given to ASIC and will continue in their prior form and effect unless ASIC determines otherwise; and
 - (c) any registers kept by a market operator under the previous supervisory framework are taken to be kept by ASIC.
- RG 000.16 The proposed amendments of the Corporations Regulations provide that the following market operators will not be subject to ASIC supervision when supervisory responsibility is first transferred to ASIC:
- (a) BGC Partners (Australia) Pty Limited;
 - (b) Bloomberg Tradebook Australia Pty Ltd;
 - (c) Mercari Pty Limited; and
 - (d) Yieldbroker Pty limited.

C Market integrity rules

Key points

The Financial Market Supervision Act provides for a new type of rules called the market integrity rules. The rules are to be made by ASIC with regard to market operators, market participants, other prescribed entities and financial products traded on a licensed market.

ASIC is responsible for supervising compliance with the market integrity rules, as well as the other market misconduct provisions of the Corporations Act. An obligation is placed on licensed market operators and participants to comply with these rules.

What are the market integrity rules?

- RG 000.17 The Financial Market Supervision Act provides for a new type of rules called the market integrity rules, which will be made by ASIC.
- RG 000.18 The market integrity rules will be legislative instruments and, as such, will be subject to parliamentary scrutiny and possible disallowance.
- RG 000.19 The rules will deal with the activities or conduct of:
- (a) licensed markets;
 - (b) persons in relation to licensed markets; and
 - (c) persons in relation to financial products traded on licensed markets.
- RG 000.20 An obligation is placed on licensed market operators, participants in licensed markets and any entities prescribed by the Corporations Regulations to comply with the rules.
- RG 000.21 The proposed Corporations Regulations prescribe employees, representatives, agents and contractors of market participants as entities that will be bound by the market integrity rules, where the rules apply to them. These rules will address matters that were previously covered in the operating rules of market operators. They will include matters such as participant conduct, participant–client relations and general trading matters.
- RG 000.22 The licensed markets that are covered by the market integrity rules are Australian financial markets licensed under s795B(1). The rules do not apply to overseas financial markets that are licensed to operate in Australia under s795B(2).

Setting of penalty for breach of a market integrity rule

- RG 000.23 A breach of a market integrity rule will be a breach of a civil penalty provision of the Corporations Act. ASIC may set a maximum penalty amount for a breach of a market integrity rule where it is appropriate to do so. The penalty amount set by ASIC will be the maximum penalty for that rule. The maximum amount that can be set by ASIC as a penalty for the breach of a rule is \$1 million.
- RG 000.24 Penalty amounts will differ across the market integrity rules and will reflect the broad range of matters that the rules will cover. The penalties will range in severity in line with the nature of the rule. Some rules will relate to minor and technical or procedural matters and it will be appropriate that a lower penalty level, or no penalty, attach to those rules.

Consultation in relation to market integrity rules

- RG 000.25 We have consulted with stakeholders in relation to the introduction of the market integrity rules. We expect to similarly consult in relation to future amendments of those rules.

Ministerial consent to market integrity rules

- RG 000.26 ASIC may not make a market integrity rule unless it has the written consent of the Minister. An exception applies for the making of emergency rules that are necessary, or in the public interest, to protect people dealing in a financial product.

Supervision of compliance with the market integrity rules

- RG 000.27 ASIC is responsible for supervising compliance with the market integrity rules, as well as the other market misconduct provisions of the Corporations Act, such as the prohibitions against insider trading, market manipulation and making false and misleading statements.

D 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, ASIC will assess and determine the action that is most appropriate to address the breach. There is no compulsion on ASIC to follow the infringement notice process or to accept an enforceable undertaking instead of undertaking the other forms of action that are available to it.

Civil penalties and other civil remedies

- RG 000.28 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 a 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 000.29 The Corporations Act provides for a range of civil orders, including the payment of compensation and publication orders, to be made in respect of a breach of the market integrity rules.
- RG 000.30 ASIC 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 000.31 Section 798K provides that 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; and/or
- (d) enter into a legally enforceable undertaking.

- RG 000.32 The proposed 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 the previous paragraph. The proposed regulations provide that, if ASIC has reasonable grounds to believe that a person has contravened a market integrity rule, it may, at its discretion, give to the person an infringement notice in relation to the alleged contravention.
- RG 000.33 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 000.34 Where an infringement notice is issued, the recipient has the option of complying with the notice (which may involve any or all of the payment of a penalty, implementing corrective measures, accepting sanctions and providing an enforceable undertaking), or defending civil or civil penalty proceedings should ASIC pursue them.
- RG 000.35 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. Where an infringement notice is issued and complied with, no further regulatory action will be taken against the recipient in relation to the breach, unless the infringement notice is withdrawn.
- RG 000.36 Our approach to infringement notices for breaches of market integrity rules is, to the extent that there is consistency in the structure of the underlying processes, 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 000.37 Modifications have been made to accommodate differences between the processes that arise from:
- (a) the proposed Corporations Regulations;
 - (b) the requirements of administrative law; and

- (c) ASIC's proposed 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)).

Markets Disciplinary Panel

- RG 000.38 ASIC will establish a Markets Disciplinary Panel (MDP) through which, by way of delegation, it will exercise its power to issue infringement notices and to accept enforceable undertakings in relation to breaches of the market integrity rules. The MDP will consist of persons with appropriate market or professional experience. It is intended to function as a peer review body.
- RG 000.39 Decisions about particular matters will be taken by a sitting panel comprising of three members of the MDP. The members of the sitting panel will be delegates of members of ASIC who will constitute a Division of ASIC responsible for performing functions and exercising powers in relation to market supervision. Decisions of the Division are legally decisions of ASIC.
- Note: Under s97 of the ASIC Act, ASIC may establish Divisions to perform specific functions and exercise specified powers.
- RG 000.40 It is intended that the MDP will take an approach that is similar to that of the ASX Disciplinary Tribunal and to determine penalties, remedial action and sanctions consistent with the approach taken by that Tribunal before the transfer of supervisory responsibility to ASIC.
- RG 000.41 ASIC will appoint a Counsel to the MDP for the purpose of assisting the MDP in performing its functions. Communications to the MDP should be addressed to Counsel to the Markets Disciplinary Panel and should be copied to the ASIC Deterrence team that has carriage of the matter.
- RG 000.42 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, and Stage 7 within nine months, of identifying an alleged breach. A flowchart illustrating the process is set out in the Appendix.

Table 1: The 11 stages of the infringement notice process

Stage	Description
1.	<p>Investigation and ASIC belief formed whether there has been a breach of the market integrity rules and whether an infringement notice is appropriate</p> <p>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 a belief that a person has breached the market integrity rules. That team will also decide whether use of the infringement notice remedy is appropriate: see RG 000.43–RG 000.46.</p>

Stage	Description
2. Statement of reasons, opportunity to be heard and relevant material is given by ASIC to a 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 to 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 000.47–RG 000.51.
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 way of either negotiating the terms of an infringement notice or the provision of an enforceable undertaking to ASIC: see RG 000.52–RG 000.56.
4. Sitting panel of the MDP is convened and briefed	If a hearing is to be held, three members of the MDP will be nominated to form the 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 000.57–RG 000.58.
5. Notification provided of the hearing date and of members of the MDP who are to hear the matter	If a hearing is to be held, Counsel assisting the MDP will arrange and inform the person, in writing, of the date fixed for the hearing. Counsel will also inform the person of the identity of the MDP members who have been nominated to hear the matter: see RG 000.59.
6. The hearing is conducted by the MDP	Where 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 000.60–RG 000.65.
7. An infringement notice may be issued by the MDP	Regardless of whether a hearing is conducted, the MDP takes all submissions and evidence into account and may decide to issue an infringement notice if there are reasonable grounds to believe there has been a breach: see RG 000.66–RG 000.70.
8. The infringement notice is served	The infringement notice is served on its recipient, with a compliance period of 28 days: see RG 000.71.
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 000.72–RG 000.74.
10. Action following response to the notice	Provided that ASIC has not withdrawn an infringement notice, if that notice is fully complied with, we cannot 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 000.75–RG 000.84.
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 withdrawal of, or failure to comply with, a notice we will publish that fact: see RG 000.85–RG 000.86.

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

- RG 000.43 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 if the matter needs to be investigated. We may use our compulsory powers to obtain relevant documents and examine people who may be able to provide relevant information.
- RG 000.44 In the course of our investigation, our Deterrence team may form a belief that a person has breached the market integrity rules. In such a case, we will decide whether seeking a remedy through the issue of an infringement notice may be appropriate. We will consider all of the relevant facts and circumstances of the matter and, particularly, the seriousness of the alleged breach.
- RG 000.45 In determining the seriousness of an alleged breach, ASIC will have regard to 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 has 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 ASIC’s attention, the degree of cooperation with ASIC’s investigation, and whether remedial steps have been taken; and
 - (i) the disciplinary/regulatory history of the person.
- RG 000.46 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 a case, ASIC will generally proceed as outlined under Stage 3 below unless the matter is of a kind that would not be suitable to be dealt with by way of the infringement notice process or an enforceable undertaking.

Stage 2: Statement of reasons, opportunity to be heard by the MDP and relevant material is given by ASIC to a proposed recipient of an infringement notice

- RG 000.47 ASIC is required, before giving an infringement notice to a person who is alleged to have breached the market integrity rules to:
- (a) give to the person a written statement that sets out ASIC's 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 ASIC;
 - (ii) give evidence to ASIC; and
 - (iii) make submissions to ASIC, in relation to their alleged breach.
- RG 000.48 When providing the written statement of reasons ASIC will also provide to the person:
- (a) a copy of all the material that its Deterrence team believes is relevant to establishing 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 the person wishes 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 *Administrative hearings* (INFO 1), which provides an outline of how we conduct our administrative hearings, and how to obtain a more detailed copy of Regulatory Guide 8 *Hearings practice manual* (RG 8).
- RG 000.49 Where a proposed recipient is a natural person, we will provide the statement of reasons and accompanying information by leaving it at, or posting it 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 000.50 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 ASIC (s109X(1)(c) and (d)).

RG 000.51 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 000.52 A person who receives a statement of reasons in relation to an alleged contravention of the market integrity rules may not wish to contest the alleged breach. In that situation the person 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 way of either negotiating the terms of an infringement notice or the provision of an enforceable undertaking to ASIC under the proposed Corporations Regulations.

RG 000.53 Any negotiated infringement notice or enforceable undertaking will be subject to approval by the MDP.

RG 000.54 In order to approve a negotiated infringement notice or enforceable undertaking, the MDP must be satisfied that the alleged breach has been established and consider the proposed penalty/remedies. The MDP will consider all of the material that is provided to it by the ASIC Deterrence team and the person who allegedly breached the market integrity rules.

RG 000.55 If the MDP approves a negotiated infringement notice, then an infringement notice will be issued by the MDP on those terms. Similarly, the MDP may accept a negotiated enforceable undertaking. RG 000.89–RG 000.95 are relevant to whether an enforceable undertaking will be accepted.

RG 000.56 If the MDP declines to accept a negotiated infringement notice or enforceable undertaking, the matter will proceed to hearing before the MDP.

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

RG 000.57 Three members of the MDP will be nominated to form the sitting panel to consider the matter.

RG 000.58 The sitting panel will be given a copy of the statement of reasons and other material that has been provided by it to the recipient (as referred to under Stage 2).

Stage 5: Notification provided of the hearing date and of members of the MDP who are to hear the matter

RG 000.59 If a hearing is to be held, counsel assisting the MDP will arrange and inform the person, in writing, of the date and place for the hearing. Counsel will also

inform the person of the identity of the MDP members who have been nominated to hear the matter.

Stage 6: The hearing is conducted by the MDP

RG 000.60 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 s54–62. 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 000.61 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 to appear at the hearing.

The hearing is fact-finding, not adversarial

RG 000.62 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 000.63 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 000.64 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 its submissions. This is reinforced by the proposed 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 000.65 The MDP may, in addition to relying on its own experience and expertise, rely on the written report of an independent expert witness to establish some elements of the breach of a market integrity rule. The MDP may ask the expert to be present to assist at the hearing.

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

- RG 000.66 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 000.67 If the MDP has reasonable grounds to believe that the 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 000.68 The issue of an infringement notice, and subsequent satisfaction of 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 000.69 The infringement notice will set out what is required for compliance. It will include details, as required by the proposed 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, 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 000.70 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 000.71 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 the infringement notice

RG 000.72 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 28 days. Where the recipient makes an application 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 (proposed reg 7.2A.09).

Response to the infringement notice

RG 000.73 The recipient has several options when it receives the infringement notice. It 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 (proposed reg 7.2A.10);
- (c) make a written application to ASIC to withdraw the infringement notice (proposed reg 7.2A.12); or
- (d) decline to satisfy the infringement notice within the compliance period.

- RG 000.74 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 there is no obligation on a recipient to comply with the notice.

Stage10: Action following response to the notice

Effect of compliance with an infringement notice

- RG 000.75 Generally, compliance with an infringement notice will conclude the action ASIC will take against the recipient of the notice in respect of the event or events in question. Provided that ASIC has not withdrawn an infringement notice, if that notice is satisfied, we cannot take civil or criminal proceedings against the recipient for the alleged breach 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 alleged breach specified in the infringement notice. This restriction does not apply if the recipient has provided false or misleading information to ASIC, or withheld evidence or information from ASIC, in relation to the alleged breach of the market integrity rules.
- RG 000.76 Compliance with an infringement notice by its recipient does not, however, preclude ASIC from taking action against other persons who were involved in an alleged breach. For example, if an infringement notice is issued to and complied with by a market participant, ASIC is 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 alleged breach.
- RG 000.77 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). ASIC is 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 000.78 If a recipient does not comply with an infringement notice by doing all things required by the notice, ASIC cannot enforce the notice. However, if the notice is not withdrawn, 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 s1342B 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 preceding paragraphs (a) or (b), 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. We can also bring proceedings to enforce that order.
- (f) We may accept an enforceable undertaking, under proposed reg 7.2A.02, and bring proceedings to enforce the undertaking.

RG 000.79 We cannot, otherwise, begin or continue any proceedings against the recipient of the infringement notice for the breach alleged in that notice.

RG 000.80 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 s793C and 1101B, and under s1317J in relation to s1317G and 1317HB). ASIC is not prevented from applying for an order on behalf of a plaintiff in accordance with the Corporations Act.

Withdrawal of an infringement notice

RG 000.81 The recipient of an infringement notice may seek its withdrawal by making a written request to ASIC. Requests of this kind should be addressed to the relevant ASIC Deterrence team. ASIC may also initiate the withdrawal of a notice (even if a withdrawal is not sought by the recipient and even if the notice has been satisfied). Generally, however, ASIC 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 hearing of the matter. Requests for withdrawal based on such material will be considered by the MDP.

RG 000.82 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 000.83 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 those remedial measures, sanctions and undertakings are taken to no longer be enforceable by ASIC.

Limit on the use of information given to ASIC

- RG 000.84 If we begin proceedings against a recipient after withdrawal of, or failure to comply with, an infringement notice, any evidence or information given to us by the recipient, 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 000.85 If ASIC gives an infringement notice to a recipient, it 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; and
 - (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); and
 - (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).

Publication of commencement of proceedings

- RG 000.86 If we begin proceedings against a recipient of an infringement notice following withdrawal of, or failure to comply with, an infringement notice, we will publish the fact of commencement of proceedings and details of the outcome of proceedings in a media release.

Enforceable undertakings

What is an enforceable undertaking?

- RG 000.87 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 000.88 Section 798K provides that the regulations may provide for, among others, 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 proposed reg 7.2A.02.

When will we consider accepting an enforceable undertaking?

- RG 000.89 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 000.90 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:
- (a) to accept an enforceable undertaking available for breaches of the market misconduct rules; or
 - (b) to require an enforceable undertaking under an infringement notice.
- RG 000.91 Our approach to accepting enforceable undertakings in relation to breaches of the market integrity rules is, to the extent that there is consistency in the structure of the underlying processes, modelled on RG 100.
- RG 000.92 Modifications have been made to accommodate differences between the processes that arise from:
- (a) the proposed Corporations Regulations; and
 - (b) ASIC's proposed approach to making, and setting penalties for, the market integrity rules (see CP 131).
- RG 000.93 The MDP will generally only consider accepting an enforceable undertaking when it:
- (a) considers the enforceable undertaking to be an appropriate regulatory outcome, having regard to 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 000.94 An enforceable undertaking that is offered as an alternative to the infringement notice process being pursued may require the market participant to do, or refrain from doing, the same acts as 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 it 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 000.95 For the purpose of achieving 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 and approval. 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 000.96 Enforceable undertakings may relate to an infringement notice that is given by the MDP in relation to an alleged breach of the market integrity rules. For example, 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 particular action that is required to be taken by the recipient. For example, the implementation of remedial measures may require a greater period than provided by the compliance period for an infringement notice.

- RG 000.97 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 000.98 ASIC, generally, will not accept enforceable undertakings as an alternative to compliance with an infringement notice. Similarly, ASIC generally will not accept an enforceable undertaking after non-compliance with an infringement notice.
- RG 000.99 ASIC may depart from its general practice with the approval of the MDP, where warranted in all the circumstances. 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 which were not evident at the time of the hearing. Those matters may relate to, among others, the facts in issue or to the inability of the recipient to comply with an infringement notice, where it 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 000.100 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 000.101 The market integrity rules may deal with the same or similar subject matters as dealt with by other provisions of the Corporations Act. Accordingly, those rules may overlap with or supplement obligations created by licence conditions and other Corporations Act provisions. If so, for entities subject to the rules, remedies beyond those specifically dealing with contraventions of the market integrity rules may be available in respect of the same contravening conduct. Those remedies may include penalties that differ to those that apply to the market integrity rules. The remedies may also include ASIC administrative action.

ASIC administrative action

- RG 000.102 Persons who are licensed to carry on a business of providing financial services in Australia in relation to Australia's licensed markets (stockbrokers) are subject to obligations imposed on them under their licences and the Corporations Act. ASIC is responsible for licensing those persons and for monitoring their compliance with their licence and other legal obligations. ASIC is also responsible for regulating persons who provide financial services on behalf of those licensees.
- RG 000.103 ASIC is 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. Those 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 000.104 Regulatory Guide 98 *Licensing: Administrative action against financial service providers* (RG 98) sets out the administrative remedies available to ASIC 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 000.105 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 000.106 The administrative hearings delegate is distinct from members of the MDP who determine infringement notice matters and whether to accept enforceable undertakings (see RG 000.43–RG 000.45) with respect to breaches of the market integrity rules.

E ASIC's approach to determining penalties and other remedies sought under infringement notices and enforceable undertakings

Key points

This section provides information on the general principles and specific factors that the MDP will take into account when determining penalties and other remedies under infringement notices and enforceable undertakings for breaches of the market integrity rules. While those penalties and remedies may be imposed or sought, a person may choose whether to accept them by either complying with an infringement notice, or by entering into and complying with an enforceable undertaking, that provides for those penalties and remedies.

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

Tables 4–6 provide a general indication of the range of possible outcomes, under the infringement notice and enforceable undertakings processes, for the three tiers of the market integrity rules that have been proposed by ASIC.

Remedial action available under the infringement notice and enforceable undertakings processes

- RG 000.107 The remedial action available under the infringement notice and enforceable undertakings processes includes the payment of a pecuniary penalty.
- RG 000.108 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 000.109 ASIC has proposed that market integrity rules that include a penalty amount be categorised as Tier 1, Tier 2 or Tier 3 (see CP 131). The proposed maximum penalty amounts for those tiers are set out in Table 2.

Table 2: Proposed penalty amounts for market integrity rules

	Penalty amount set for rule	Maximum pecuniary 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 000.110 The third column of Table 2 sets out the maximum penalties payable for each tier under the infringement notice process.

RG 000.111 Where we think a contravention of a particular market integrity rule could warrant the maximum (Tier 3) penalty, we have categorised a 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 000.112 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 000.113 RG 000.118–RG 000.123 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. Those 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 may have regard to similar considerations when determining remedies for a breach of the market integrity rules, it may be that the considerations of the court may differ.

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

RG 000.114 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 have regard to 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. Those factors are not exhaustive. The MDP will, in relation to each matter, be required to give proper consideration to all of the relevant circumstances of that matter.

- RG 000.115 For those market integrity rules for which 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 for which 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 000.116 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 000.117 Tables 4–6 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 that we have proposed for 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 000.118 The MDP will have regard to the following principles in determining the remedies that should be sought by us 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;
 - (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 recover 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 000.119 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 we 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 ASIC in relation to 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</p> <p>Whether those procedures were complied with</p> <p>Where the breach was by an individual employee, 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"> • 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 to not 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>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 and any licence conditions</p> <p>Whether the person has previously given any undertakings not to do a particular act or engage in particular behaviour</p> <p>The general compliance history of the person, including their history of compliance with the market integrity rules</p>
RG 000.120	<p>When considering the regulatory record of the market operator, participant or other subject entity, the MDP may have regard to action that took place and events that occurred both before and after the transfer of supervisory responsibility to ASIC.</p>
RG 000.121	<p>Where multiple breaches have occurred and penalties are considered an appropriate remedy, the MDP may either apply a separate penalty for each breach or, alternatively, a total penalty in respect of all of the breaches. Where a total penalty is applied, the MDP will consider the level at which it should be set. Applying the totality principle, it may be appropriate for the total 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.</p>
RG 000.122	<p>Where we consider applying more than one type of remedy in respect of one or more breaches, the MDP will consider the aggregate effect of those remedies and determine whether it is appropriate or whether the remedies should be varied to be proportionate to the gravity of the breaches.</p>
RG 000.123	<p>Where two or more breaches of the same market integrity rule are the subject of an infringement notice or enforceable undertakings process, the MDP may apply separate penalties in relation to each of those 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 a</p>

substantially similar, nature and where they occurred at 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 000.124 Tables 4–6 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 that we have proposed for the market integrity rules.
- RG 000.125 The groupings of the factors in Tables 4–6 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 those 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 Tables 4–6 indicate may be appropriate for those breaches.
- RG 000.126 Table 4 sets out how the factors specified in Table 3 may operate in favour of remedies in the lower range of severity for each of the three tiers that we have proposed for the market integrity rules (see Table 2). The second column in that table specifies an indicative range of pecuniary penalty that we consider falls within the lower range of penalty available for each of those tiers. The third column provides an indication of other remedies that we may consider appropriate among available remedies with a lower 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		
Breach self-reported to ASIC		
Attempt to remedy the breach and person has fully cooperated with ASIC		
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		

RG 000.127 Table 5 sets out how the factors specified in Table 3 may operate in favour of remedies in the middle range of severity for each of the three tiers that we have proposed for the market integrity rules (see Table 2). The second column in that table specifies an indicative range of pecuniary penalty that we consider falls within the middle range of penalty available for each of those tiers. The third column provides an indication of other remedies we may consider appropriate among available remedies with a middle range of severity.

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: <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
Incompetence and irresponsibility but with the possibility that the person may develop requisite skills and abilities	Tier 2: Nil to \$40,000	
One or more breaches	Tier 3: Nil to \$400,000	
Serious nature of breach		
Breach not self-reported		
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		
Misconduct involved a breach or loss of confidentiality		

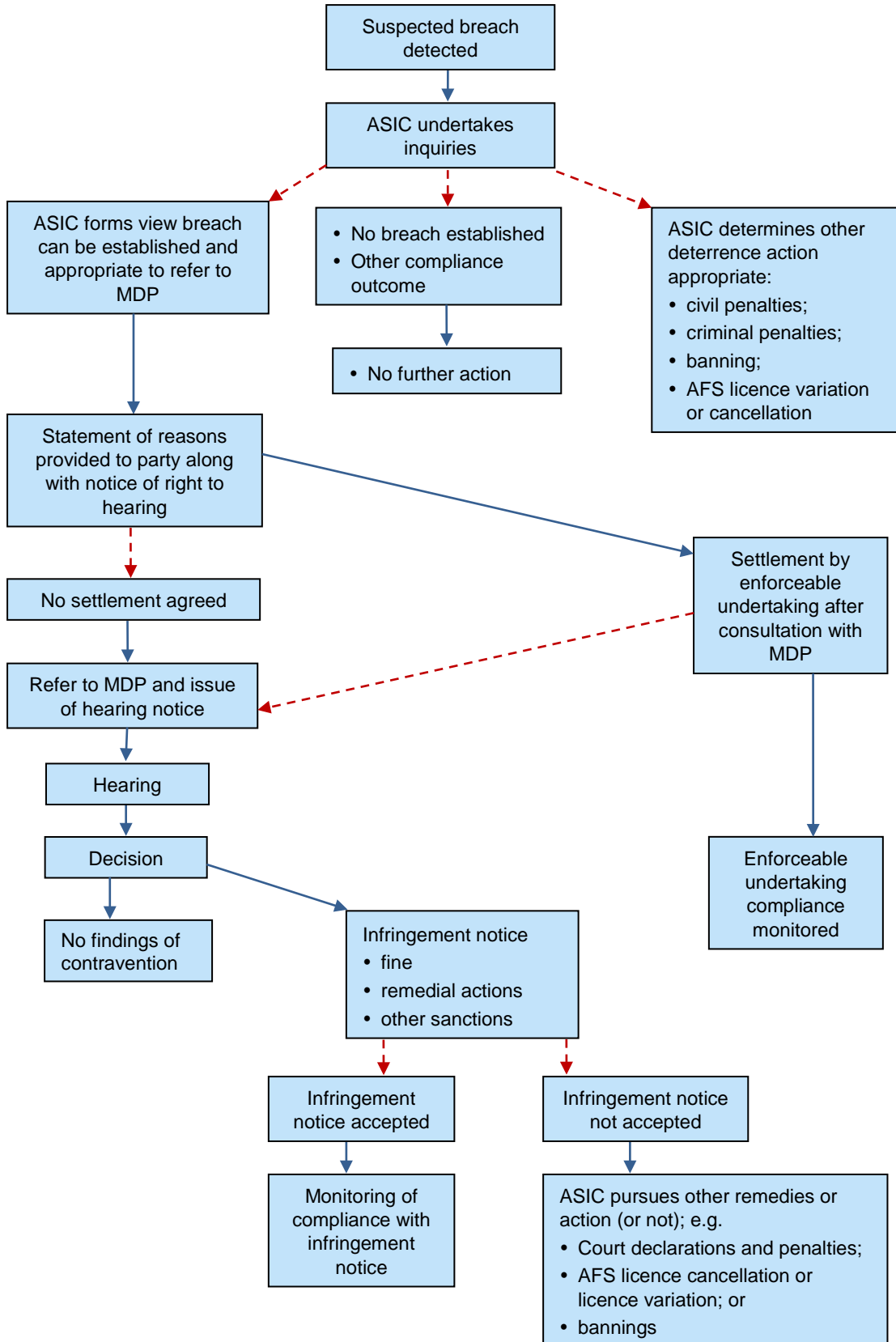
RG 000.128 Table 6 sets out how the factors specified in Table 3 may operate in favour of remedies in the higher range of severity for each of the three tiers that we have proposed for the market integrity rules (see Table 2). The second column in that table specifies an indicative range of pecuniary penalty that we consider falls within the higher range of penalty available for each of those tiers. The third column provides an indication of other remedies that we may consider appropriate among available remedies with a higher range of severity.

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 from/permanent ban against 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 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		
Misconduct involved a breach or loss of confidentiality		

Appendix: Markets Disciplinary Panel breach process

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



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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
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 proposed reg 7.2A.02 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 proposed reg 7.2A.05 of the Corporations Regulations
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestically licensed markets
MDP	ASIC's Markets Disciplinary Panel, through which ASIC will exercise 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
proposed Corporations Regulations	The exposure draft of the Corporations Amendment Regulations 2010 to support the Financial Markets Supervision Act, released on 13 May 2010
proposed reg 7.2A.12 (for example)	A regulation under the proposed Corporations Regulations (in this example, numbered 7.2A.12)
reg 7.2A.01 (for example)	A regulation under the Corporations Regulations (in this example, numbered 7.2A.01), unless otherwise specified
s795B (for example)	A section of the Corporations Act (in this example, numbered 795B), unless otherwise specified

Related information

Headnotes

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

Regulatory guides

RG 8 *Hearings practice manual*

RG 52 *Enforcement action submissions*

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

RG 100 *Enforceable undertakings*

Legislation

Australian Securities and Investments Commission Act 2001

Corporations Act 2001

Corporations Regulations 2001

Corporations Amendment (Financial Market Supervision) Act 2010

Consultation papers and reports

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

Media and information releases

INFO 1 *Administrative hearings*

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