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ASIC

Australian Securities & Investments Commission

REPORT 207

Response to submissions on CP 136 Markets Disciplinary Panel

July 2010

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 136 *Markets Disciplinary Panel* (CP 136) and details our responses.

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.

Disclaimer

This report 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.

This report does not contain ASIC policy. Please see Regulatory Guide 216 *Markets Disciplinary Panel* (RG 216).

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A Overview/Consultation process

- 1 In Consultation Paper 136 *Markets Disciplinary Panel* (CP 136), we consulted on a draft regulatory guide dealing with the disciplinary processes for the market integrity rules.
- 2 Our draft regulatory guide dealt with, among other things:
- the establishment of the Markets Disciplinary Panel (MDP);
 - 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.
- 3 This report highlights the key issues that arose out of the submissions received to CP 136 and our responses to those issues.
- 4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 136. We have limited this report to the key issues.

Responses to consultation

- 5 We received 10 responses to CP 136 from a variety of sources. For a list of the non-confidential respondents to CP 136, see the Appendix. We are grateful to respondents for taking the time to send us their comments.
- 6 Generally, respondents were supportive of the peer review model for the MDP, and ASIC's approach of modelling it, as far as possible, on the current ASX Disciplinary Tribunal.
- 7 The main issues raised by the respondents and others related to:
- potential double jeopardy;
 - exposure of individuals;
 - information given to the MDP;

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- independence of the MDP;
- conflicts of interest of MDP members;
- whether there should be a cap on penalties; and
- whether ASIC should publicise infringement notices that are not satisfied.

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B Significant issues

Key points

There was general support for:

- the peer review model for the MDP, which is modelled on, as far as possible, the current ASX Disciplinary Tribunal; and
- the policy proposed to be applied on setting the level of penalties.

The more significant issues related to:

- potential double jeopardy;
- exposure of individuals;
- information given to the MDP;
- independence of the MDP;
- conflicts of interest of MDP members;
- whether there should be a cap on penalties; and
- whether ASIC should publicise infringement notices that are not satisfied.

- 8 The draft regulatory guide was prepared on the basis of an exposure draft of regulations (the draft regulations) proposed to be made for the purpose of Pt 7.2A of the *Corporations Act 2001* (Corporations Act). Responses were made on the same basis. Some issues were raised about the following matters, which have been overtaken because of the form in which the regulations were subsequently made:
- the application of the market integrity rules to individuals; and
 - the withdrawal of infringement notices after they have been satisfied.

Potential double jeopardy

- 9 Concerns were raised that the reference of a matter to the MDP may not bring an end to regulatory action in relation to the relevant events where:
- the MDP does not find that it has reason to believe that there has been a contravention of a market integrity rule; or
 - the MDP issues an infringement notice and it is complied with.
- 10 In regard to the latter, there were concerns about the possibility of:
- an infringement notice being withdrawn after it has been complied with; and/or

- the conduct being otherwise pursued. Those raising this issue referred to the potential overlapping operation of the market integrity rules and various statutory provisions.

11 Unlike the draft regulations, the regulations made for the purposes of Pt 7.2A provide that an infringement notice that has been complied with may only be withdrawn if the recipient agrees to the withdrawal.

ASIC's response

If a matter is taken to the MDP and no infringement notice is issued, we will not seek a remedy against the relevant participant in another forum unless significant new evidence becomes available.

If an infringement notice is complied with by a participant, no further action will be taken against the participant in relation to the relevant events (provided that the participant has not given false or misleading information to, or withheld evidence or information from, us and/or the MDP).

Exposure of individuals

12 Concerns were raised about the possibility of civil, criminal or administrative action being pursued against officers and employees of a market participant in relation to the same events for which the participant is being pursued for a breach of the market integrity rules. This concern arose independently of whether individuals were subject to the market integrity rules (which, as mentioned above, has been overtaken by the regulations). Again, those raising this issue referred to the potential overlapping operation of the market integrity rules and various statutory provisions.

ASIC's response

Whether we will take action against both a participant and its officers and employees in any particular case will depend on all the circumstances. Action is only taken against a person when it is in the public interest to do so. We are more likely to act against both a participant and its officers and employees where they are all culpable.

It is open to a participant seeking to settle a matter to explore with us the possibility of the settlement covering all concerned.

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Information given to the MDP

- 13 Information given to the MDP by a participant will be made available to the ASIC Deterrence team that presents the matter to the MDP. We may, subject to the prohibition against admitting that information in evidence in proceedings against the participant, use that information for the purpose of taking other action against the participant if it does not comply with any infringement notice issued by the MDP.
- 14 Information given to the MDP by a participant may be used against an officer, employee or other associate of the participant.
- 15 It was suggested that where a participant does not comply with an infringement notice and ASIC pursues the matter in court, there needs to be appropriate protection to avoid unnecessary prejudice to the participant.

ASIC's response

There is no practical means to quarantine information given to the MDP. Our Deterrence team presenting a matter to the MDP must have the opportunity to make submissions about any information given to the MDP.

Independence of the MDP

- 16 A number of issues were raised concerning the independence of the MDP from ASIC. These included:
- the process and criteria for selecting MDP members; and
 - whether ASIC will give directions to MDP members, as they will be acting under delegations.

ASIC's response

MDP members will be appointed on the basis of their market/professional experience and integrity. As with similar governmental roles, the positions will not necessarily be advertised.

The only direction that will be given to MDP members is to have regard to our published policies. Our contracts with MDP members expressly indicate that they will not be given a direction about a particular matter.

Under established administrative law principles, MDP members will have to act independently in carrying out their duties.

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Conflicts of interest of MDP members

- 17 Clarification was sought on what measures have been put in place to ensure that members of sitting panels of the MDP will not have conflicts of interest.

ASIC's response

It is a requirement of administrative law that decision makers act impartially.

Our contractual arrangements with MDP members will require them to make appropriate disclosures.

The Chairman of the MDP will take into account the disclosures of MDP members in advising on the composition of sitting panels.

Participants may also notify Counsel to the MDP if they believe that any member of a sitting panel of the MDP has a conflict of interest that would prevent them from acting impartially.

Whether there should be a cap on penalties

- 18 Our draft regulatory guide indicated that we will be departing from the ASX practice of limiting the penalty for multiple breaches of a rule to the maximum penalty for a single breach of the rule. Concerns were raised that in the absence of a cap on the penalty for multiple breaches of a single provision, there will be implications for the availability of professional indemnity insurance.

ASIC's response

The MDP will decide whether to apply an individual penalty for each breach or an overall penalty for the conduct in question. In either case, the MDP will look at the conduct as a whole to ensure that the final penalty is proper having regard to the totality of the conduct. The MDP will not simply engage in an arithmetic calculation of aggregating penalties that it would otherwise apply to individual breaches. There will be no onus on the participant to establish why an arithmetic approach should not be taken.

Whether ASIC should publicise infringement notices that are not satisfied

- 19 There was some concern that publication of an infringement notice that has not been complied with will lead to unwarranted damage to a market participant's reputation. It was suggested that ASIC should only publish notices that have been complied with.

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- 20 Unlike the draft regulations, the regulations made for the purposes of Pt 7.2A require us to publish a statement that the giving of the infringement notice is only an allegation and the recipient is not taken to have contravened the legislation if we publish an infringement notice that has not been complied with.

ASIC's response

We do not consider that we should, by way of policy, close off the possibility of exercising a discretion to publish an infringement notice that has not been complied with. This is particularly the case given that the Government has responded to concerns about the possibility by building an additional safeguard into the regulations.

C Changes to our draft regulatory guide

Key points

Our draft regulatory guide has been revised in light of the responses to CP 136.

- 21 We have revised our draft regulatory guide to take into account our thinking on the issues discussed in Section B of this report. Where appropriate, the clarification sought in submissions has been provided. Our final guidance is in Regulatory Guide 216 *Markets Disciplinary Panel* (RG 216).
- 22 Much of the background information in our draft regulatory guide dealing with our assuming responsibility for market supervision and the market integrity rules has been omitted. Where relevant, the information may be found in RG 214 *Guidance on ASIC market integrity rules for ASX and ASX 24 markets* (RG 214).
- 23 Our final regulatory guide (RG 216) deals with:
- establishment of the MDP;
 - remedies for breaches of the market integrity rules;
 - the MDP's processes; and
 - the policies the MDP will apply in determining penalties and other remedies.

Appendix: List of non-confidential respondents

- Australasian Compliance Institute
 - Australian Bankers' Association
 - Australian Financial Markets Association
 - Bell Potter Securities Limited
 - David Castle
 - Euroz Securities Limited
 - Law Council of Australia
 - QBE Insurance Group Limited
 - Stockbrokers Association of Australia
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