



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 306

Markets Disciplinary Panel

November 2018

About this paper

ASIC took over responsibility for market supervision in August 2010. At that time, ASIC created the Markets Disciplinary Panel (MDP) to make decisions about alleged contraventions of the market integrity rules.

ASIC is seeking your feedback about proposals to change the kinds of matters that should be referred to the MDP and the powers that should be exercised by the MDP.

This paper attaches a draft of the revised Regulatory Guide 216 *Markets Disciplinary Panel*.

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 29 November 2018 and is based on the Corporations Act as at the date of issue.

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.

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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 keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

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

Your comments will help us develop our policy in relation to the Markets Disciplinary Panel. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section C, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

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

Please refer to our [privacy policy](#) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 15 January 2019 to:

Markets Disciplinary Panel Secretariat
Chief Legal Office
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000
email: mdp@asic.gov.au

What will happen next?

Stage 1	29 November 2018	ASIC consultation paper released
Stage 2	15 January 2019	Comments due on the consultation paper
Stage 3	February 2019	Final regulatory guide released

A Background

Key points

ASIC is not proposing to fundamentally change the MDP—it is simply proposing to make some changes to the MDP at the margins.

ASIC's aim in making these changes is to maximise the MDP's expertise in a cost-effective way.

- 1 ASIC was given responsibility for market supervision in August 2010. A key aspect of market supervision is making and enforcing the market integrity rules. These are rules of conduct that apply to market participants and market operators.
- 2 ASIC created the Markets Disciplinary Panel (MDP) as part of the framework for enforcing the market integrity rules.
- 3 The MDP is a peer review panel. It is made up of a pool of experienced industry people from which sitting panels are drawn to make decisions about whether infringement notices should be issued or court enforceable undertakings accepted for alleged contraventions of the market integrity rules.
- 4 Technically the MDP operates as a Division of ASIC. In practice, however, sitting panels of the MDP independently make decisions on the merits of each matter.
- 5 The ASIC website contains an [MDP Outcomes Register](#) which lists the outcomes of all completed matters that have been decided by the MDP. The website also contains a [list of current MDP members](#).

No fundamental change to the MDP

- 6 ASIC is not proposing to fundamentally change the MDP. The MDP will continue to be the primary decision-making forum where sitting panels will independently make decisions on the merits of matters that involve alleged contraventions of the market integrity rules.
- 7 However, ASIC considers there are some aspects of the current model which could be improved with a view to achieving more efficient and cost-effective regulatory outcomes.

Simplified policy and streamlined procedures

- 8 There are two main regulatory guides relating to the MDP: [Regulatory Guide 216 Markets Disciplinary Panel](#) (RG 216) and [Regulatory Guide 225 Markets Disciplinary Panel practices and procedures](#) (RG 225). These guides were published in July 2010 and May 2011 respectively, and have not been updated since their original publication.
- 9 They were drafted at a time when the MDP model was in its infancy. As such, ASIC considered it appropriate to publish considerable guidance on how the MDP model would work. With the benefit of over seven years' experience of the MDP model, ASIC considers that it can now adopt more streamlined policies and procedures. To reflect this, RG 216 and 225 will be consolidated into a single, simplified guide.
- 10 The adoption of more streamlined policies and procedures will not affect the quality of the decision-making of the MDP; nor will it detract from ASIC's obligation to afford procedural fairness to affected persons.
- 11 ASIC is seeking to encourage focused submissions to the MDP on the material issues, with a view to continuing to improve timeliness in the completion of matters by the MDP.

Maximising the MDP's expertise in a cost-effective way

- 12 ASIC's current policy is to refer all matters involving alleged contraventions of the market integrity rules, in which it is seeking an infringement notice as an outcome, to the MDP for consideration.
- 13 When ASIC undertakes surveillances or investigates matters in relation to compliance with the market integrity rules, it may discover conduct that, while considered to be at the lower end of the spectrum of seriousness, warrants a regulatory response.
- 14 ASIC considers that it might not be cost-effective to refer such minor matters to a three-person sitting panel of the MDP as a matter of course.

B Proposals for change

Key points

ASIC is not proposing to fundamentally change the MDP. The MDP will continue to be the primary decision-making forum in relation to alleged contraventions of the market integrity rules.

ASIC is proposing to make some changes to the policies and procedures of the MDP with a view to simplifying policies, streamlining procedures and ensuring the MDP is appropriately used as a peer review, decision-making panel for significant matters.

Clearly articulate the MDP's policies

Proposal

- B1** We propose to expressly state the key factors the MDP takes into account in determining penalties and what the MDP considers to be mitigating or aggravating factors.

Your feedback

- B1Q1** Do you consider that the redrafted expression of the MDP's policies provides clearer guidance?
- B1Q2** Should there be further guidance on the MDP's policies? If so, in which areas?

Rationale

- 15 Existing RG 216 sets out a series of factors that the MDP takes into account in determining the appropriate penalty (or other sanctions) and a further series of tables containing lists of factors that may operate in favour of lower, middle or higher penalty ranges.
- 16 The tables are only intended as guidance. However, even as guidance, they can be difficult to meaningfully apply in practice because there is a large degree of overlap between the lists of factors. Further, this difficulty in application has resulted in lengthy submissions from parties.
- 17 Proposed RG 216 specifies the key high-level factors that the MDP will take into account. There are four key high-level factors:
- (a) the character of the conduct;
 - (b) the consequences of the conduct;
 - (c) the compliance culture; and
 - (d) remediation.

- 18 The MDP expects the parties to frame their submissions on penalties (or other sanctions) according to these four key high-level factors. We expect this approach will lead to more succinct submissions.
- 19 The MDP also proposes to use the four key high-level factors when drafting infringement notices, with the aim of improving comparability between infringement notices.
- 20 The revised policies also seek to more clearly articulate what the MDP considers to be aggravating or mitigating factors.

No separate MDP reasons for decision

Proposal

- B2** We propose that where a matter referred to the MDP results in an infringement notice being given, the MDP will not give separate reasons for the decision unless requested to do so by the market participant within seven days of being given the infringement notice.

Your feedback

- B2Q1 Do you agree that, where an infringement notice is given by the MDP, the infringement notice itself is a sufficient vehicle for explaining the MDP's findings and conclusions?
- B2Q2 Do you agree that seven days would be sufficient for the market participant to submit a request for separate reasons for the decision?

- B3** We propose that where a matter referred to the MDP does not result in an infringement notice being given, the MDP will not give reasons for the decision unless requested to do so by the market participant within seven days of receiving written notification of the MDP's decision.

Your feedback

- B3Q1 Do you agree that, where the MDP makes no adverse finding, reasons for the decision should only be provided when requested by the market participant within seven days of being informed of the MDP's decision?

Rationale

- 21 Before ASIC can exercise the power to give an infringement notice, it is required to give written reasons for believing that a person has contravened the market integrity rules and give the person the opportunity to appear at a hearing and make submissions. However, there is no legal requirement for the infringement notice to be accompanied by reasons for the decision.

- 22 An infringement notice must contain certain information (see regs 7.2A.06(a)–(k) of the Corporations Regulations) and *may* include ‘any other information that ASIC considers necessary’ (see reg 7.2A.06(l)).
- 23 ASIC considers that the power to include any other information that ASIC considers necessary is a power that could and should be used to explain why the MDP gave the infringement notice on the particular terms that it did.
- 24 As the infringement notice is the public face of the MDP outcome, we propose that it should be fully utilised to ensure that the notices achieve their maximum deterrence and educational effect.
- 25 There might be occasions where the MDP wishes to make further comments on a particular matter to a recipient but does not wish those comments to be included in the infringement notice. The MDP does not expect such occasions to arise often.
- 26 Where a matter is referred to the MDP which does not result in an infringement notice being given because the MDP has made no adverse finding, the MDP will provide reasons for its decision on request by the market participant. The aim of this proposal is to ensure that interested parties retain the opportunity to understand the rationale of the MDP’s decision but not to put the MDP to unnecessary work.
- 27 Requests should be made within seven days of either being given the infringement notice or receiving written notification that the MDP has made no adverse findings. The seven-day limit would place the sitting panel members in the best position to elaborate on their reasons in a cost-effective and efficient manner.

Market operator matters excluded from MDP remit

Proposal

- B4** We propose that matters involving alleged contraventions of the market integrity rules by market operators will not be referred to the MDP but, instead, will be determined by an internal ASIC hearing delegate.

Your feedback

- B4Q1** Do you agree that matters involving alleged contraventions of the market integrity rules by market operators should not be heard by the MDP but, instead, should be heard by an internal ASIC hearing delegate?

Rationale

- 28 Given that the MDP is a peer review panel, which is predominantly comprised of individuals connected to market participants, ASIC considers

that it might not be appropriate for the MDP to make decisions about whether market operators have contravened the market integrity rules.

Tier 1 matters determined by a single delegate

Proposal

B5 We propose that matters involving alleged contraventions of Tier 1 rules by market participants will generally not be referred to a sitting panel of the MDP but, instead, will be determined by a single ASIC delegate. We propose this approach irrespective of whether the matter is contested by the market participant.

Your feedback

B5Q1 Should a single delegate, rather than a three-person sitting panel, be used for matters only involving Tier 1 rules?

B5Q2 Are there any Tier 1 rules that would be more appropriately heard by a three-person sitting panel?

B5Q3 If a single delegate model is used for matters only involving Tier 1 rules, should the delegate be an internal ASIC delegate or an MDP member?

Rationale

- 29 The market integrity rules classify each rule into one of three tiers for the purposes of the applicable maximum penalty. The maximum penalty for each tier is \$1 million (Tier 3), \$100,000 (Tier 2) and \$20,000 (Tier 1).
- 30 Where a matter is proposed to be dealt with by way of an infringement notice, the respective maximum penalty for each tier is three-fifths of that maximum penalty—\$600,000, \$60,000 and \$12,000 respectively.
- 31 There is a cost to ASIC of referring all alleged contraventions of the market integrity rules to a three-person sitting panel of the MDP. This cost is ultimately borne by market participants via industry funding.
- 32 If the matter only involves alleged contraventions of one or more Tier 1 rules, we think it would generally be more cost-effective to have the matter considered by an internal ASIC delegate. We think contraventions such as a market participant's failure to ensure that its accredited advisers comply with the continuing professional education requirements (Rule 2.4.21 of the Securities Markets Rules) can appropriately be dealt with by an internal ASIC delegate.
- 33 Where a matter involves an alleged contravention of a Tier 1 rule, in addition to either a Tier 2 or Tier 3 rule, we propose to continue our current approach of referring those matters to a three-person sitting panel of the MDP.

MDP's consultancy role in court enforceable undertakings

Proposal

- B6** We propose that the MDP should not be a decision-maker in relation to accepting court enforceable undertakings but that, where considered appropriate by ASIC on a particular matter, an MDP member should be used in a consultancy or advisory capacity.

Your feedback

- B6Q1** Do you agree with our proposed model for engagement of an MDP member for the purposes of court enforceable undertakings?

Rationale

- 34 Court enforceable undertakings are negotiated outcomes which typically involve ASIC having ongoing monitoring responsibilities. ASIC is in the best position to understand its monitoring capabilities and should therefore be the one to decide when to accept court enforceable undertakings offered by market participants for alleged contraventions of the market integrity rules.
- 35 ASIC accepts that there might be cases where it wishes to seek input from a member of the MDP on the design of a proposed court enforceable undertaking which has been offered to ASIC. In these cases, an MDP member will be used in a consultancy or advisory capacity rather than in the capacity as decision-maker.

C Regulatory and financial impact

36 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) peer review decision-making; and
- (b) cost-effective regulatory outcomes.

37 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

38 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

39 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
court enforceable undertaking	A court enforceable undertaking that may be accepted by ASIC under reg 7.2A.01 of the Corporations Regulations
hearing	The meaning given by s5 of the ASIC Act
infringement notice	An infringement notice issued under reg 7.2A.04 of the Corporations Regulations
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
MDP	ASIC's Markets Disciplinary Panel, through which ASIC exercises its power to issue infringement notices in relation to alleged contraventions of the market integrity rules
Pt 9.4B (for example)	A part of the Corporations Act (in this example numbered 9.4B), unless otherwise specified
reg 7.2A.01 (for example)	A regulation under the Corporations Regulations (in this example numbered 7.2A.01), unless otherwise specified
RG 216 (for example)	An ASIC regulatory guide (in this example numbered 216)
s798A (for example)	A section of the Corporations Act (in this example numbered 798A), unless otherwise specified
Securities Markets Rules	ASIC Market Integrity Rules (Securities Markets) 2017—rules made by ASIC under s798G of the Corporations Act

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to expressly state the key factors the MDP takes into account in determining penalties and what the MDP considers to be mitigating or aggravating factors.</p>	<p>B1Q1 Do you consider that the redrafted expression of the MDP's policies provides clearer guidance?</p> <p>B1Q2 Should there be further guidance on the MDP's policies? If so, in which areas?</p>
<p>B2 We propose that where a matter referred to the MDP results in an infringement notice being given, the MDP will not give separate reasons for the decision unless requested to do so by the market participant within seven days of being given the infringement notice.</p>	<p>B2Q1 Do you agree that, where an infringement notice is given by the MDP, the infringement notice itself is a sufficient vehicle for explaining the MDP's findings and conclusions?</p> <p>B2Q2 Do you agree that seven days would be sufficient for the market participant to submit a request for separate reasons for the decision?</p>
<p>B3 We propose that where a matter referred to the MDP does not result in an infringement notice being given, the MDP will not give reasons for the decision unless requested to do so by the market participant within seven days of receiving written notification of the MDP's decision.</p>	<p>B3Q1 Do you agree that, where the MDP makes no adverse finding, reasons for the decision should only be provided when requested by the market participant within seven days of being informed of the MDP's decision?</p>
<p>B4 We propose that matters involving alleged contraventions of the market integrity rules by market operators will not be referred to the MDP but, instead, will be determined by an internal ASIC hearing delegate.</p>	<p>B4Q1 Do you agree that matters involving alleged contraventions of the market integrity rules by market operators should not be heard by the MDP but, instead, should be heard by an internal ASIC hearing delegate?</p>
<p>B5 We propose that matters involving alleged contraventions of Tier 1 rules by market participants will generally not be referred to a sitting panel of the MDP but, instead, will be determined by a single ASIC delegate. We propose this approach irrespective of whether the matter is contested by the market participant.</p>	<p>B5Q1 Should a single delegate, rather than a three-person sitting panel, be used for matters only involving Tier 1 rules?</p> <p>B5Q2 Are there any Tier 1 rules that would be more appropriately heard by a three-person sitting panel?</p> <p>B5Q3 If a single delegate model is used for matters only involving Tier 1 rules, should the delegate be an internal ASIC delegate or an MDP member?</p>
<p>B6 We propose that the MDP should not be a decision-maker in relation to accepting court enforceable undertakings but that, where considered appropriate by ASIC on a particular matter, an MDP member should be used in a consultancy or advisory capacity.</p>	<p>B6Q1 Do you agree with our proposed model for engagement of an MDP member for the purposes of court enforceable undertakings?</p>