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Contents

Markets Disciplinary Panel: Infringement Notice

Recipient: Openmarkets Australia Limited

The recipient has complied with the infringement notice. Compliance is not an admission of guilt or liability; and the recipient is not taken to have contravened subsection 798H(1) of the *Corporations Act 2001*.

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PART 7.2A OF THE CORPORATIONS REGULATIONS 2001

ASIC
Australian Securities &
Investments Commission

**INFRINGEMENT NOTICE****PART 7.2A OF THE CORPORATIONS REGULATIONS 2001
INFRINGEMENT NOTICE**

To: Openmarkets Australia Limited ACN 090 472 012
Level 40, 225 George Street
Sydney NSW 2000

Matter: MDP 0815/22

Date given: 15 May 2023

TAKE NOTICE: The Australian Securities and Investments Commission (**ASIC**) gives this infringement notice to Openmarkets Australia Limited ACN 090 472 012 (**Openmarkets**) under regulation 7.2A.04 of the *Corporations Regulations 2001* (the **Regulations**), which is made for the purposes of section 798K of the *Corporations Act 2001* (the **Act**).

To comply with this notice, Openmarkets must:

- (a) pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **\$4,500,000**; and
- (b) enter into an undertaking (**enforceable undertaking**) under regulation 7.2A.01 of the Regulations on the terms specified in Appendix 2 to this notice.

Unless a contrary intention appears, capitalised terms used in this notice have the same meaning as in Rules 1.4.3 and 3.5.8(3) of the *ASIC Market Integrity Rules (Securities Markets) 2017 (Securities Rules)*, *ASIC Market Integrity Rules (ASX Market) 2010 (ASX Rules)* and *ASIC Market Integrity Rules (Chi-X Australia Market) 2011 (Chi-X Rules Rules)* as in force at the time of the conduct to which they relate (together the **Relevant Rules**).

Background

1. At all relevant times, Openmarkets was a Market Participant of both the ASX Market and the Cboe Market (the financial market previously operated by Chi-X Australia Pty Ltd and operated by Cboe Australia Limited (**Cboe**) since 1 February 2022).
2. Openmarkets was required by subsection 798H(1) of the Act to comply with the ASX Rules and the Chi-X Rules for conduct occurring up to and including 6 May 2018 and with the Securities Rules for conduct occurring on and after 7 May 2018. Openmarkets' principal place of business at the relevant times was Level 40, 225 George Street, Sydney NSW 2000.

3. This infringement notice relates to Rules 2.1.3, 2.1.5(2), 3.5.9, 3.5.10(d), 5.5.2, 5.6.1, 5.6.3(1)(a), 5.7.1(b)(iii) and 5.11.1(1)(b) of the Securities Rules and Rules 2.1.3, 5.5.2, 5.6.1 and 5.6.3(1)(a) of the ASX Rules and the Chi-X Rules. Details of those Rules are set out in Appendix 1 in the order in which they are dealt with in this notice.

Openmarkets' compliance history

4. On 13 December 2016, ASIC imposed conditions on Openmarkets' Australian financial services licence, requiring Openmarkets to appoint an independent expert to review its compliance arrangements, identify any deficiencies, and recommend enhancements appropriate to its business (**Licence Conditions**). The imposition of Licence Conditions followed surveillance activities undertaken by ASIC which identified concerns in relation to Openmarkets':
 - (a) arrangements for identifying and preventing potential market misconduct;
 - (b) reconciliation of its client trust accounts; and
 - (c) supervisory arrangements and organisational and technological resourcing.

ASIC also referred Openmarkets to the Markets Disciplinary Panel (**MDP**) in relation to concerns ASIC had regarding 1,858 trades executed by Openmarkets between 12 June 2015 and 11 December 2015.

5. On 23 September 2017, the MDP issued an infringement notice to Openmarkets, which included a financial penalty of \$200,000. The MDP would have imposed a penalty of \$560,000 if not for the Licence Conditions having been imposed. The MDP found that between 12 June 2015 and 11 December 2015, Openmarkets executed 1,858 trades for clients which involved no change in beneficial ownership (such trades being commonly referred to as 'wash trades').
6. These trades had occurred because Openmarkets had failed to activate an anti-wash trade filter in its automated order processing system (**IRESS IOS AOP**) and because Openmarkets had not opted to use the ASX Unintentional Crossing Prevention (**UCP**) service on ASX Trade, being a service designed to prevent on-market executions where the trade would result in no change of beneficial ownership. As a result of the anti-wash trade filter not being activated, Openmarkets' automated order processing (**AOP**) system failed to reject the orders that resulted in the relevant trades, or to pass them to a designated trading representative (**DTR**) for review.
7. The MDP found that it had reasonable grounds to believe that Openmarkets contravened ASX Rule 5.5.2 because it did not have in place an automated post-trade monitoring system to identify wash trades. The MDP stated that, having regard to the nature and structure of Openmarkets' business, noting its significant transmission of orders to the markets, the only feasible process to conduct real time trade monitoring was through the use of an automated system.
8. The MDP also found that it had reasonable grounds to believe that Openmarkets contravened ASX Rule 5.6.1 and Chi-X Rule 5.6.1 because it did not have in place appropriate AOP filters capable of dealing with the submission of orders into

competing exchange markets, which resulted in orders being placed on the Chi-X market at prices that deviated substantially from the prevailing market conditions.

9. As a result of the Licence Conditions imposed in December 2016, Openmarkets engaged an independent expert to review its compliance arrangements. In September 2017, the independent expert produced a 'final summary report' setting out various recommendations. Once the independent expert's recommendations were implemented, the Licence Conditions were removed in February 2018.

Alleged contraventions

10. The MDP was satisfied as to the matters in paragraphs 11 to 54. The MDP has reasonable grounds to believe that Openmarkets contravened Rules 2.1.3, 5.5.2, 5.6.1 and 5.6.3(1)(a) of each of the ASX Rules, the Chi-X Rules and the Securities Rules and Rules 5.7.1(b)(iii), 5.11.1(1)(b), 2.1.5(2), 3.5.9 and 3.5.10(d) of the Securities Rules and therefore contravened subsection 798H(1) of the Act in respect of the conduct described in those paragraphs.
11. On 24 March 2021, ASIC commenced an investigation into Openmarkets' compliance with the Securities Rules in respect of the period from 1 January 2020 to 9 July 2021.
12. As a result of its investigation, ASIC alleged that it had reasonable grounds to believe that, between 1 January 2020 and 9 July 2021, Openmarkets contravened section 798H(1) of the Act on the basis that it had reasonable grounds to believe that between those dates Openmarkets contravened:
 - (a) Rule 2.1.3 of the Securities Rules, which requires Market Participants to have appropriate supervisory policies and procedures to ensure compliance with the Securities Rules and the Corporations Act. ASIC alleged that while Openmarkets broadly had appropriate written supervisory policies and procedures, the implementation of the policies was inadequate to ensure compliance;
 - (b) Rule 5.5.2 of the Securities Rules, which requires Trading Participants to have and maintain the necessary organisational and technical resources to ensure compliance with the Securities Rules. ASIC alleged that Openmarkets:
 - (i) did not appropriately calibrate its post-trade surveillance system, being the Nasdaq SMARTS system. The failure to appropriately calibrate the SMARTS system resulted in it generating around 6,700 SMARTS alerts per month from 1 January 2020 until approximately March 2021. This volume of alerts was unmanageable, which resulted in most alerts not being reviewed; and
 - (ii) had insufficient employees with the appropriate skills, knowledge and experience to carry out effective trade surveillance (including reviewing the overwhelming number of SMARTS alerts);
 - (c) Rule 5.6.1 of the Securities Rules, which requires a Trading Participant to have appropriate AOP filters, and to ensure that its AOP system does not interfere with the efficiency and integrity of the market, or proper functioning of any

trading platform. ASIC alleged that Openmarkets contravened this requirement because:

- (i) Openmarkets failed to engage the anti-wash trade filter in its IRESS IOS AOP system; and
 - (ii) Openmarkets continued to place trades on behalf of the client responsible for the majority of the wash trades which were the subject of the 2017 MDP infringement notice;
- (d) Rule 5.6.3(1)(a) of the Securities Rules, which requires a Trading Participant to have adequate organisational and technical resources within its AOP system to ensure that trading messages submitted into a trading platform do not interfere with the efficiency and integrity of the market, or the proper functioning of any trading platform. ASIC alleged that Openmarkets failed to ensure its AOP system was fit for purpose, as it had not reviewed the appropriateness of its AOP filters since they were established following the independent expert review of Openmarkets' compliance procedures in 2017;
- (e) Rule 5.7.1(b)(iii) of the Securities Rules, which requires Market Participants to refrain from transmitting orders to the market on account of any other person where, taking into account the circumstances of the order, the Market Participant ought reasonably suspect that the person has placed the order with the intention of creating a false or misleading appearance of active trading in any financial product or with respect to the market for, or the price of, any financial product. This allegation concerned 2,011 orders placed into the market by Openmarkets on behalf of the client responsible for the majority of the wash trades the subject of the 2017 MDP infringement notice;
- (f) Rule 5.11.1(1)(b) of the Securities Rules, which requires Market Participants to notify ASIC in writing of reportable matters, including suspicious transactions or orders transmitted to a trading platform. ASIC made this allegation in respect of suspicious trading entered into the market by Openmarkets on behalf of the clients referred to in paragraphs 19 and 20 below;
- (g) Rule 2.1.5(2) of the Securities Rules, which requires Market Participants to ensure that their supervisory staff do not engage in unprofessional conduct because Openmarkets failed to prevent unprofessional conduct by multiple senior staff; and
- (h) Rules 3.5.9 and 3.5.10(d) of the Securities Rules, which require Market Participants to perform accurate trust account reconciliations and to notify ASIC in writing within two Business Days of any failure to do so and of any trust account deficiencies. ASIC alleged that Openmarkets' trust account reconciliations were not accurate in respect of 35 consecutive business days and that it failed to report the deficiencies within 2 business days.
13. Openmarkets did not contest that the MDP had reasonable grounds to believe that it had contravened Rule 2.1.3, Rule 5.5.2, Rule 5.6.1 and Rule 5.6.3(1)(a) from 1 January

2020, and it contended that the MDP also had reasonable grounds to believe that those contraventions had been ongoing since the Licence Conditions were lifted in February 2018.

14. Openmarkets also did not contest that the MDP had reasonable grounds to believe that it had contravened Rule 5.7.1(b)(iii), Rule 5.11.1(1)(b), Rule 3.5.9 and Rule 3.5.10(d) from 1 January 2020.
15. However, Openmarkets contended that, although it had contravened Rule 3.5.9 on 35 occasions because it had failed to perform accurate trust account reconciliations on 35 consecutive business days, it had only contravened MIR 3.5.10(d) once because it had failed to report trust account deficiencies within 2 Business Days on one occasion.

Details of the alleged contraventions

Alleged contravention 1 – Supervisory procedures (Rule 2.1.3)

16. Openmarkets operated a risk model involving two lines of defence to ensure compliance with the Relevant Rules:
 - (a) the first line of controls was the AOP filters, a number of which automatically denied client orders if any limits or filters were breached. Others were configured to refer an order to a DTR for review and, if appropriate, for the DTR to authorise transmission of the order to the relevant market. DTRs were also required to escalate any suspicious activity; and
 - (b) the second line of controls was Openmarkets' DTRs, who operated and reviewed the Nasdaq SMARTS (*SMARTS*) surveillance system and alerts generated by it.
17. From February 2018, Openmarkets had a Post-Trade Surveillance policy in place which required:
 - (a) SMARTS alerts parameters to be regularly reviewed;
 - (b) SMARTS alerts to be monitored and reviewed on a daily basis, with alerts requiring escalation to be allocated an "Investigating" status and to be assigned to the relevant party with a referral to one or more of the Head of Trading, Compliance Manager and General Counsel;
 - (c) Compliance to track all SMARTS alerts requiring further investigation and to report on them to the quarterly Compliance and Risk committee meetings; and
 - (d) a SMARTS alerts trend analysis to be tabled at quarterly compliance meetings, and for the top 10 accounts by volume of SMARTS alerts to be reviewed.
18. Following a configuration change to SMARTS in August 2019, the number of alerts that required review increased significantly. Further, in 2020 the number of orders placed by Openmarkets was over 2.5 times the number placed in 2019. These factors led to the number of alerts becoming unmanageable for the staff allocated to review

them. Records were inadequate to demonstrate which SMARTS alerts were reviewed within a reasonable timeframe and it was not contested that for a period of nearly 2 months in 2020 the SMARTS alerts were not reviewed at all.

19. In the trend analysis presented at an Openmarkets' Compliance meeting held in February 2020, one client had significantly more SMARTS alerts than any other client. It was noted that an investigation was warranted into that client's trading. On 22 July 2020, a suspicious activity report was lodged with ASIC regarding trading by that client on that one day. In September 2020, the client was sent a warning email regarding their trading which advised that a number of spoofing alerts had been identified and, as a consequence, the number of permitted untraded deletes (i.e. orders that are cancelled by the client before they result in a trade) for the client had been reduced from 250 to 50. The client subsequently left Openmarkets in November 2020.
20. The August 2020 Compliance committee meeting minutes noted that another client was second on the list of clients generating the most SMARTS alerts with respect to trading in July 2020 as well as for the year to date, and that a review of that client's trading was underway. A warning email was sent to that client in September 2020, stating that their trading was being monitored by the Openmarkets' Compliance team. That client appeared fifth in the list of top ten clients generating SMARTS alerts considered at the November 2020 Compliance Committee meeting and the February 2021 Compliance Committee meeting. In April 2021, the client was sent a further email informing him that his orders were to be directed to a DTR for authorisation before they were transmitted to a market pending a further investigation into his trading. The client left Openmarkets by May 2021.
21. The MDP is satisfied that from 1 February 2018 to 9 July 2021, Openmarkets did not have appropriate supervisory procedures to ensure compliance by Openmarkets with Rule 5.7.1(b)(iii) and Rule 5.11.1(1)(b) of the Relevant Rules. In particular, contrary to Openmarkets' Post-Trade Surveillance policy:
 - (a) Openmarkets did not, prior to September 2020, conduct a regular review of SMARTS alerts parameters;
 - (b) Openmarkets' records were inadequate to demonstrate which SMARTS alerts were reviewed, which staff member was responsible and what steps were taken; and
 - (c) there was inconsistent and inadequate follow up with the clients responsible for the greatest number of SMARTS alerts each quarter.
22. While Openmarkets' written policies and procedures were not at issue, written policies and procedures alone are not sufficient to ensure compliance with the Rules or satisfy the requirements of Rule 2.1.3.
23. Openmarkets did not contest ASIC's allegation that the MDP had reasonable grounds to believe that it had contravened Rule 2.1.3 from 1 January 2020, and Openmarkets contended that the MDP also had reasonable grounds to believe that those contraventions had been ongoing since the Licence Conditions were lifted in February

2018. In light of Openmarkets' submissions, the MDP was satisfied that it had reasonable grounds to believe that the contravention of Rule 2.1.3 had been ongoing since 1 February 2018.

24. Accordingly, the MDP has reasonable grounds to believe that:

- (a) from 1 February 2018 to 6 May 2018, Openmarkets contravened Rule 2.1.3 of the ASX Rules and Rule 2.1.3 of the Chi-X Rules; and
- (b) from 7 May 2018 to 9 July 2021, Openmarkets contravened Rule 2.1.3 of the Securities Rules.

Alleged Contravention 2 – Organisational and technical resources (Rule 5.5.2)

25. The MDP was satisfied that from 1 February 2018 to 25 May 2021 Openmarkets did not have and maintain the necessary organisational and technical resources to ensure compliance with the Relevant Rules. In particular:

- (a) Openmarkets did not appropriately calibrate its SMARTS system, meaning that a large volume of SMARTS alerts was generated during the period from 1 January 2020 until around March 2021 when the recalibration of the SMARTS alerts parameters was completed. The failure to appropriately calibrate the SMARTS system resulted in it generating around 6,700 SMARTS alerts per month from 1 January 2020 until approximately March 2021. This volume of alerts was unmanageable, which resulted in most alerts not being reviewed;
- (b) Openmarkets had an insufficient number of employees with the appropriate skills, knowledge and experience to carry out effective trade surveillance. Although Openmarkets employed a number of staff involved in post-trade surveillance in varying capacities between February 2018 and January 2020, it was not until May 2021 that Openmarkets had an employee dedicated to post-trade surveillance who had the appropriate skills, knowledge and experience to review SMARTS alerts; and
- (c) there was no consistent system to provide training to employees responsible for reviewing SMARTS alerts.

26. Openmarkets did not contest ASIC's allegation that the MDP had reasonable grounds to believe that it had contravened Rule 5.5.2 from 1 January 2020, and Openmarkets contended that the MDP also had reasonable grounds to believe that those contraventions had been ongoing since the Licence Conditions were lifted in February 2018. In light of Openmarkets' submissions, the MDP was satisfied that it had reasonable grounds to believe that the contravention of Rule 5.5.2 had been ongoing since 1 February 2018.

27. Accordingly, the MDP has reasonable grounds to believe that:

- (a) from 1 February 2018 to 6 May 2018, Openmarkets contravened Rule 5.5.2 of the ASX Rules and Rule 5.5.2 of the Chi-X Rules; and

- (b) from 7 May 2018 to 25 May 2021, Openmarkets contravened Rule 5.5.2 of the Securities Rules.

Alleged Contravention 3 – Responsible use of system for Automated Order Processing (Rule 5.6.1)

- 28. The MDP was satisfied that Openmarkets did not have appropriate automated filters in relation to AOP and failed to ensure that its AOP system did not interfere with the efficiency and integrity of a market and the proper functioning of any trading platform.
- 29. Openmarkets failed to engage the anti-wash trade filter following the 2017 MDP proceedings, resulting in ASX's UCP or Cboe's No Self Trade (*NST*) tools being triggered on 175 occasions during the period from 1 January 2020 to 31 March 2021. These 175 trades:
 - (a) were transmitted on behalf of the client that was responsible for the majority of the wash trades which were the subject of the 2017 MDP infringement notice; and
 - (b) had an aggregate value of \$13,983,272.38, and would have resulted in wash trades during the relevant period, if not for the operation of the relevant exchange's UCP or NST tools.
- 30. Openmarkets did not contest ASIC's allegation that the MDP had reasonable grounds to believe that it had contravened Rule 5.6.1 from 1 January 2020, and Openmarkets contended that the MDP also had reasonable grounds to believe that those contraventions had been ongoing since the Licence Conditions were lifted in February 2018. In light of Openmarkets' submissions, the MDP was satisfied that it had reasonable grounds to believe that the contravention of Rule 5.6.1 had been ongoing since 1 February 2018.
- 31. Accordingly, the MDP has reasonable grounds to believe that:
 - (a) from 1 February 2018 to 6 May 2018, Openmarkets contravened Rule 5.6.1(1) of the ASX Rules and Rule 5.6.1(1) of the Chi-X Rules; and
 - (b) from 7 May 2018 to 31 March 2021, Openmarkets contravened Rule 5.6.1 of the Securities Rules.

Alleged Contravention 4 – Automatic Order Processing system requirements (Rule 5.6.3(1)(a))

- 32. The MDP is satisfied Openmarkets did not ensure that its AOP system had in place organisational and technical resources to enable trading messages to be submitted into a trading platform without interfering with the efficiency and integrity of the relevant market or the proper functioning of that trading platform. This was because Openmarkets had not conducted any sufficient review of the appropriateness of its AOP filters since they were established following the independent review of its compliance arrangements in 2017. In addition, following this review and continuing

up until October 2021, Openmarkets believed the anti-wash trade filter was engaged when it was not.

33. Openmarkets engaged an independent expert in November 2021 to review and assess the adequacy of the design of Openmarkets' trade surveillance controls and supporting governance arrangements. The independent expert prepared a report in March 2022 which found that although an AOP annual review occurs, it was only focussed on testing whether the current filter arrangements operate as designed and did not test the appropriateness of Openmarkets' filters. The report stated:

"We did not see evidence (documented or otherwise) of a regular and systematic approach to assessing the appropriateness of filter settings, including trend analysis and documented justification demonstrating that the filter parameters selected for the price filters were deemed to be adequate and effective for the clients trading through OMAL's AOP system".

...

"[OpenMarkets] does not have any practices to assess the use of algorithmic trading programs or high frequency trading strategies to inform its filters, such as its order-to-trade ratio filter."

34. Openmarkets did not contest ASIC's allegation that the MDP had reasonable grounds to believe that it had contravened Rule 5.6.3(1)(a) from 1 January 2020 until 9 July 2021, and Openmarkets contended that the MDP also had reasonable grounds to believe that those contraventions had been ongoing since the Licence Conditions were lifted in February 2018. In light of Openmarkets' submissions, the MDP was satisfied that it had reasonable grounds to believe that the contravention of Rule 5.6.3(1)(a) had been ongoing since 1 February 2018.
35. Therefore, the MDP has reasonable grounds to believe that Openmarkets contravened:
- (a) Rule 5.6.3(1)(a) of the ASX Rules and Rule 5.6.3(1)(a) of the Chi-X Rules from 1 February 2018 to 6 May 2018; and
 - (b) Rule 5.6.3(1)(a) of the Securities Rules from 7 May 2018 to 9 July 2021.

Alleged Contravention 5 – Suspicious Orders (Rule 5.7.1(b)(iii))

36. On 2,011 occasions between 1 January 2020 and 31 March 2021 and as further specified in ASIC's Amended Statement of Reasons dated 19 October 2022, Openmarkets placed orders on the market:
- (a) on behalf of the client responsible for the majority of the wash trades the subject of the 2017 MDP infringement notice; and
 - (b) in circumstances where Openmarkets ought reasonably to have suspected that the client placed those orders with the intention of creating a false or misleading appearance:

- (i) of active trading in any financial product; or
- (ii) with respect to the market for, or the price of, any financial product.

37. The client used a trading strategy where:

- (a) an order (***Iceberg Order***) was submitted on the opposite side (either bid or ask side) of an existing position held by the client;
- (b) another order (***Same Price Order***) was submitted on the opposite side of the Iceberg Order for a volume that was less than 30% of the volume of the Iceberg Order;
- (c) the Same Price Order could be on the same stock exchange as the Iceberg Order or a different exchange; and
- (d) the result of the Same Price Order and the Iceberg Order was that the client was a buyer and seller of the same security at the same price at the same time.

38. The matters that a Market Participant must have regard to in considering the circumstances of the Order are set out in Rule 5.7.2 of the Securities Rules. These matters include:

- (a) whether the Order would be inconsistent with the history or recent trading in a financial product;
- (b) the time the Order is entered, the frequency with which the Orders are placed and the volume of financial products placed by the person;
- (c) whether the Order appears to be a series of Orders, when put together with other Orders that make up the series, the Order or series is unusual;
- (d) whether there appears to be a legitimate commercial reason for that person placing the Order; and
- (e) the extent to which a person amends or cancels an instruction to purchase or sell a financial product relative to the number of transactions executed for that person.

39. The MDP considers that Openmarkets ought reasonably to have suspected that the client placed those orders with the requisite intent having regard to the circumstances of those orders as follows:

- (a) it was identified from the 2017 MDP Proceedings that the client had a prior history of entering potential wash trades into the market;
- (b) the consistent trading pattern of the client where on 2,011 occasions between 1 January 2020 and 31 March 2021 the client booked simultaneous bids and ask orders in the same security at the same price point, in many cases as part of an unusual series of orders, including the amendment and cancellation of large volume orders;

- (c) the client submitted Same Price Orders on 175 occasions that would have caused wash trades but for the operation of ASX's UCP and/or the Chi-X's NST programs;
 - (d) 350 SMARTS alerts were generated by the client account from 1 January 2020 to 31 March 2021 plus a number of "pattern alerts";
 - (e) in relation to 1,205 of the 1,208 Iceberg Orders (and 2,008 of the 2,011 occasions where the client submitted a Same Price Order), the client submitted at least one resting order on the opposite side of the Iceberg Order at priority. This created a significant asymmetry in both the order number and volume submitted by the client. Further, those resting orders were often cancelled or amended so as to lose priority within a short interval of the Iceberg Order being filled or partially filled; and
 - (f) a DTR of Openmarkets was aware that the client was triggering SMARTS alerts from May 2020, but did not escalate the matter.
40. Therefore, the MDP had reasonable grounds to believe that from 1 January 2020 to 31 March 2021, Openmarkets contravened Rule 5.7.1(b)(iii) of the Securities Rules on 2,011 occasions.

Alleged Contravention 6 – Suspicious Activity Reporting (Rule 5.11.1(1)(b))

41. For the reasons set out below, the MDP had reasonable grounds to believe that Openmarkets contravened Rule 5.11.1(1)(b) of the Securities Rules on five occasions - namely 20 February 2020 and 14 September 2020 with respect to one client (being the client referred to in paragraph 19) and 20 August 2020, 21 September to 26 November 2020 and 18 February to 19 April 2021 with respect to a second client (being the client referred to in paragraph 20).
42. The MDP was satisfied that Openmarkets had reasonable grounds to suspect that the first client transmitted an order or transaction to a Trading Platform of a Market that was likely to have the effect of creating an artificial price for trading in securities on a Market or creating a false or misleading appearance of active trading in those securities because:
- (a) the client was responsible for the greatest number of SMARTS alerts of any Openmarkets client and was responsible for a majority of alerts in relation to spoofing. The minutes of the Compliance Committee meeting of 20 February 2020 noted that further investigation into the client's trading was required. Openmarkets did not notify ASIC of its suspicions with respect to the client at that time;
 - (b) on 22 July 2020, Openmarkets lodged a suspicious activity report with ASIC regarding trading by the client. The report stated that "on 22 July 2020 the trading behaviour of the client suggests he is creating a false or misleading appearance of active trading"; and
 - (c) the client continued to generate a high number of SMARTS alerts throughout

August and September 2020 such that Openmarkets sent the client an email on 14 September 2020 warning him that the Openmarkets post-trade surveillance system was continuing to identify a number of spoofing alerts on his trading account. Openmarkets did not notify ASIC of its suspicions with respect to the client at that time.

43. The MDP was satisfied that Openmarkets had reasonable grounds to suspect that the second client transmitted an order or transaction to a Trading Platform of a Market that was likely to have the effect of creating an artificial price for trading in securities on a Market or creating a false or misleading appearance of active trading those securities because:
- (a) that client was generating the second highest number of SMARTS alerts with respect to trading in January 2020 according to the minutes of the Compliance Committee meeting of 20 February 2020;
 - (b) that client also generated the second highest number of SMARTS alerts with respect to trading in July 2020, as well as for the year to date, according to the minutes of the Compliance Committee meeting of 20 August 2020. Those Compliance Committee minutes also stated that a review of the client was in progress, including to ascertain whether or not the alerts he was generating were valid alerts;
 - (c) that client received a warning email from Openmarkets on 21 September 2020 notifying him that his trading was being monitored by the Openmarkets compliance team. The minutes of the Compliance Committee meeting of 26 November 2020 recorded the client as having continued to trigger a significant number of alerts being 976 alerts for the year to date being fifth in the list of top 10 clients generating SMARTS alerts. Openmarkets did not notify ASIC of its suspicions with respect to the client in the period between the dates of the warning email and the Compliance Committee meeting; and
 - (d) the minutes of the Compliance Committee meeting of 18 February 2021 record that the client was fifth on the list of clients generating the greatest number of SMARTS alerts for that reporting period. The client received a further warning email from Openmarkets on 19 April 2021 regarding his alerts and informed him that his orders were to be directed to a DTR before transmission to a market pending a further investigation into his trading. Openmarkets did not notify ASIC of its suspicions with respect to the client in the period between the dates of Compliance Committee meeting and the further warning email.

Alleged Contravention 7 – Unprofessional Conduct (Rule 2.1.5(2))

44. The MDP has reasonable grounds to believe that Openmarkets contravened Rule 2.1.5(2) of the Securities Rules from 1 January 2020 to 31 March 2021 by failing to ensure that certain executive staff members did not engage in unprofessional conduct.
45. The unprofessional conduct constituted the following conduct referred to in ASIC's Amended Statement of Reasons dated 19 October 2022:

- (a) a senior DTR of Openmarkets was aware that a client was triggering a significant number of concerning SMARTS alerts from May 2020, but did not escalate the matter. Indeed, on a number of occasions the DTR inputted “no further action”, closing out the relevant alert;
 - (b) a staff member providing information to a client as to which SMARTS alerts were being triggered by the client between May 2020 and February 2021. While it may be that a process of engagement by management or compliance in assessing a client’s trading may include a discussion of the types of post-trade alerts being triggered to improve either execution of orders or potentially, appropriately, revising alert parameters, the communications were not of that type; and
 - (c) a staff member receiving client instructions on their personal device in breach of Openmarkets’ Code of Conduct and Acceptable Use Policy which specifically required staff to use work-approved devices in the course of carrying out their duties as employees. At the relevant times, Openmarkets was unaware of the communications and accordingly was unable to supervise or review the communications.
46. The relevant staff members referred to in paragraph 45 are no longer employed by Openmarkets.

Alleged Contravention 8 – Reconciliation of trust accounts (Rule 3.5.9)

47. Over the weekend of 14 and 15 August 2021, Openmarkets transitioned its back-office system from one service provider to another. This transition inadvertently resulted in trust account deficiencies of up to approximately \$20,000,000 on each of the 35 business days from 18 August to 5 October 2021.
48. The trust account reconciliations performed by Openmarkets in respect of those days did not identify the trust account deficiencies, and therefore were not accurate, in contravention of Rule 3.5.9 of the Securities Rules. No clients suffered loss as a result of these deficiencies, which were remedied.
49. Accordingly, the MDP has reasonable grounds to believe that Openmarkets contravened Rule 3.5.9 of the Securities Rules on 35 occasions, being each business day during the period from 18 August 2021 to 5 October 2021.

Alleged Contravention 9 – Obligation to notify ASIC in respect of reconciliation (Rule 3.5.10(d))

50. On 5 October 2021, Openmarkets discovered that it had a deficiency in its trust account and that there had been a deficiency on each day between 10 September 2021 and 5 October 2021.
51. After becoming aware of the deficiency on 5 October 2021, Openmarkets verbally informed ASIC of the issue but did not formally report the deficiency to ASIC until 11 October 2021.

52. Although Openmarkets did not formally report the deficiency in its trust account funds to ASIC within two business days, it is likely that Openmarkets made ASIC aware of the issue verbally within the two business day period referred to in Rule 3.5.10(d).
53. The MDP has reasonable grounds to believe there was a contravention of Rule 3.5.10(d) of the Securities Rules. However, given the verbal report to ASIC the MDP considered that the contravention was only a technical one.
54. The MDP was not satisfied that it had reasonable grounds to believe that the remainder of the 35 alleged contraventions of Rule 3.5.9 also involved contraventions of Rule 3.5.10(d).

The determination of penalty

55. In determining the appropriate penalty, the MDP considered the four key factors set out in *ASIC Regulatory Guide 216: Markets Disciplinary Panel (RG 216)*, namely:
 - (a) the character of the conduct;
 - (b) the consequences of the conduct;
 - (c) the participant's compliance culture; and
 - (d) remedial steps taken by the participant.
56. In addition to these factors, the MDP also considered the following principles in determining the appropriate penalty:
 - (a) the penalty should promote market integrity by acting as a deterrent to any future misconduct by the participant and as a general deterrent to other participants (RG 216.81(b));
 - (b) the penalty to be specified in an infringement notice should be just and appropriate having regard to the totality of the conduct and whether there are factually related contraventions (RG 216.111 and 216.112); and
 - (c) the penalty should be "proportionate" in the sense that it should strike a reasonable balance between deterrence and oppressive severity (RG 216.81(a) and *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 at [41]).
57. These additional matters are considered in more detail in paragraphs 134 to 142 below. Their application resulted in the final penalty imposed by the MDP (\$4,500,000 in total) being significantly less than the penalty the MDP would have imposed (\$8,600,000 in total) if the contraventions had been considered in isolation. The final penalty also incorporated a substantial reduction in light of the requirement for Openmarkets to enter into a significant enforceable undertaking and the fact that Openmarkets did not contest the alleged contraventions before the MDP.
58. The alleged contraventions of Rule 5.7.1(b)(iii), Rule 5.11.1(1)(b), Rule 2.1.5(2), Rule

3.5.9 and Rule 3.5.10(d) occurred wholly after 13 March 2019. Therefore, the penalties associated with the alleged contravention of those Rules were assessed under the new penalty framework introduced by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*. For penalties assessed under this framework, the value of a penalty unit is \$210 for contraventions committed between 13 March 2019 and 30 June 2020 and \$222 for contraventions committed between 1 July 2020 and 31 December 2022.

59. The alleged contraventions of Rule 2.1.3, Rule 5.5.2, Rule 5.6.1 and Rule 5.6.3(1)(a) occurred over an extended period of time across the operation of the old and new penalty frameworks. However, as the relevant conduct did not occur wholly on and after 13 March 2019, the penalties associated with the contravention of these Rules were assessed under the old penalty regime.

Alleged Contravention 1—Supervisory procedures (Rule 2.1.3)

Character of the conduct

60. Although Openmarkets had written policies and procedures in place, it failed to integrate those policies and procedures into its day-to-day supervisory procedures. Further, it did not employ sufficient staff to enable it to apply its written policies and procedures in practice. There is no benefit in having well written policies and procedures if they are not adhered to or are not capable of being implemented.
61. The conduct continued over a period of 41 months. It should have been clear to Openmarkets that its procedures were not operating effectively given the very large numbers of SMARTS alerts being triggered and given that the volume of SMARTS alerts had become unmanageable for the staff allocated to review them. This meant that Openmarkets' staff could not follow its written procedures. The MDP considered that the conduct of Openmarkets in not having the necessary supervisory procedures to ensure compliance with the Rules in the circumstances was reckless.
62. The MDP considered that the nature of the conduct and the extended length of time over which the conduct occurred was an aggravating factor and that the character of the conduct was serious.

Consequences of the conduct

63. Openmarkets was not undertaking the relevant processes set out in its policies and procedures. Openmarkets benefited from cost savings associated with not hiring the additional staff that would have been needed to adequately implement its policies and procedures. Openmarkets also benefitted from retaining clients and order flow in circumstances where its supervisory procedures were not adequately followed to appropriately manage and properly supervise the significant flow of orders and the subsequent number of SMARTS alerts generated by those clients.

Compliance culture

64. The MDP considered that the internal controls of Openmarkets were inadequate, as Openmarkets did not have the controls in place to detect whether its policies and procedures were being implemented and followed.

65. The compliance history of Openmarkets was very poor and an aggravating factor having regard to:
- (a) the prior regulatory action taken by ASIC in 2016 when it imposed conditions on Openmarkets' Australian financial services licence. These conditions were subsequently lifted in the expectation that Openmarkets would improve its compliance culture;
 - (b) the issue of a \$200,000 infringement notice by the MDP in the 2017 MDP proceedings;
 - (c) the Chi-X Australia (now Cboe) Compliance Committee sanctioning Openmarkets in December 2019 and imposing a fine of \$20,000. Chi-X Australia found that Openmarkets had contravened Rule 3.1(e) of the Chi-X Operating Rules (A participant must comply with the Market Integrity Rules) by not having "a complete suite of alerts and other controls in place to detect and prevent trading that may prejudice the fair and orderly operation of the Chi-X market"; and
 - (d) the ASX determining that Openmarkets had not complied with:
 - (i) ASX Clear Operating Rule 4.1.1(b), which requires a participant to comply with any condition imposed on its admission under ASX Clear Operating Rule 3.1.4; and
 - (ii) ASX Clear Operating Rules 3.5.1 and 4.11(a), which require a participant to have adequate resources and processes to comply with its obligations as a participant under the ASX Clear Operating Rules.

As a consequence, ASX issued a disciplinary notice to Openmarkets and imposed a fine of \$80,000 (plus GST).

66. Openmarkets co-operated with ASIC during its investigation. However, Openmarkets did not promptly report issues in relation to its supervisory procedures to ASIC. Accordingly, this was a neutral factor.

Remediation

67. Openmarkets undertook a number of steps to address the defects in its supervisory procedures (as well as the other alleged contraventions), including:
- (a) seeking to improve its compliance and governance with the appointment of a new Chief Executive Officer and a new Chief Operating Officer in December 2022;
 - (b) appointing an independent expert in November 2021 to conduct an independent review of the design of its trade surveillance arrangements and supporting governance arrangements. The expert produced a report in March 2022. Openmarkets shared the expert report with ASIC on a voluntary basis, and committed to implement an uplift program in response to the report; and

- (c) the expert report noted that Openmarkets took a range of steps in 2021 to uplift its trade surveillance and governance arrangements. These included recruiting experienced personnel, conducting a comprehensive review of post-trade controls, introducing new governance arrangements for post-trade surveillance and significant uplift in its risk management arrangements and control environment.
68. Further, key individuals associated with the relevant conduct are no longer with Openmarkets.
69. Although the MDP welcomed the above remedial steps, the MDP considered them to be a neutral factor, rather than a mitigating factor. That is because Openmarkets' policies and procedures were not followed for a significant period of time and the remedial steps, whilst significant, were not taken far earlier.

Penalty

70. Given that the conduct commenced in February 2018, the penalty was determined under the penalty regime in place prior to 13 March 2019, which provides for significantly lower penalties than the current penalty regime. The maximum penalty for a contravention of Rule 2.1.3 under the relevant penalty regime is \$600,000.
71. If the alleged contravention of Rule 2.1.3 had been considered in isolation, the MDP would have determined that having regard to the length of the conduct and the very poor compliance history of Openmarkets that a penalty at the bottom of the high range would have been appropriate. To this end, the MDP would have imposed a penalty of \$400,000.
72. Following consideration of the additional matters referred to in paragraphs 134 to 142 below (e.g. totality and factually related contraventions, balancing deterrence and oppressive severity, the requirement that Openmarkets enter into a significant enforceable undertaking and the fact that Openmarkets did not contest the alleged contraventions before the MDP), the MDP decided that a penalty of \$209,240 was appropriate. The MDP attributed this penalty as follows:
- (a) in relation to Rule 2.1.3 of the ASX Rules and Rule 2.1.3 of the Chi-X Rules (from 1 February 2018 to 6 May 2018)—\$0; and
 - (b) in relation to Rule 2.1.3 of the Securities Rules (from 7 May 2018 to 9 July 2021)—\$209,240.

Alleged Contravention 2—Organisational and technical resources (Rule 5.5.2)

Character of conduct

73. The conduct was serious. As a gatekeeper to the market, Openmarkets is required to have and maintain the necessary organisational and technical resources in place to ensure compliance with the Relevant Rules.
74. Openmarkets had an insufficient number of employees with the appropriate skills,

knowledge and experience to review the SMARTS alerts being generated by the trading of its clients. Moreover, it did not take action to address this issue in a timely manner as the conduct continued over a sustained period of 37 months. The MDP considers that the nature of the conduct and the extended length of time over which this conduct occurred was an aggravating factor. The MDP characterised the conduct as reckless.

75. The MDP noted the comments of Colvin J in *ASIC v State One Stockbroking Limited* [2018] FCA 1830 at [14]:

Therefore, policies and procedures, no matter how well-crafted they may be, will not be sufficient. In almost every instance they will be required. However, of greater importance, will be training staff in what is required, systems to ensure that questionable conduct is identified and escalated to those with the necessary knowledge and experience to make decisions as to what to do in particular circumstances and a culture that encourages observance and implementation of the policies and procedures. Further, there must be sufficient time available for matters of compliance to be considered and addressed promptly. The policies and procedures must be integrated into day to day practice and reinforced by the way employees are supervised.

Consequences of the conduct

76. The consequences were similar to the consequences in relation to Rule 2.1.3. That is:
- (a) Openmarkets benefited from cost savings associated with not hiring the necessary staff with the requisite skills, knowledge and experience to conduct post-trade surveillance and to review SMARTS alerts parameters on a regular basis; and
 - (b) Openmarkets also benefited from the retention of clients and order flow it was not adequately resourced to transmit lawfully and appropriately monitor.

The MDP considered the consequences of the conduct to be an aggravating factor.

Compliance culture

77. The MDP considered Openmarkets' internal controls were completely inadequate. Further, as mentioned above, the compliance history of Openmarkets was very poor. An additional factor in relation to Rule 5.5.2 is that in 2017 the MDP made adverse findings regarding Openmarkets' compliance with the Rule. In light of the repeated failures regarding Rule 5.5.2, the MDP found that the compliance culture of Openmarkets was a significant aggravating factor.

Remediation

78. The remedial steps taken by Openmarkets are noted generally above at paragraph 67. In addition, Openmarkets commenced a recalibration of the SMARTS alerts system in September 2020, but the process did not finish until March 2021 because only two calibrations could be enacted per month. The MDP considered that the recalibration process could have been expedited if Openmarkets had spent additional money to make more filter changes per month.

79. The MDP noted the remedial steps taken, but found that remediation was a neutral factor in relation to Rule 5.5.2.

Penalty

80. Given the period over which the alleged contraventions of Rule 5.5.2 occurred, the maximum penalty which the MDP could impose for each contravention of the rule was \$600,000.
81. If the alleged contravention of Rule 5.5.2 had been considered in isolation, the MDP would have determined that, having regard to the length of the conduct (37 months) and the fact that the conduct reoccurred after the 2017 MDP proceedings, a penalty in the middle of the high range would have been appropriate. To this end, the MDP would have imposed a penalty of \$550,000.
82. Following consideration of the additional matters referred to in paragraphs 134 to 142 below, the MDP decided that a penalty of \$287,800 was appropriate. The MDP attributed this penalty as follows:
- (a) in relation to Rule 5.5.2 of the ASX Rules and Rule 5.5.2 of the Chi-X Rules (from 1 February 2018 to 6 May 2018)—\$0; and
 - (b) in relation to Rule 5.5.2 of the Securities Rules (from 7 May 2018 to 25 May 2021)—\$287,800.

Alleged Contravention 3—Responsible use of system for Automated Order Processing (Rule 5.6.1)

Character of the conduct

83. The MDP considered that Openmarkets' failure to activate the anti-wash trade filter was serious and characterised it as very reckless. Openmarkets was aware that the ASX UCP and Chi-X NST tools had prevented potential wash-trades from being executed in the market, but did not check whether its anti-wash trade filter had been activated, resulting in the conduct continuing for 37 months.

Consequences of the conduct

84. Although the ASX UCP and Chi-X NST tools prevented potential wash-trades from being executed in the market, Openmarkets benefitted from the conduct by receiving increased order flow and generating commission in respect of the balance of the relevant client's orders.
85. There was no quantifiable loss suffered by Openmarkets clients and others from the conduct. However, the conduct struck at the core of market confidence by allowing impermissible orders to be entered into the market. If the UCP and NST tools had not prevented the orders from being executed, the orders would have undermined the fair and orderly operation of the markets.

Compliance Culture

86. The conduct was not reported to ASIC. Openmarkets did not identify that its anti-wash trade filter was deactivated until shortly after a new Head of Trading and Execution was appointed in October 2021. This occurred around 7 months after ASIC commenced its investigation into Openmarkets' trade surveillance controls in March 2021. The delay by Openmarkets in identifying whether its anti-wash trade filter was activated was indicative of a poor compliance culture.
87. The general compliance history of Openmarkets, as previously covered, is very poor and was also considered an aggravating factor.
88. A further significant aggravating factor was that the 2017 MDP proceedings also dealt with a failure by Openmarkets to identify that the anti-wash trade filter was not operating as intended.

Remediation

89. The remedial steps taken by Openmarkets are noted generally above at paragraph 67.
90. Further, as mentioned at paragraph 78 above, although Openmarkets commenced a recalibration of the SMARTS alerts system in September 2020, this was limited to two filter changes a month and the MDP considered that the recalibration could have been expedited if Openmarkets had spent additional money.
91. The MDP acknowledged the efforts taken by Openmarkets to improve its trade surveillance controls and supporting governance arrangements. However, the MDP considered that this was a neutral, rather than a mitigating factor because this action was not taken promptly.

Penalty

92. Given the period over which the alleged contraventions occurred, the maximum penalty which the MDP could impose was \$600,000.
93. If the alleged contravention of Rule 5.6.1 had been considered in isolation, the MDP would have determined that a penalty in the middle of the high range would have been appropriate having regard to the length of the conduct (37 months) and the fact that the conduct has re-occurred since the 2017 MDP proceedings. To this end, the MDP would have imposed a penalty of \$550,000. If the new penalty regime had applied, the penalty would have been far higher.
94. Following consideration of the additional matters referred to in paragraphs 134 to 142 below, the MDP decided that a penalty of \$287,800 was appropriate, attributed as follows:
- (a) in relation to Rule 5.6.1 of the ASX Rules and Rule 5.6.1 of the Chi-X Rules (from 1 February 2018 to 6 May 2018)—\$0; and
 - (b) in relation to Rule 5.6.1 of the Securities Rules (from 7 May 2018 to 31 March 2021)—\$287,800.

Alleged Contravention 4 – Automatic Order Processing system requirements (Rule 5.6.3(1)(a))

Character of the conduct

95. The MDP considered that Openmarkets' failure to conduct any sufficient review of the appropriateness of its filter settings was serious. The MDP characterised the conduct as reckless and noted that the conduct was linked to Openmarkets' failure to implement and follow its supervisory policies and procedures (in particular, its trade and surveillance policy). The conduct occurred over a period of 41 months.

Compliance culture and remediation

96. The compliance culture of Openmarkets and the remedial steps taken by Openmarkets are noted generally above at paragraphs 64 to 67.
97. In addition, the MDP noted that the compliance culture of Openmarkets in relation to the AOP system requirements was particularly poor. Relevantly:
- (a) the very large number of SMARTS alerts being triggered should have identified that there was a need for Openmarkets to test the appropriateness of its filter settings; and
 - (b) although it was not conducting any sufficient review of the appropriateness of its filter settings, Openmarkets was nonetheless signing annual notifications under Rule 5.6.8B of the Relevant Rules that nothing had come to its attention during the preceding 12 months that would indicate that it is unable to comply with Part 5.6 of the Rules.

Penalty

98. Given the period over which the alleged contraventions occurred, the maximum penalty which the MDP could impose was \$600,000.
99. If the alleged contravention of Rule 5.6.3(1)(a) had been considered in isolation, the MDP would have determined that a penalty in the top of the medium range would have been appropriate having regard to the length of the conduct and Openmarkets' poor compliance culture. To this end, the MDP would have imposed a penalty of \$400,000.
100. Following consideration of the additional matters referred to in paragraphs 134 to 142 below, the MDP decided that a penalty of \$209,240 was appropriate, attributed as follows:
- (a) in relation to Rule 5.6.3(1)(a) of the ASX Rules and Rule 5.6.3(1)(a) of the Chi-X Rules (from 1 February 2018 to 6 May 2018)—\$0; and
 - (b) in relation to Rule 5.6.3(1)(a) of the Securities Rules (from 7 May 2018 to 9 July 2021)—\$209,240.

Alleged Contravention 5 – Suspicious trades (Rule 5.7.1(b)(iii))

Character of conduct

101. The MDP considered that Openmarkets' conduct in allowing 2,011 suspicious orders to be entered into the market over a period of 15 months was reckless and very serious in light of the matters referred to in paragraph 39, including:
- (a) based on the 2017 MDP proceedings, the client had a prior history of entering potential wash trades into the market;
 - (b) numerous SMARTS alerts and same price exchange alerts were triggered as a result of the client's trading; and
 - (c) a DTR of Openmarkets was aware that the client was triggering SMARTS alerts from May 2020, but did not escalate the matter.

Consequences of the conduct

102. Openmarkets benefitted from increased order flow from the client and commission generated from the impermissible trades. The conduct placed market integrity at risk by allowing suspicious orders to be entered into the market for an extended period of time.

Compliance culture and remediation

103. The comments made above in relation to compliance culture and remediation are generally applicable in relation to the alleged contraventions of Rule 5.7.1(b)(iii). The MDP noted that the failures of Openmarkets in relation to Rule 5.7.1(b)(iii) were related to its failures to have appropriate supervisory policies and procedures, necessary organisational and technical resources and appropriate filters.

Penalty

104. Although there were 2,011 individual alleged contraventions, the MDP decided that it was appropriate to treat them as a single course of conduct. That was because the alleged contraventions ultimately resulted from the failure by Openmarkets to have appropriate AOP filters in place and to appropriately review and escalate alerts.
105. If the alleged contravention of Rule 5.7.1(b)(iii) had been considered in isolation, the MDP would have determined that a penalty at the low end of the high range would have been appropriate for the alleged contravention of Rule 5.7.1(b)(iii), taking into account the repeated conduct, the extended period over which the contraventions occurred and the multiple aggravating factors. To this end, the MDP would have imposed a penalty of \$2.2 million.
106. Following consideration of the additional matters referred to in paragraphs 134 to 142 below, the MDP decided that a penalty of \$1,150,800 was appropriate, attributed as follows:
- (a) for the first contravention—5,480 penalty units at \$210, being \$1,150,800; and

- (b) for each subsequent contravention—nil.

Alleged Contravention 6—Reporting suspicious trades to ASIC (Rule 5.11.1(1)(b))

Character of conduct

107. The conduct was very serious and was the result of the broader failure of Openmarkets to have the compliance frameworks in place to identify and report suspicious trading activity by its clients.
108. The MDP characterised the conduct as reckless given the number of SMARTS alerts being triggered, the limited consideration of the trading by Openmarkets' Compliance Committee and the decisions to warn the clients about the relevant trades rather than report the conduct to ASIC.
109. The decision by Openmarkets not to report the suspicious trades to ASIC was unacceptable as it denied the regulator an opportunity to investigate the conduct and take appropriate action where necessary. Accordingly, the MDP considered that aspect of Openmarkets conduct to be an aggravating factor.

Consequences of the conduct

110. Not promptly reporting the suspicious trading to ASIC had the potential to undermine market integrity.

Compliance culture

111. The compliance history of Openmarkets, as previously covered, is very poor and was considered an aggravating factor.

Remediation

112. Openmarkets has since undertaken a comprehensive review and uplift of its procedures for suspicious activity reporting. This involves a more robust escalation process under which potentially serious trades are identified daily and escalated to senior management for approval to lodge a suspicious activity report the following day.
113. However, the MDP considers this to be a neutral factor, as those steps do not appear to have been taken promptly after Openmarkets had suspicions about potentially manipulative trades by one client in February 2020.

Penalty

114. Although there were 5 alleged contraventions, the MDP considered these should be grouped as a single course of conduct, because they resulted from a broader failure of Openmarkets to have in place robust compliance frameworks (in particular an effectively operating Compliance Committee) to identify and report suspicious trading activity by its clients.
115. If the conduct had occurred before 13 March 2019, the maximum penalty for a contravention of Rule 5.11.1(1)(b) that the MDP could impose would have been

\$12,000. For conduct occurring on and after 13 March 2019, this was increased to 15,000 penalty units. This increase is consistent with the important function served by Rule 5.11.1(1)(b), namely its purpose of requiring that Market Participants report suspicious trades to ASIC so that ASIC can take action to assess and deal with potentially manipulative conduct.

116. If the alleged contravention of Rule 5.11.1(1)(b) had been considered in isolation, the MDP would have determined that a penalty at the high end of the middle range would have been appropriate. Although constituting a single course of conduct, the alleged contraventions took place over a period of 14 months, involved more than one client and occurred on multiple occasions. Further, there were a number of aggravating factors. To this end, the MDP would have imposed a penalty of \$2 million.
117. Following consideration of the additional matters referred to in paragraphs 134 to 142 below, the MDP decided that a penalty of \$1,045,800 was appropriate, attributed as follows:
- (a) for the first contravention—4,980 penalty units at \$210, being \$1,045,800; and
 - (b) for each subsequent contravention—nil.

Alleged Contravention 7 – Unprofessional conduct (Rule 2.1.5(2))

Character of the conduct

118. The MDP characterised the conduct as very serious and at the upper end of careless. The MDP considered that the poor conduct reflected the culture of Openmarkets at a time when effective compliance was not being supported.
119. The MDP considered in particular that the ongoing conduct of a staff member opting to warn a client of the SMARTS alerts that the client triggered instead of escalating the matter to compliance was highly unprofessional and an aggravating factor.

Consequences of the conduct

120. There was no benefit to Openmarkets and no loss was suffered by any clients.

Compliance culture

121. The comments made above in relation to compliance culture are generally applicable in relation to the alleged contraventions of Rule 2.1.5(2).

Remediation

122. The senior staff members engaged in unprofessional conduct are no longer employed by Openmarkets. Openmarkets has sought to improve its compliance and governance and to that end appointed a new Chief Executive Officer and separately a new Chief Operating Officer in December 2022. These appointments were followed by a significant number of changes to the executive leadership team of Openmarkets.
123. The MDP considers the new appointments were warranted and positive, but in terms of consideration of penalty were a neutral factor having regard to the time between the alleged contraventions and the eventual appointments.

Penalty

124. If the alleged contravention of Rule 2.1.5(2) had been considered in isolation, the MDP would have determined that a penalty in the middle of the middle range would have been appropriate, having regard to the aggravating aspects of the character of the conduct and Openmarkets' compliance culture. To this end, the MDP would have imposed a penalty of \$1.5 million.
125. Following consideration of the additional matters referred to in paragraphs 134 to 142 below, the MDP decided that a penalty of \$785,400 was appropriate, being 3,740 penalty units at \$210.

Alleged Contravention 8—Reconciliation of trust accounts (Rule 3.5.9)*Character of the conduct*

126. The conduct was serious and lasted for 35 business days. The MDP characterised the conduct as highly careless because Openmarkets did not employ the necessary resources to carry out testing that would have promptly identified the issues arising out of the transition of its back office system. This meant that the conduct continued for a significant time.
127. Although highly careless, the MDP did not consider that there was any impropriety associated with the conduct.

Consequences of the conduct

128. There was no benefit to Openmarkets and its clients did not suffer loss from the conduct.

Compliance culture and remediation

129. As mentioned above, Openmarkets' compliance history is very poor. However, once the trust account deficiencies were identified, Openmarkets promptly reported them to ASIC.
130. Since the relevant conduct occurred, Openmarkets has reported an additional trust account issue to ASIC. This additional matter is not the subject of this infringement notice and so the MDP did not make any findings as to whether it may have involved a contravention of the Securities Rules. Having said that, the MDP considered that the matter was promptly reported and this aspect of the matter was more consistent with the appropriate behaviour to be expected of a Market Participant.

Penalty

131. If the alleged contravention of Rule 3.5.9 had been considered in isolation, the MDP would have determined that a penalty in the high end of the low range would have been appropriate. To this end, the MDP would have imposed a penalty of \$1 million.
132. Following consideration of the additional matters referred to in paragraphs 134 to 142 below, the MDP decided that a penalty of \$523,920 was appropriate, being 2,360 penalty units at \$222.

Alleged Contravention 9—Obligation to notify ASIC in respect of reconciliation (Rule 3.5.10(d))

133. As mentioned, although the MDP had reasonable grounds to believe there was a contravention of Rule 3.5.10(d) of the Securities Rules, it considered that the contravention was only a technical one in circumstances where ASIC was notified verbally rather than in writing. Consequently, the MDP decided that it was not appropriate to impose a penalty for the alleged contravention and in the absence of all other matters would have recommended ASIC issue a ‘no further action letter’ warning that in future all such similar reports must also be in writing.

Other factors relevant to penalty

134. The MDP also considered the following principles in determining the appropriate penalty:

- (a) the penalty should promote market integrity by acting as a deterrent to any future misconduct by the participant and as a general deterrent to other participants (RG 216.81(b));
- (b) the penalty to be specified in an infringement notice should be just and appropriate having regard to the totality of the conduct and whether there are factually related contraventions (RG 216.111 and 216.112); and
- (c) the penalty should be “proportionate” in the sense that it should strike a reasonable balance between deterrence and oppressive severity (RG 216.81(a) and *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 at [41]).

135. The MDP considered that Alleged Contraventions 1 to 7 were interconnected as they each related to the failure of Openmarkets to have a compliance framework in place that was capable of dealing with the suspicious trading the subject of Alleged Contraventions 5 and 6. In particular:

- (a) Alleged Contravention 1 relates to the adequacy of the implementation of Openmarkets supervisory procedures to detect and respond to the trading;
- (b) Alleged Contravention 2 relates to the adequacy of the organisational and technical resources of Openmarkets to detect and address concerns arising from the trading;
- (c) Alleged Contraventions 3 and 4 relate to the adequacy of Openmarkets AOP filters to detect 175 wash trade having a value of nearly \$14 million;
- (d) Alleged Contraventions 5 and 6 relate to the suspicions which a reasonable market participant might have with respect to the trading; and
- (e) Alleged Contravention 7 relates to unprofessional conduct of Openmarkets’ staff in respect of the trading and the relevant clients.

136. The fact that these Alleged Contraventions occurred across a wide range of rules and over a number of years highlights the fundamental importance of a market participant:

- (a) having the foundations of a strong compliance framework and culture in place before it commences a new type of business or materially expands its business;
 - (b) continuing to monitor its compliance framework and updating it as necessary to take into account changes to its business. A compliance framework includes:
 - (i) appropriate compliance policies and procedures; and
 - (ii) adequate human, financial and technological resources to enable the market participant to provide and monitor its market services in accordance with those policies and procedures, the Securities Rules, relevant operating rules and the Act;
 - (c) ensuring that its charging structure (current and planned) for its clients, and its financial resources generally, are adequate to support its compliance framework; and
 - (d) responding appropriately to increased business volumes and adequately resourcing its operations at all times.
137. It is likely that many of the Alleged Contraventions would not have occurred or would have been identified and dealt with promptly if Openmarkets had had a robust compliance framework and culture in place. The MDP noted that a market participant must not take on a new type of business or materially expand its business if it is not confident that its compliance resources are adequate to accommodate the change or expansion. A Market Participant is required to carefully consider its structure and finances (including fees charged of clients) to ensure it is able to fund the necessary uplift in its compliance framework before such change or expansion occurs. If its structures or charges will be inadequate to finance a robust compliance framework, it must not permit the change or expansion. In particular, it is important for risk management processes such as compliance committees to respond appropriately to matters presented to them and ensure matters are investigated and reported appropriately. Specifically, where individual clients are causing potential breaches of the Securities Rules, the activity needs to be investigated and addressed as a priority.
138. It is notable that Openmarkets did not contest the alleged contraventions before the MDP, thereby saving the MDP considerable time and cost in determining this matter. The MDP considered that this warranted a reasonable reduction in penalty.
139. Rather than simply imposing a monetary penalty, the MDP considered there would be a benefit to Openmarkets and to the market generally in Openmarkets entering into an enforceable undertaking, which the MDP has directed will extend to including a second report. That is because an enforceable undertaking will give an assurance that the remedial action taken by Openmarkets to date has been adequately implemented and that any additional remedial steps required have been identified and addressed.
140. In determining the appropriate penalty, the MDP also had regard to the size and financial position of Openmarkets.
141. In the MDP's view, the final penalty determined by the MDP (combined with the considerable cost of Openmarkets entering into a significant enforceable undertaking with ASIC) is one that will have a specific as well as a general deterrent effect. The

MDP was satisfied that the penalty is not oppressive, in the sense that it is not greater than the objective of deterrence requires: see *Water Efficiency Labelling and Standards Regulator v Renaissance Traditional Bathrooms Pty Ltd* [2022] FCA 1456 at [79]; *Pattinson* at [39] to [41].

142. The MDP noted that Openmarkets' poor compliance history was generally an aggravating factor. Accordingly, the final penalty imposed was significantly greater than would have been the case if Openmarkets had a strong compliance history.
143. If each rule had been considered in isolation, the MDP would have applied penalties totalling \$8.6 million across the eight contraventions (**unadjusted penalty**). However, taking into account the matters set out in paragraphs 134 to 142, the MDP determined the final penalty be reduced to a total of \$4.5 million across the eight contraventions (**final penalty**) together with entry into the enforceable undertaking.
144. The following table sets out the unadjusted penalties (in Column 2) and the final penalty (in Column 3) for each of the alleged contraventions.

Table 1 – penalty amounts

Rule	Unadjusted Penalty	Final Penalty
2.1.3 - Supervisory procedures	\$400,000	\$209,240 allocated as follows: <ul style="list-style-type: none"> • Rule 2.1.3 of the ASX Rules and Rule 2.1.3 of the Chi-X Rules – nil; • Rule 2.1.3 of the Securities Rules - \$209,240.
5.5.2 - Organisational and technical procedures	\$550,000	\$287,800 allocated as follows: <ul style="list-style-type: none"> • Rule 5.5.2 of the ASX Rules and Rule 5.5.2 of the Chi-X Rules – nil; • Rule 5.5.2 of the Securities Rules - \$287,800.
5.6.1 - Failure to have in place appropriate filters	\$550,000	\$287,800 allocated as follows: <ul style="list-style-type: none"> • Rule 5.6.1 of the ASX Rules and Rule 5.6.1 of the Chi-X Rules – nil; • Rule 5.6.1 of the Securities Rules - \$287,800.
5.6.3(1)(a) – Adequate organisational and technical resources for AOP	\$400,000	\$209,240 allocated as follows: <ul style="list-style-type: none"> • Rule 5.6.3(1)(a) of the ASX Rules and Rule

		<p>5.6.3(1)(a) of the Chi-X Rules – nil;</p> <ul style="list-style-type: none"> • Rule 5.6.3(1)(a) of the Securities Rules - \$209,240.
<p>5.7.1(b)(iii) - Placing suspicious orders (2,011 contraventions, but considered as a single course of conduct)</p>	\$2,200,000	<p>\$1,150,800</p> <p>5,480 penalty units allocated as follows:</p> <ul style="list-style-type: none"> • for the first contravention – 5,480 penalty units at \$210, being \$1,150,800; • for each subsequent contravention - nil.
<p>5.11.1(1)(b) - Failure to notify ASIC of suspicious orders (5 contraventions, but considered as a single course of conduct)</p>	\$2,000,000	<p>\$1,045,800</p> <p>4,980 penalty units allocated as follows:</p> <ul style="list-style-type: none"> • for the first contravention – 4,980 penalty units at \$210, being \$1,045,800; • for each subsequent contravention - nil.
<p>2.1.5(2) - Unprofessional Conduct</p>	\$1,500,000	<p>\$785,400</p> <p>3,740 penalty units at \$210, being \$785,400 in total.</p>
<p>3.5.9 – Reconciliation of Trust Accounts (35 contraventions, but considered as a single course of conduct)</p>	\$1,000,000	<p>\$523,920</p> <p>2,360 penalty units allocated as follows:</p> <ul style="list-style-type: none"> • for the first contravention – 2,360 penalty units at \$222, being \$523,920; • for each subsequent contravention - nil.
<p>Rule 3.5.10(d) - Obligation to notify ASIC in respect of reconciliation</p>	Nil	Nil
Total	\$8,600,000	\$4,500,000

Enforceable undertaking

145. In addition to paying a penalty, Openmarkets must enter into an enforceable undertaking under regulation 7.2A.01 of the Regulations on the terms set out in Appendix 2 to this infringement notice. Paragraphs 146 to 152 below set out a high-level summary of the key terms of the enforceable undertaking.

146. Openmarkets must appoint an independent expert approved by ASIC to review, assess and identify any deficiencies in:
- (a) Openmarkets' organisational and technical resources in relation to trade surveillance, client on-boarding and client money; and
 - (b) the design effectiveness and operational effectiveness of Openmarkets' arrangements in relation to trade surveillance, client onboarding and client money, including, but not limited to its:
 - (i) policies, processes and controls;
 - (ii) risk and compliance framework;
 - (iii) monitoring and supervision (including management oversight); and
 - (iv) governance framework.
147. The independent expert must also identify what, if any remedial actions (**Remedial Actions**) are necessary to address any deficiencies that it has identified.
148. The independent expert must provide ASIC and Openmarkets with a report (**First Report**) in relation to its review within 90 business days of their appointment. The independent expert must also provide ASIC and Openmarkets with a written summary (**First Summary Report**) of its report.
149. Openmarkets must advise ASIC within 30 business days of receiving the First Report:
- (a) which of the Remedial Actions Openmarkets does not propose to implement and why; and
 - (b) which of the Remedial Actions (**Relevant Remedial Actions**) Openmarkets proposes to implement, including details of how this will be achieved and a timetable for implementation.
150. Openmarkets must provide ASIC with monthly reports until such time (**Remedial Action Plan Completion Date**) that Openmarkets reasonably believes it has implemented the Relevant Remedial Actions.
151. Within the period of 3 to 9 months following the Remedial Action Plan Completion Date (and within 24 months from the date of the enforceable undertaking), the independent expert must assess and provide an additional report (**Second Report**) to ASIC and Openmarkets in relation to Openmarkets' implementation of each Relevant Remedial Action. The independent expert must also provide ASIC and Openmarkets with a written summary (**Second Summary Report**) of its report.
152. Subject to limited exceptions, ASIC may make publicly available:
- (a) a copy of the enforceable undertaking;

- (b) a copy of the First Summary Report and the Second Summary Report; and
- (c) a summary of which Remedial Actions Openmarkets decided to implement, or not implement (and reasons).

153. The MDP considered the requirement for the Second Report was necessary to provide assurance that Openmarkets had implemented the Relevant Remedial Actions. This requirement takes into account the circumstances of the 2017 expert report, where the expert made various recommendations but these were not adequately implemented.

Other information

In relation to the conduct set out in this infringement notice:

- (a) the maximum pecuniary penalty payable under an infringement notice in relation to an alleged contravention of subsection 798H(1) of the Act, by reason of contravening Rule 2.1.3, 5.5.2, 5.6.1 and 5.6.3(1)(a) of the Relevant Rules is \$600,000;
- (b) the maximum pecuniary penalty that a Court could order Openmarkets to pay for contravening subsection 798H(1) of the Act, by reason of contravening Rule 2.1.3, 5.5.2, 5.6.1 and 5.6.3(1)(a) of the Relevant Rules is \$1,000,000;
- (c) the maximum pecuniary penalty payable under an infringement notice in relation to an alleged contravention of subsection 798H(1) of the Act, by reason of contravening Rule 2.1.5(2), 5.7.1(b)(iii), 5.11.1(1)(b) and 3.5.9 of the Securities Rules is \$3,150,000 for alleged contraventions between 13 March 2019 and 30 June 2020 and \$3,300,000 for alleged contraventions between 1 July 2020 and 31 December 2022; and
- (d) the maximum pecuniary penalty that a Court could order Openmarkets to pay for contravening subsection 798H(1) of the Act (a civil penalty provision), by reason of contravening Rule 2.1.5(2), 5.7.1(b)(iii), 5.11.1(1)(b) and 3.5.9 of the Relevant Rules, is determined by section 1317G of the Act.

Note 1: The maximum pecuniary penalty is 15,000 penalty units for a body corporate: see subsection 798K(2) of the Act.

Note 2: Under subsections 1317G(2) and (4), the maximum pecuniary penalty is the greatest of:

- (a) 50,000 penalty units; and
- (b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and
- (c) either:
 - (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
 - (ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

Compliance with the infringement notice

To comply with this infringement notice, Openmarkets must pay the penalty specified in this infringement notice, and enter into an undertaking under regulation 7.2A.01 of the Regulations on the terms specified in Appendix 2 to this notice, within the compliance period.

The compliance period starts on the day on which this notice is given to Openmarkets and ends 27 days after the day on which it is given. This penalty can be paid using the method detailed in the email by which this notice is given.

The effects of compliance with this infringement notice are:

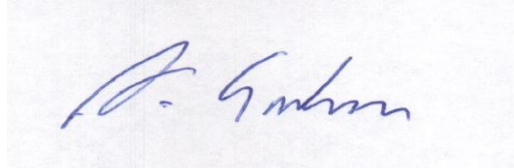
- (a) any liability of Openmarkets to the Commonwealth for the alleged contraventions of subsection 798H(1) of the Act is discharged; and
- (b) no civil or criminal proceedings may be brought or continued by the Commonwealth against Openmarkets for the conduct specified in the infringement notice as being the conduct that made up the alleged contraventions of subsection 798H(1) of the Act; and
- (c) no administrative action may be taken by ASIC under sections 914A, 915B, 915C or 920A of the Act against Openmarkets for the conduct specified in the infringement notice as being the conduct that made up the alleged contraventions of subsection 798H(1) of the Act; and
- (d) Openmarkets is not taken to have admitted guilt or liability in relation to the alleged contraventions; and
- (e) Openmarkets is not taken to have contravened subsection 798H(1) of the Act.

Openmarkets may choose not to comply with this infringement notice, but if Openmarkets does not comply, civil proceedings may be brought against it in relation to the alleged contravention.

Openmarkets may apply to ASIC for withdrawal of this infringement notice under regulation 7.2A.11 of the Regulations and for an extension of time to comply under regulation 7.2A.09 of the Regulations.

ASIC may publish details of this notice under regulation 7.2A.15 of the Regulations.

The unique code for this notice is MDP 0815/22.

**Anthony Graham**

Counsel to the Markets Disciplinary Panel

with the authority of a Division of the Australian Securities and Investments Commission

Note: Members of the Markets Disciplinary Panel constitute a Division of ASIC as delegates of the members of the Division for the purposes of considering the allegations covered by this notice.

Appendix 1 to Infringement Notice

MDP 0815/22

Relevant Rules

1. Rule 2.1.3 of the Securities Rules requires that a Market Participant must have the appropriate supervisory policies and procedures to ensure compliance with the relevant rules and legislation. Rule 2.1.3 states:

2.1.3 Supervisory procedures

A Market Participant must have appropriate supervisory policies and procedures to ensure compliance by the Market Participant and each person involved in its business as a Market Participant with these Rules, the operating rules of each relevant Market and the Corporations Act.

2. Rule 5.5.2 of the Securities Rules requires that a Trading Participant must have and maintain necessary organisational and technical resources. Rule 5.5.2 states:

5.5.2 Organisational and technical resources

A Trading Participant must have and maintain the necessary organisational and technical resources to ensure that:

- (a) Trading Messages submitted by the Trading Participant do not interfere with:
 - (i) the efficiency and integrity of a Market; or
 - (ii) the proper functioning of a Trading Platform; and
 - (b) the Trading Participant complies at all times with these Rules and the operating rules of all Markets of which it is a Trading Participant.
3. Rule 5.6.1 of the Securities Rules requires that a Trading Participant which uses its system for Automated Order Processing (*AOP*) must have appropriate automated filters in place at all times. Rule 5.6.1 states:

5.6.1 Responsible use of system for Automated Order Processing

A Trading Participant which uses its system for Automated Order Processing must at all times:

- (a) have appropriate automated filters, in relation to Automated Order Processing; and
 - (b) ensure that such use does not interfere with:
 - (i) the efficiency and integrity of a Market;
 - (ii) the proper functioning of any Trading Platform; or
 - (iii) the efficiency and integrity of any Crossing System operated by the Trading Participant.

4. Rule 5.6.3 of the Securities Rules prescribes the system requirements that a Trading Participant must have if it uses its system for AOP. In particular, Rule 5.6.3(1)(a) deals with requirements for organisational and technical resources and states:

5.6.3 Automated Order Processing system requirements

(1) A Trading Participant which uses its system for Automated Order Processing must ensure that the system has in place:

- (a) organisational and technical resources, including having appropriate automated filters, filter parameters and processes to record any changes to the filters or filter parameters, to enable Trading Messages to be submitted into a Trading Platform without interfering with the efficiency and integrity of the relevant Market or the proper functioning of that Trading Platform.

5. Between 1 February 2018 and 6 May 2018 (inclusive), the ASX Rules and Chi-X Rules contained equivalent rules (with the same numbering) to Rules 2.1.3, 5.5.2, 5.6.1 and 5.6.3(1)(a) of the Securities Rules, save that the requirement contained in Rule 5.6.1 of the Securities Rules was contained in Rule 5.6.1(1) of the ASX Rules and Chi-X Rules.
6. Rule 5.7.1 of the Securities Rules deals with a Market Participant's obligations in relation to Orders having a false or misleading appearance and states:

5.7.1 False or misleading appearance

A Market Participant must not make a Bid or Offer for, or deal in, any financial product:

- (a) as Principal:
- (i) with the intention; or
 - (ii) if that Bid, Offer or dealing has the effect, or is likely to have the effect,

of creating a false or misleading appearance of active trading in any financial product or with respect to the market for, or the price of, any financial product; or

- (b) on account of any other person where:
- (i) the Market Participant intends to create;
 - (ii) the Market Participant is aware that the person intends to create;
- or
- (iii) taking into account the circumstances of the Order, a Market Participant ought reasonably suspect that the person has placed the Order with the intention of creating,

a false or misleading appearance of active trading in any financial product or with respect to the market for, or the price of, any financial product.

7. The circumstances of the Order that a Market Participant must have regard to in Rule 5.7.1(b)(iii) is detailed in Rule 5.7.2 of the Securities Rules, which states:

5.7.2 Circumstances of Order

In considering the circumstances of the Order, a Market Participant must have regard to the following matters:

- (a) whether the Order or execution of the Order would be inconsistent with the history of or recent trading in that financial product;
- (b) whether the Order or execution of the Order would materially alter the market for, or the price of, the financial product;
- (c) the time the Order is entered or any instructions concerning the time of entry of the Order;
- (d) whether the person on whose behalf the Order is placed, or another person who the Market Participant knows to be a Related Party of that person, may have an interest in creating a false or misleading appearance of active trading in any financial product or with respect to the market for, or the price of, any financial product;
- (e) whether the Order is accompanied by settlement, delivery or security arrangements which are unusual;
- (f) where the Order appears to be part of a series of Orders, whether when put together with other Orders which appear to make up the series, the Order or the series is unusual having regard to the matters referred to in this Rule 5.7.2;
- (g) whether there appears to be a legitimate commercial reason for that person placing the Order, unrelated to an intention to create a false or misleading appearance of active trading in or with respect to the market for, or price of, any financial product;
- (h) whether the transaction, bid or offer the execution of which is proposed will involve no change of beneficial ownership;
- (i) the frequency with which Orders are placed by a person;
- (j) the volume of financial products the subject of each Order placed by a person; and
- (k) the extent to which a person amends or cancels an instruction to purchase or sell a financial product relative to the number of transactions executed for that person.

8. Rule 5.11.1 of the Securities Rules relates to the obligations of a Market Participant to report suspicious activity to ASIC and states:

5.11.1 Notification requirement

(1) Subject to subrule (2), if a Market Participant has reasonable grounds to suspect that:

- (a) a person (the *Insider*) has placed an order into or entered into a transaction on a Market in relation to a financial product while in possession of inside information (within the meaning of section

- 1042A of the Corporations Act), whether or not the Market Participant is aware of:
- (i) the identity of the Insider; or
 - (ii) all of the details of the order or transaction; or
- (b) a transaction or an order transmitted to a Trading Platform of a Market has or is likely to have the effect of:
- (i) creating an artificial price for trading in financial products on a Market;
 - (ii) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a Market;
 - (iii) creating, or causing the creation of, a false or misleading appearance of active trading in financial products on a Market; or
 - (iv) creating, or causing the creation of, a false or misleading appearance with respect to the market for, or the price for trading in, financial products on a Market,

whether or not the Market Participant is aware of:

- (v) the intention of any party to the transaction or order; or
- (vi) all of the details of the transaction or order,

the Market Participant must, as soon as practicable, notify ASIC in writing of the details of the transaction or order (to the extent known to the Market Participant) and the reasons it suspects the matter set out in paragraphs (a) and, or, (b).

(2) A Market Participant is not required to notify ASIC under subrule (1) if the Market Participant has reported the information that would otherwise be required to be contained in the notification to ASIC under subrule (1) to the Australian Transaction Reports and Analysis Centre under section 41 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or under section 16 of the *Financial Transaction Reports Act 1988*.

9. Rule 2.1.5 of the Securities Rules prohibits a Market Participant and its supervisory staff from engaging in Unprofessional Conduct and states:

2.1.5 Unprofessional Conduct

- (1) A Market Participant must not engage in Unprofessional Conduct.
- (2) A Market Participant must ensure that its supervisory staff does not engage in Unprofessional Conduct.

10. Unprofessional Conduct is defined as follows:

Unprofessional Conduct includes:

- (a) conduct which amounts to impropriety affecting professional character and which is indicative of a failure either to understand or to practise the precepts of honesty or fair dealing in relation to other Market Participants, clients or the public;
 - (b) unsatisfactory professional conduct, where the conduct involves a substantial or consistent failure to reach reasonable standards of competence and diligence; and
 - (c) conduct which is, or could reasonably be considered as likely to be, prejudicial to the interests of a Market operator or Market Participants, by a Market Participant, or an Employee, whether in the conduct of the Market Participant's business as a Market Participant or in the conduct of any other business, and need not involve a contravention of these Rules or any law.
11. Rule 3.5.9 of the Securities Rules concerns a Market Participant's obligation to perform a reconciliation of money held by it in clients' trust accounts and states:

3.5.9 Reconciliation of trust accounts

(1) A Market Participant must perform a reconciliation of:

- (a) the aggregate balance held by it at the close of business on each Business Day in clients' trust accounts maintained pursuant to Rule 3.5.1 or 3.5.2 and the corresponding balance as recorded in the Market Participant's accounting records; and
- (b) the balance held by it at the close of business on the last Business Day of each week on trust for each person on whose behalf money is held in a trust account maintained pursuant to Rule 3.5.1 or 3.5.2 and the corresponding balance as recorded in the Market Participant's accounting records,

that:

- (c) is accurate in all respects; and
- (d) contains a statement signed by a person with supervisory responsibility for the Market Participant or a person authorised in writing by that person, stating that the signatory believes, and has no reason not to believe, that the reconciliation is accurate in all respects.

(2) A Market Participant must perform the reconciliation referred to in subrule (1) by 7.00 pm on the Trading Day after the Trading Day to which the reconciliation relates.

12. Rule 3.5.10 of the Securities Rules requires a Market Participant to notify ASIC about certain matters in respect of the reconciliation and states:

3.5.10 Obligation to notify ASIC in respect of reconciliation

A Market Participant must notify ASIC, in writing, within two Business Days if:

- (a) a reconciliation has not been performed in accordance with Rule 3.5.8;
- (b) a reconciliation has not been performed in accordance with Rule 3.5.9;
- (c) according to a reconciliation performed pursuant to Rule 3.5.8, Total Deposits is less than Total Third Party Client Monies; or
- (d) according to a reconciliation performed pursuant to Rule 3.5.9, there is a deficiency of funds in its trust accounts (or, in respect of a reconciliation performed pursuant to paragraph 3.5.9(1)(b), a deficiency in respect of any particular person on whose behalf money is held in the trust account) or if it is unable to reconcile its trust accounts pursuant to Rule 3.5.9.

Appendix 2 to Infringement Notice**MDP 0815/22****Form of undertaking****ENFORCEABLE UNDERTAKING***Corporations Act 2001 (Cth)*

Regulation 7.2A.01

The commitments in this undertaking are offered to the Australian Securities and Investments Commission (**ASIC**) by:

Openmarkets Australia Limited

ACN 090 472 012

Level 40, 225 George Street, Sydney NSW 2000
(**Openmarkets**)

1. Definitions

In addition to terms defined elsewhere in this undertaking, the following definitions are used:

AFSL means an Australian financial services licence, which is a licence under section 913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services.

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth).

ASX means Australian Securities Exchange Limited (ACN 000 943 377).

ASX Market means the financial market operated by ASX under the *Australian Market Licence (Australian Securities Exchange Limited) 2002*.

AOP means a Market Participants' Automated Order Processing system (including an Automated Order Processing system that permits automated client order processing), being the process by which orders are received electronically and are placed into a trading platform without being rekeyed by a Designated Trading Representative. The trading platform is registered in a Market Participant's system, which connects it to a market operator, such as the ASX Market or Cboe Australia.

Books means a register, financial reports or financial records, a document, banker's books and any other record of information.

Client Onboarding means the making of an assessment about a prospective client, including their likely trading patterns, as part of Openmarkets' account opening process and to inform Trade Surveillance appropriate for that client.

Client Money means money to which Subdivision A of Division 2 of Part 7.8 of the Corporations Act applies.

Client Money Account means an account that meets the requirements of section 981B(1) of the Corporations Act.

Corporations Act means the *Corporations Act 2001* (Cth).

Corporations Regulations means the *Corporations Regulations 2001* (Cth).

Deficiencies include a gap, risk, weakness and/or defect identified by the independent expert during the assessment and report period.

First Report means the written report prepared by the independent expert as required under subparagraph 3.4(c).

First Summary Report means a written summary of the content of the First Report prepared by the independent expert as required under subparagraph 3.4(e).

Market Participant means a participant within the meaning of paragraph (b) of the definition of "participant" under section 761A of the Corporations Act.

Markets Disciplinary Panel (MDP) means a peer review panel, the members of which constitute a Division of ASIC as delegates of the members of the Division.

Pre-trade Controls means AOP filters and filter parameters to prevent and detect possible market misconduct.

Post-trade Controls means any alerts and analysis of, and arrangements to investigate, those alerts (including any trend analysis) to detect potential market misconduct.

Relevant Remedial Actions means the Remedial Actions referred to in subparagraph 3.5(b).

Remedial Actions means remedial action recommended by the independent expert of the kind referred to in subparagraph 3.4(b).

Remedial Action Plan means the plan referred to in paragraph 3.5.

Remedial Action Plan Completion Date means the date referred to in paragraph 3.6.

Second Report means the written report prepared by the independent expert as required under subparagraph 3.4(g).

Second Summary Report means a written summary of the content of the Second Report prepared by the independent expert as required under subparagraph 3.4(i).

Securities MIRs means *ASIC Market Integrity Rules (Securities Markets) 2017*.

Supervisory Policies and Procedures means the supervisory policies and procedures implemented by Openmarkets, in accordance with Securities MIR 2.1.3 to ensure compliance with the Securities MIRs and the Corporations Act.

Trade Surveillance means the Pre-trade Controls and Post-trade Controls used by Openmarkets.

2. **Background**

ASIC's role

- 2.1 Under section 1 of the ASIC Act, ASIC is charged with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.

Openmarkets

- 2.2 Openmarkets is a Market Participant of ASX, Cboe Australia and NSX, and an ASX Clear and Settlement Participant. During the 2021-2022 financial year, OpenMarkets was in the top 15 largest retail brokers in Australia by equities trading value. Openmarkets is a technology-driven stockbroker that provides execution-only brokerage services for trading on the Australian markets. It provides: (i) trading services to retail, professional and wholesale investors; and (ii) trading, clearing and settlement services to intermediary groups. Its AFSL authorises it to deal in securities, bonds, derivatives, deposit products and managed investment schemes, and to provide custodial/depository services. Its services include the provision of white-labelled technology solutions across onboarding, order management, managed accounts, risk management, client management and advice.
- 2.3 Subsection 798H(1) of the Corporations Act requires participants in licensed markets to comply with the market integrity rules.
- 2.4 The ASX market is a licensed market and the Securities MIRs are market integrity rules made by ASIC under section 798G of the Corporations Act.
- 2.5 As a Market Participant in the ASX market, Openmarkets is required to comply with the Securities MIRs.

Openmarkets' relevant compliance history

- 2.6 On 13 December 2016, following surveillance activities which identified concerns in Openmarkets':
- (a) arrangements for identifying and preventing potential market misconduct (for example, inadequate automated filters in its AOP systems and ineffective pre-trade and post-trade monitoring arrangements);
 - (b) reconciliation of its client trust accounts; and

- (c) supervisory arrangements and organisational and technological resourcing,

ASIC imposed conditions on Openmarkets' AFSL, requiring it to appoint an independent expert to review the organisation's arrangements, identify any deficiencies, and recommend enhancements appropriate to the business.

- 2.7 In April 2017 ASIC referred Openmarkets to the MDP in relation to 1,858 trades executed by Openmarkets between 12 June 2015 and 11 December 2015. There was no change in beneficial ownership of these trades, as the buyer and seller was the same entity. Such trades, which are commonly referred to as 'wash trades', create a false or misleading appearance of active trading, and accordingly have the potential to interfere with the efficiency and integrity of the market. Openmarkets AOP system had failed to reject them, resulting in a breach by Openmarkets of Securities MIR 5.6.1.
- 2.8 On 28 September 2017 the MDP issued an infringement notice to Openmarkets, which included a fine for \$200,000. Key findings of the MDP included that Openmarkets had failed to have appropriate AOP filters in place and had failed to ensure that the AOP filters and associated alerts were appropriately configured/and or operating as intended, posing a significant risk to market integrity.
- 2.9 As a result of the licence conditions imposed in 2016, Openmarkets engaged an independent expert to review its compliance arrangements. In September 2017, the independent expert produced a "final summary report" setting out further recommendations (the **Final Summary Report**). A notable finding in the Final Summary Report was that several of the alerts had not been changed from their default settings, and that *"No review of the market integrity risks and ensuring alerts calibration had taken place at the outset or to date. As such, the appropriateness of generated alerts with respect to the regulatory risks is questionable"*. Once the independent expert's recommendations were implemented, the licence conditions were removed in February 2018.

ASIC's current concerns

- 2.10 On 24 March 2021, ASIC commenced a further investigation into Openmarkets' compliance with the Securities MIRs. As a result of its current investigation, ASIC is concerned that between 1 January 2020 and 9 July 2021 (**Relevant Period**), Openmarkets:
- (a) whilst broadly having appropriate written Supervisory Policies and Procedures, had not implemented these (either partially, or in some cases, at all) to ensure compliance with the Securities MIRs;
 - (b) had insufficient organisational and technical resources, due to it:
 - (i) not having appropriately calibrated its post-trade surveillance system, the Nasdaq SMARTS system, (**SMARTS**). The failure to appropriately calibrate the SMARTS system resulted in it generating

around 6,700 SMARTS alerts per month from 1 January 2020 until approximately March 2021. This volume of alerts was unmanageable, which resulted in most alerts not being reviewed; and

- (ii) having insufficient employees with the appropriate skills, knowledge and experience to carry out the required roles (including reviewing the overwhelming number of SMARTS alerts);
- (c) failed to appropriately review and prevent 2,011 potentially manipulative trades from being placed onto the market, in circumstances where Openmarkets ought to have reasonably suspected that the relevant client had placed the orders with the intention of creating a false or misleading appearance with respect to the market for or price of trading in the relevant security on the ASX;
- (d) failed to ensure its AOP system was fit for purpose, as the AOP filters and associated alerts were either not activated at all, not appropriately configured, and/or not operating as intended. This failure contributed to the abovementioned 2,011 potentially manipulative trades not being identified and rejected by the AOP filters. In particular the anti-wash trade filter was not engaged in the period from 1 January 2020 to July 2021;
- (e) failed to lodge suspicious activity reports in relation to other suspicious trading which had triggered a large number of SMARTS alerts by other clients over an extended period;
- (f) failed to have an appropriate company culture to support effective compliance, resulting in it failing to prevent unprofessional conduct by senior staff; and
- (g) breached its client money obligations by failing to accurately reconcile its trust accounts on multiple occasions. This resulted in trust account deficiencies of up to \$20,000,000, some of which were not identified and reported to ASIC for 35 consecutive business days.

2.11 As a result of its investigation, ASIC is concerned that Openmarkets may not have complied with its obligations during the Relevant Period under:

- (a) Securities MIR 2.1.3, which requires Market Participants to have appropriate supervisory policies and procedures to ensure compliance with the Securities MIRs and the Corporations Act;
- (b) Securities MIR 5.5.2, which requires Market Participants to have and maintain the necessary organisational and technical resources to ensure compliance with the Securities MIRs;
- (c) Securities MIR 5.6.1, which requires a Trading Participant to have appropriate AOP automated filters, and to ensure that its AOP system does

not interfere with the efficiency and integrity of the market, or proper functioning of any trading platform;

- (d) Securities 5.6.3(1)(a), which requires a Market Participant to have adequate organisational and technical resources within its AOP system to ensure that trading messages submitted into a trading platform do not interfere with the efficiency and integrity of the market, or the proper functioning of any trading platform;
 - (e) Securities MIR 5.11.1, which requires Market Participants to notify ASIC in writing of reportable matters, including suspicious transactions or orders transmitted to a trading platform;
 - (f) Securities MIR 5.7.1(b)(iii), which requires Market Participants to refrain from transmitting orders to the market on account of any other person where, taking into account the circumstances of the order, the Market Participant ought reasonably suspect that the person has placed the order with the intention of creating a false or misleading appearance of active trading in any financial product or with respect to the market for, or the price of, any financial product;
 - (g) Securities MIR 2.1.5, which requires Market Participants to not engage in unprofessional conduct and to ensure that their supervisory staff do not engage in unprofessional conduct;
 - (h) Securities MIRs 3.5.9 and 3.5.10(d), which require Market Participants to perform accurate trust account reconciliations and to notify ASIC in writing within two Business Days of any failure to do so and of any trust account deficiencies; and
 - (i) section 798H(1) of the Corporations Act which requires Market Participants to comply with the Securities MIRs.
- 2.12 On 15 May 2023, the Markets Disciplinary Panel decided that it had reasonable grounds to believe that Openmarkets had contravened Rules 2.1.3, 5.5.2, 5.6.1, 5.6.3(1)(a), 5.7.1(b)(iii), 5.11.1(1)(b), 2.1.5(2), 3.5.9 and 3.5.10(d) of the Securities MIRs and Rules 2.1.3, 5.5.2, 5.6.1 and 5.6.3(1)(a) of the *ASIC Market Integrity Rules (ASX Market) 2010* and the *ASIC Market Integrity Rules (Chi-X Australia Market) 2011*.
- 2.13 On 15 May 2023, the Markets Disciplinary Panel issued an infringement notice to Openmarkets under regulation 7.2A.04 of the Corporations Regulations (**Infringement Notice**).
- 2.14 The Infringement Notice required Openmarkets to give an undertaking to ASIC under regulation 7.2.A.01 of the Corporations Regulations on the terms of this undertaking.

2.15 Openmarkets has offered, and ASIC has agreed to, the undertakings set out below.

3. **Undertakings**

3.1 Openmarkets undertakes to request ASIC to approve, within 30 business days of the date that ASIC accepts this enforceable undertaking (or within such longer period as may be agreed by ASIC and Openmarkets):

- (a) the appointment of an independent expert that meets the criteria in paragraph 3.3; and
- (b) draft terms of engagement for that independent expert that meet the requirements of paragraph 3.4.

3.2 If ASIC approves the draft terms of engagement and the appointment of an independent expert following a request by Openmarkets under paragraph 3.1, Openmarkets undertakes to appoint the approved independent expert on the terms approved by ASIC within 10 business days of receiving ASIC's approval (or within such longer period as may be agreed by ASIC and Openmarkets).

3.3 Openmarkets undertakes to nominate, under subparagraph 3.1(a), an independent expert who, in Openmarkets' opinion:

- (a) has the necessary expertise, experience and operational capacity to perform the role contemplated by this enforceable undertaking;
- (b) is independent of Openmarkets, its related bodies corporate and its officers at the time of the appointment; and
- (c) will, at all material times, be capable of exercising objective and impartial judgement in connection with the roles contemplated by paragraph 3.4.

The request to ASIC must provide details of the matters in paragraph 3.3, including any prior engagement of the proposed independent expert by Openmarkets, its related bodies corporate and/or officers.

3.4 Openmarkets undertakes to ensure the terms of the independent expert's engagement provided to ASIC for approval under subparagraph 3.1(b):

- (a) require the independent expert to conduct a review, by 90 business days following their appointment, or such later date as agreed in writing by ASIC and Openmarkets, in which the independent expert must:
 - (i) assess the adequacy of Openmarkets' organisational and technological resources in relation to Trade Surveillance, Client Onboarding and Client Money; and
 - (ii) assess the design effectiveness and test the operational effectiveness of Openmarkets' arrangements in relation to Trade Surveillance, Client Onboarding and Client Money including but not limited to its:

- (A) policies, processes and controls;
 - (B) risk and compliance framework;
 - (C) monitoring and supervision (including management oversight);
and
 - (D) governance framework; and
- (iii) identify Deficiencies (if any) in the matters referred to in subparagraphs 3.4(a)(i) and (ii);

(together the **Openmarkets Review**)
- (b) require the independent expert to identify what, if any remedial actions are necessary, in the opinion of the independent expert to effectively address any Deficiencies that the independent expert has identified during the Openmarkets Review (**Remedial Actions**);
- (c) require that the independent expert must, by 90 business days following their appointment, or such later date agreed in writing by ASIC and Openmarkets, give to ASIC and Openmarkets a First Report in respect of the Openmarkets Review and Remedial Actions;
- (d) require that the First Report must set out:
 - (i) a description of how the independent expert conducted its assessments;
 - (ii) a list of the title and position of representatives of Openmarkets and any third-party service providers that the independent expert interviewed in conducting its assessments;
 - (iii) a list of the Books, or extracts from those Books, which were most relevant in the view of the independent expert to its assessments;
 - (iv) if any sample-based testing was conducted by the independent expert, a description of the sampling approach used by the independent expert and the sample size;
 - (v) each of the factual findings or assumptions on which an opinion of the independent expert is based;
 - (vi) particulars of the relevant training, study or experience by which the independent expert has acquired specialised knowledge to conduct its assessments;
 - (vii) each of the independent expert's opinions of the matters as assessed in the Openmarkets Review (including Deficiencies identified and set out separately from the factual findings or assumptions);

- (viii) the reasons for each of the independent expert's opinions;
 - (ix) explanation of any limitations on or qualifications to the opinions expressed in the report, and the reasons for those limitations or qualifications;
 - (x) a declaration as to whether the independent expert has made all inquiries in connection with its assessments which the independent expert believes are desirable and appropriate; and
 - (xi) whether, to the independent expert's knowledge, any material information which the independent expert regards as relevant to its assessments has been withheld from the independent expert;
- (e) require that the independent expert give to ASIC and Openmarkets, at the same time that it gives the First Report, a First Summary Report;
- (f) require the independent expert to conduct a review and finalise its Second Report, within 3 to 9 months following the Remedial Action Plan Completion Date. This review and the finalisation of the Second Report must occur within 24 months from the date of this enforceable undertaking, or such other period as agreed in writing by ASIC and Openmarkets. In the review, the independent expert must assess whether:
- (i) each Relevant Remedial Action has been adequately implemented within the timeframes notified to ASIC and, if it has not, whether the Relevant Remedial Action was subsequently adequately implemented;
 - (ii) each Relevant Remedial Action has continued to be operational since it was first implemented and, if it has not, the extent to which it has not been operational; and
 - (iii) there were any issues which precluded or materially impacted the implementation or operation of any Relevant Remedial Action;
- (together the **Openmarkets Remedial Action Review**)
- (g) require that the independent expert must, by the end of the period referred to in subparagraph 3.4(f), or such later date agreed in writing by ASIC and Openmarkets, give to ASIC and Openmarkets a Second Report in respect of the Relevant Remedial Actions;
- (h) require that the Second Report must set out:
- (i) a description of how the independent expert conducted its assessments;
 - (ii) a list of the title and position of representatives of Openmarkets and any third-party service providers that the independent expert interviewed in conducting its assessments;

- (iii) a list of the Books, or extracts from those Books, which were most relevant in the view of the independent expert to its assessments;
 - (iv) if any sample-based testing was conducted by the independent expert, a description of the sampling approach used by the independent expert and the sample size;
 - (v) each of the factual findings or assumptions on which an opinion of the independent expert is based;
 - (vi) particulars of the relevant training, study or experience by which the independent expert has acquired specialised knowledge to conduct its assessments;
 - (vii) each of the independent expert's opinions of the matters as assessed in the Openmarkets Remedial Action Review;
 - (viii) the reasons for each of the independent expert's opinions;
 - (ix) explanation of any limitations on or qualifications to the opinions expressed in the report, and the reasons for those limitations or qualifications;
 - (x) a declaration as to whether the independent expert has made all inquiries in connection with its assessments which the independent expert believes are desirable and appropriate; and
 - (xi) whether, to the independent expert's knowledge, any material information which the independent expert regards as relevant to its assessments has been withheld from the independent expert;
- (i) require that the independent expert give to ASIC and Openmarkets, at the same time that it gives the Second Report, a Second Summary Report;
 - (j) include a statement to the effect that the work of the independent expert is being carried out for Openmarkets and ASIC and acknowledge that ASIC is relying on the work of the independent expert;
 - (k) include a statement that upon request by ASIC, ASIC is to be copied into all or some communications between Openmarkets and the independent expert;
 - (l) require the independent expert to notify ASIC where a conflict of interest arises during the engagement or when the independent expert becomes aware of information that adversely affects its ability to exercise objective and impartial judgment; and
 - (m) include an acknowledgement that, in relation to the written First Report, Second Report, First Summary Report and Second Summary Report to be given to ASIC and Openmarkets, ASIC may from time to time publicly refer

to the content of the report, and may make the First Summary Report and the Second Summary Report, or a statement that refers to the content of those reports, public.

3.5 If the First Report sets out one or more Remedial Actions, Openmarkets undertakes to decide within 30 business days of the First Report, or a later date agreed in writing by Openmarkets and ASIC, to advise ASIC in writing:

- (a) which of the Remedial Actions in the First Report Openmarkets proposes not to implement and why; and
- (b) which of the Remedial Actions in the First Report Openmarkets proposes to implement (the **Relevant Remedial Actions**), including:
 - (i) the specific actions Openmarkets proposes to take to implement the Remedial Actions;
 - (ii) a timetable for the implementation of each Remedial Action that specifies the date by which each Remedial Action will be implemented; and
 - (iii) identifying the allocation of sufficiently qualified and skilled staff to implement the implementation plan and specifying who will ultimately be responsible for each Remedial Action.

(the **Remedial Action Plan**)

3.6 Openmarkets undertakes to provide monthly reports to ASIC, following provision of the Remedial Action Plan to ASIC and the independent expert and until such time (**Remedial Action Plan Completion Date**) as Openmarkets reasonably believes that the Remedial Action Plan has been completed, setting out Openmarkets' reasonable belief as to:

- (a) the progress of the specific actions in the Remedial Action Plan; and
- (b) if there are any issues which preclude or materially impact the implementation of any actions in the Remedial Action Plan, a summary of those issues and what action Openmarkets will take to address these.

3.7 Openmarkets undertakes to:

- (a) implement all Remedial Actions that it decides to implement within the timeframes notified to ASIC; and
- (b) notify ASIC when such Remedial Actions have been implemented.

3.8 Openmarkets undertakes that it will not unreasonably decide not to implement the Remedial Actions recommended by the independent expert.

- 3.9 Openmarkets undertakes to permit the independent expert to have reasonable access to Openmarkets' systems and records and to interview persons involved in its business, for the purposes of enabling the expert to carry out the Openmarkets Review.
- 3.10 Openmarkets undertakes to give the independent expert any information or explanation reasonably requested by the independent expert of any matter connected with the Openmarkets Review.
- 3.11 Openmarkets undertakes to pay the costs of its compliance with this enforceable undertaking.

4. **Acknowledgements**

4.1 Openmarkets:

- (a) acknowledges that ASIC can make publicly available the following information:

- (i) a copy of this enforceable undertaking;
- (ii) a copy of the First Summary Report and the Second Summary Report; and
- (iii) a summary of which Remedial Actions Openmarkets decided to implement, or not implement (and reasons);

excluding information which ASIC is satisfied would be unreasonable to make publicly available because it would unreasonably affect the business, commercial or financial affairs of Openmarkets, other than in a way that arises from the outcomes of the undertaking; and

- (b) acknowledges that:

- (i) ASIC will from time to time publicly report about compliance with the enforceable undertaking; and
- (ii) the enforceable undertaking has no operative force until accepted by ASIC.

- 4.2 Openmarkets and ASIC acknowledge that the date of the enforceable undertaking is the date on which it is accepted by ASIC.

EXECUTED by **OPENMARKETS**
AUSTRALIA LIMITED in
accordance with s 127(1) of the
Corporations Act 2001

Signature of director

Signature of director/company secretary

Name

Name of director/company secretary

Date

Date

**Accepted by the Australian Securities and Investments Commission under reg
7.2A.01 of the Corporations Regulations 2001 by its duly authorised delegate:**

.....
Delegate of Australian Securities and Investments Commission
Date accepted by ASIC: