SUBMISSION

Consultation Paper 306: Markets Disciplinary Panel

To:

Markets Disciplinary Panel Secretariat
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Consultation Paper 306: Markets Disciplinary Panel 29 November 2018

Introduction

The Australian Securities and Investments Commission (ASIC) has invited feedback on proposed changes to the Markets Disciplinary Panel (MDP). Consultation Paper 306 describes the changes as follows:

> *"ASIC is not proposing to fundamentally change the MDP*
>
> *—it is simply proposing to make some changes to the MDP at the margins."*[1]

The Consultation Paper goes on to suggest several changes, including:

1. have an ASIC delegate (not an MDP Member) determine Tier 1 matters; and
2. the MDP will no longer give reasons for its decisions.

Both proposals are fundamental changes to the MDP processes and cannot be described as changes "at the margins".

There are substantive matters not even raised, discussed or resolved by the Consultation Paper like creating conflicting regimes for determining MIR breaches.[2]

Moreover, the time allowed for industry consultation is inadequate when you take into account the Christmas/New Year holiday break was included in the already short six week consultation period.

MDP characteristics

The MDP is a division of ASIC.[3] Its processes are administrative in nature and "the MDP is a peer review panel."[4] These administrative processes involve peer review by experienced industry experts assisted by ASIC staff working with the MDP, not involved with enforcement.

MDP Infringements Notices are not reviewable by the Administrative Appeals Tribunal (AAT) but ASIC must go to Court and obtain a Court order to have any penalties imposed, if the Market Participant declines to pay the Infringement Notice (which the Market Participant is legally entitled to do under the *Australian Securities and Investments Commission Act 2001*).

The MDP was introduced after ASIC assumed market supervision responsibilities from the Stock Exchanges in 2010. These Exchanges previously took disciplinary action against members for

[1] ASIC Consultation Paper 306, 29 November 2018 at page 6.
[2] If some proposals were adopted.
[3] ASIC RG216.16, July 2010, also ASIC Consultation Paper 306, 29 November 2018 at paragraph 4.
[4] ASIC Consultation Paper 306, 29 November 2018 at paragraph 28.

market rule breaches. It was these disciplinary committees who were the source of the peer review process reflected in the MDP.

ASIC delegate decision making is not peer review

Any proposal for an ASIC delegate (not an MDP Member) to determine Tier 1 matters is not a process of peer review. Such a change would remove the peer review process altogether for Tier 1 matters, scarcely a change "at the margins".

Decisions of an ASIC delegate are reviewable by the AAT and the Market Participant does not have an express legal right not to pay the Infringement Notice, creating a conflicting regime for MIR breaches (see further below). There is no obvious discussion of this anomaly.

It would also be misleading and deceptive to present a decision by an ASIC delegate as being from the MDP.

The Consultation Paper proposes, in part:

Tier 1 matters determined by a single delegate

Proposal

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

Your feedback

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

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

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

Feedback B5Q1: No, unless the Market Participant agrees. In Tier 1 matters if a penalty cannot be negotiated, or if principles are involved, the matter should be heard by three MDP Members.

Feedback B5Q2: Yes, when the issues are about the application and interpretation of MIR rules and not penalties *per se*.

Feedback B5Q3: using an ASIC Delegate removes the peer review process and changes the review and appeal procedures.

MDP to give no reasons for making a decision, unless asked

I read this proposal several times before believing what I was reading.

It does not concern me whether reasons are part of the Infringement Notice or in a separate document. What is important is that the MDP always gives reasons for a decision, no exceptions, ever. Giving reasons is a fundamental obligation of the MDP.

Best practice would be for a separate document so that the Infringement Notice remains clear and concise, and the reasons are readily available in another document.

The Consultation Paper proposes changes in these terms:

No separate MDP reasons for decision

Proposal

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

Your feedback

B2Q1 Do you agree that, where an infringement notice is given by the MDP, the infringement notice itself is a sufficient vehicle for explaining the MDP's findings and conclusions?

B2Q2 Do you agree that seven days would be sufficient for the market participant to submit a request for separate reasons for the decision?

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

Your feedback

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

It is a fundamental MDP obligation to give reasons for all of its decisions, not only when a Market Participant requests them within seven days of receiving an Infringement Notice, or having no right to request reasons, under the proposals, if no adverse decision is made.

If ASIC has commenced administrative proceedings against the Market Participant, then the Participant and the wider industry are entitled to know why the case failed. ASIC also opens itself up to the perception, rightly or wrongly, that its wants to cover up its failures.

Feedback B2Q1: No, the Infringement Notice is not a "sufficient vehicle" for explaining the "...MDP's findings and conclusions" unless it contains the full reasoning for making an adverse finding and imposing the penalty.

Feedback B2Q2: No, seven days (five business days) is not a sufficient period to request reasons. Market Participants, under the principles of Administrative Law, are entitled to reasons in all circumstances and should not have to request them.

I have real concerns if ASIC's proposals were adopted, it would undermine the validity of MDP Infringement Notices, as they would breach the rules of natural justice.

The Consultation Paper does not even raise or consider the principles of Administrative Law when discussing this radical proposal. Instead the Paper (wrongly in my opinion) asserts "… there is no legal requirement for the infringement notice to be accompanied by reasons for the decision", the contents required by the Regulations and some other matters. There is no mention in the Paper of the principles of Administrative Law, the rights of Markets Participants, the importance of peer review and the need for MDP Members to demonstrate objectively they had "reasonable grounds to believe" there was a breach of the MIR.

There are compelling reasons why the MDP must give reasons for decisions, whether or not it makes an adverse finding and imposes a penalty.

Why the MDP must give reasons

Courts do, Tribunals do, Industry Disciplinary Committees do. Because it is the cornerstone of a fair hearing and Market Participants have a right to know the reasoning underlying a decision, especially ones that can impose penalties as high as $600,000. The average person on the Clapham omnibus[5] would understand this.

In summary, the MDP should give reasons, in all cases, to:

1. comply with the principles of Administrative Law (or more commonly called the rules of natural justice);
2. stop the creation of conflicting regimes for MIR Infringement Notices;
3. ensure the MDP is accountable and has processes that are open, transparent and fair;
4. promote confidence in the MDP's decision making processes;
5. educate and provide guidance to Market Participants on the Market Integrity Rules;
6. ensure ASIC enforcement staff do not speak for the MDP; and
7. avoid an unacceptable concentration of power in ASIC's enforcement staff.

[5] Sir Richard Henn Collins MR, in the English Court of Appeal libel case, *McQuire v. Western Morning News* [1903] 2 K.B. 100 at 109. In Australia, the "Clapham omnibus" expression has inspired the New South Wales and Victorian equivalents, "the man on the Bondi [bus]" and "the man on the Bourke Street tram". In Western Australia, the equivalent is "the man on the Prospector to Kalgoorlie".

Not doing so, breaches the rules of natural justice

Basic fairness dictates that the MDP, who can issue Infringement Notices of up to $600,000, should give reasons for its decisions. After-all "the MDP can only give an infringement notice to a market participant if it has 'reasonable grounds to believe' that the participant has contravened the market integrity rules."[6]

When management ask staff or legal advisers the reasons why penalties were imposed, those staff will have to speculate, or worse guess, the MDP's reasons. A very difficult task if the MDP made its decision without a hearing (but based on written submissions alone).

Moreover, how do MDP members prove there are "reasonable grounds to believe" a breach of MIR occurred when they give no reasons in support of the Infringement Notice?

ASIC proposals will create legal uncertainty around MDP Infringement Notices by failing to comply with rules of natural justice.

Conflicting regimes for MIR breaches

If the current proposals are implemented by ASIC, it will mean an ASIC delegate (for Tier 1 matters) will generally give reasons, but the MDP for Tier 2 and 3 matters (which have higher penalties) will not.

An ASIC delegate's decision is reviewable by the Administrative Appeals Tribunal, a MDP decision is not. The MDP decision is a peer review process, the ASIC delegates hearing is not.

One set of MIR rules, two different regimes for imposing penalties for breaches.

Accountability, transparency & confidence

Giving reasons for a decision ensure the MDP is accountable and has processes that are open, transparent and fair. It promotes confidence in the MDP's decision making processes, fundamental to the peer review process.

The public's confidence in ASIC has been sorely tested by the revelations in the Banking Royal Commission, reinforcing the need for the MDP's processes to be open, transparent and fair.

Educational value lost

MDP decisions, to impose or not impose penalties, are widely read in the financial services industry. The decisions (with reasons) educate and provide guidance to *all* Market Participants on the MIR.

Matters heard by the MDP rarely go to court, so understanding how the MIRs are interpreted and applied by the MDP is of considerable educational value to the industry (who actually pay the MDP's costs).

ASIC enforcement staff do not speak for the MDP

Paragraph 21 seems to suggest or imply one of the reasons why the MDP does not need to give reasons for an adverse finding is because ASIC is "… required to give written reasons for

[6] Draft ASIC Regulatory Guide 216, 29 November 2018, at page 15.

believing that a person has contravened the market integrity rules and give the person the opportunity to appear at a hearing and make submissions." As if somehow ASIC's unproven and untested written reasons (drafted by enforcement staff) are identical to those of the "independent" MDP when making an adverse finding.

ASIC is at pains to assert the MDP peer review process is independent of ASIC (as far as is possible when excising ASIC's powers). Using ASIC's "written reasons" as if they were those of the MDP would be evidence this is not the case, a troubling revelation.

Rarely, in a contested matter, is one side 100% correct 100% of the time, after the issues have been presented, argued, contested, considered and determined by an impartial and unbiased panel like the MDP.

Moreover, the peer review process involves the testing and proving of ASIC's allegations before the independent members of the MDP. It would be scandalous for ASIC staff to assume they speak for the MDP in this way.

ASIC cannot enforce an Infringement Notice against an unwilling Market Participant, it must go to Court, prove its case before a Judge. The Judge will then make a determination and orders, not either party.

Unacceptable concentration of power

If the MDP does not give reasons when making an adverse finding, it will create an unacceptable concentration of power into the hands of ASIC enforcement staff, thereby damaging the peer review process and casting doubt on the MDP being independent of ASIC enforcement staff.

Conclusion

Some of the draft proposals are poorly thought out, they will damage the MDP if implemented and the overall process has been rushed leading to a lack of genuine consultation.

The proposals must be given further thought, all relevant issues discussed and the industry properly consulted.

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