



**Stockbrokers
And Financial Advisers
Association Limited**

25 January 2019

Market Disciplinary Panel Secretariat
Chief Legal Office
Australian Securities & Investments Commission
Level 5
100 Market Street
SYDNEY NSW 2000

By email: mdp@asic.gov.au

ASIC CONSULTATION PAPER CP 306 – MARKET DISCIPLINARY PANEL SUBMISSION FROM STOCKBROKERS AND FINANCIAL ADVISERS ASSOCIATION

We refer to ASIC Consultation Paper CP 306 issued on 29 November 2018 proposing possible amendments to the operation of the Market Disciplinary Panel (“the MDP”). The Stockbrokers and Financial Advisers Association (SAFAA) appreciates the opportunity to provide the comments below in relation to the Consultation Paper.

SAFAA also appreciates the extension of time to make submissions afforded by ASIC, in view of the timing of the Consultation period overlapping the Christmas/New Year break.

SAFAA members strongly support the peer review policy underpinning the creation of the MDP. Aside from some isolated issues that individual members may have regarding particular matters that have been dealt with by the MDP, our feedback is that the MDP has by and large worked well and as envisaged.

One particular comment members have made is that the increased level of detail in the published Panel determinations in recent years is a welcome improvement.

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This has provided enough information to enable Participants and their staff to fully understand the facts and issues central to each matter, which assists in ensuring that they have policies and processes in place to protect against those issues arising in their own businesses.

Our comments on the Consultations Questions in CP 306 are set out below.

CP 306 Consultation Questions

B1. Clearly articulate the MDP's Policies

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

B1Q1 Do you consider that the redrafted expression of the MDP's policies provides clearer guidance?

B1Q2 Should there be further guidance on the MDP's policies? If so, in which areas?

SAFAA Members are supportive in principle of the proposal to streamline and consolidate the existing Regulatory Guides relating to the MDP. We may obviously have further comment once the detail of the new Draft Guidance is available.

B2. 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.

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?

We have received strong feedback from members that a Participant is entitled to reasons as a fundamental principle and should not have to request them. Members have indicated that they would invariably request the reasons for decision, regardless of the outcome of the matter, because of the need to consider whether further reporting is needed, for example, to Boards, auditors, insurers, or other supervisory bodies. If the

right to request reasons is likely to be exercised in the majority of instances, it is questionable how much saving in terms of time and resources the proposal would generate, and whether that warrants the proposal being proceeded with.

Subject to our comments above, the infringement notice itself is not sufficient as a replacement for a statement of reasons. There may be reasons that cannot for various reasons be published in the infringement notice, or details of which are simplified. This would not render it a satisfactory replacement for the statement of reasons.

As regards the seven-day period for requesting reasons, this is a very short period. There is a range of reasons why seven days may not be enough time to make this request. There is no reason why the period would need to be this short, or why a period of, say, 28 days could not be afforded.

Proposal 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.

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?

We refer to our previous comments. Members have indicated that they may be bound to ask for reasons regardless of the outcome, because of the need to consider whether further steps need to be taken as a result of the matter.

B4. Exclude Market Operators from the jurisdiction of the MDP

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

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

SAFAA Members were strongly opposed to this proposal. There is no reason why persons who have been appointed to the Panel should not be as equipped to hear a breach of the Market Integrity Rules by a Market Operator as they are a breach by a Market Participant. There is certainly no reason why an ASIC delegate should be any

better placed to hear the matter than a panel of three experienced industry professionals.

If the suggestion is being made that persons who are connected to Market Participants could not be trusted to hear a matter involving a Market Operator in an impartial manner, then we strongly object to that. Market Participants rely on the markets and Market Operators for their livelihood, and they have a strong interest in the markets operating fairly, efficiently and in accordance with regulatory requirements.

B5. Tier 1 matters heard by a single delegate

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.

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?

SAFAA members strongly oppose the proposal to re-introduce a single ASIC delegate to determine Tier 1 matters.

Members were not opposed to Tier 1 matters being heard by a MDP consisting of one Panel Member, if this were to result in efficiencies and savings.

However, reintroducing an ASIC Delegate to hear certain classes of matters would create a split system for decisions on MIR breaches, with differing avenues of appeal. Decisions by an ASIC delegate would be a decision by a Commonwealth decision-maker and would re-introduce the Administrative Appeals Tribunal jurisdiction into the processes.

The policy underlying the MDP was one of peer review leading to better decisions which drew on experienced industry professionals. An added consideration was that Market Participants would be more likely to accept a decision reached by peers, and not as likely to contest or reject the decision.

Therefore, we would suggest that, if there are to be efficiencies to be had by instituting a single person to preside over Tier 1 matters, then this should be achieved by constituting a MDP comprising a single Panel member.

B6. MDP’s Consultancy Role in Court Enforceable Undertakings

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

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

SAFAA Members are not averse to limiting the role of the MDP in relation to Court enforceable undertakings to a consultancy or advisory capacity. Members acknowledge that the decision whether to accept an undertaking in lieu of proceeding by way of enforcement is a regulatory decision for ASIC to take.

CONCLUSION

SAFAA appreciates the opportunity to comment on the Proposals in CP306. We would be happy to discuss any issues arising these comments, or to provide any further material that may assist. Should you require any further information, please contact Peter Stepek, Policy Executive, on (02) 8080 3200 or email pstepek@stockbrokers.org.au.

Yours sincerely,



Andrew Green
Chief Executive