



**ASIC**  
Australian Securities &  
Investments Commission

**REPORT 624**

# **Response to submissions on CP 306 Markets Disciplinary Panel**

August 2019

## **About this report**

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 306 Markets Disciplinary Panel](#) (CP 306) and details our responses to those issues.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

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

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## A Overview/Consultation process

- 1 In [Consultation Paper 306 Markets Disciplinary Panel](#) (CP 306), we consulted on proposals to change the kinds of matters that should be referred to the Markets Disciplinary Panel (MDP) and the powers that should be exercised by the MDP.
- 2 CP 306 also contained proposals to change aspects of the MDP with a view to achieving more efficient and cost-effective regulatory outcomes.
- 3 This report highlights the key issues that arose out of the submissions received on CP 306 and our responses to those issues.
- 4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 306. We have limited this report to the key issues.

### Responses to consultation

- 5 We received five non-confidential responses to CP 306 from industry associations, market operators and an individual. We are grateful to respondents for taking the time to send us their comments.
- 6 The main issues raised by respondents related to proposals to:
  - (a) provide separate reasons for the MDP's decision when requested to do so by the relevant market participant within seven days of being given an infringement notice or, where the MDP makes no adverse findings, receiving written notification of the MDP's decision;
  - (b) refer matters involving alleged contraventions of the market integrity rules by market operators to an internal ASIC hearing delegate; and
  - (c) refer Tier 1 matters to a single ASIC hearing delegate.
- 7 For a list of the non-confidential respondents to CP 306, see the appendix. Copies of these submissions are currently on the ASIC website under [CP 306](#).

## B Response to submissions on CP 306

### Key points

This section outlines the responses we received on our proposals in [CP 306](#) and our responses to those submissions, in particular:

- the MDP should not give separate reasons for a decision unless requested to do so by the market participant within seven days of being given an infringement notice or, where the MDP makes no adverse findings, receiving written notification of the MDP's decision (see questions B2Q1–B2Q2 and B3Q1);
- alleged contraventions of the market integrity rules by market operators should be referred to an internal ASIC hearing delegate rather than the MDP (see question B4Q1); and
- alleged contraventions of Tier 1 rules by market participants should be determined by a single ASIC delegate rather than a sitting panel of the MDP (see questions B5Q1–B5Q3).

### Reasons for MDP decisions

- 8 In [CP 306](#), we proposed 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.
- 9 We also proposed that where a matter referred to the MDP does not result in an infringement notice being given, reasons for a decision will only be provided if a request is made by the market participant within seven days of receiving written notification of the MDP's decision.
- 10 Three respondents submitted that the MDP should provide reasons for a decision regardless of the outcome of the matter. Respondents raised concerns that natural justice would be denied if market participants were not given reasons for the MDP's decisions.
- 11 The same three respondents also submitted that the proposed seven-day period for requesting reasons was too short. One respondent suggested that the period for requesting reasons should be extended to 28 days.

#### *ASIC's response*

We have considered the feedback received, but we are of the view that the published infringement notice gives a comprehensive account of the relevant conduct and reasons for the MDP's decision—separate reasons for the decision were only intended to be used as an opportunity for the parties to clarify the reasons provided in the infringement notice.

However, we will amend the proposal by extending the period for requesting additional clarification, taking into account:

- the feedback received about the period for requesting reasons; and
- reg 7.2A.08 of the Corporations Regulations 2001, which specifies that a market participant has 27 days from the date an infringement notice is given to comply with the infringement notice.

Accordingly, market participants and ASIC's Markets group may seek such clarification within 14 days—rather than seven days—of the infringement notice being given.

In view of the feedback received, we will not proceed with the proposal relating to matters where the MDP has not made an adverse finding. The MDP will continue to provide market participants with reasons for the decision where the MDP has made no adverse findings.

## Market operator matters

- 12 In [CP 306](#), we proposed 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.
- 13 Three respondents objected to this proposal based on the view that MDP members have the appropriate market and professional experience to make determinations involving alleged contraventions by market operators and are capable of making independent decisions about those matters. One of the three respondents suggested that a sitting panel of three members making a decision by majority vote, rather than a single ASIC delegate, was likely to result in more balanced outcomes. This respondent also suggested increasing appointments to the MDP of industry experts unaffiliated with market participants.
- 14 One respondent acknowledged the conflicts of interest that arise from the MDP being predominantly comprised of individuals connected to market participants which are customers of, and subject to regulatory oversight by, market operators. One respondent did not make submissions on the issue.

### *ASIC's response*

We have considered the submissions and we are of the view that matters involving market operators should not be referred to the MDP. The MDP predominantly consists of clients of market operators, which creates a potential conflict of interest that cannot be appropriately managed under the MDP regime.

## Tier 1 matters

- 15 In [CP 306](#), we proposed 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.
- 16 Two respondents opposed the proposal to refer Tier 1 contraventions to a single ASIC delegate because they were of the view that industry professionals would be able to make better decisions due to their ability to draw on their experiences. One of the two respondents also suggested that market participants would be more willing to accept decisions that were made by industry professionals.
- 17 Another respondent submitted that Tier 1 contraventions be heard by a single MDP member where the conduct relates to professional judgement or industry practices. Two respondents did not make submissions on the issue.

### *ASIC's response*

In light of the responses, ASIC will not proceed with this proposal. Accordingly, all matters involving alleged contraventions of the market integrity rules will continue to be heard by a three-person sitting panel.

Two respondents raised concerns about the differing avenues of appeal for decisions made by the MDP and an ASIC delegate. We would like to clarify that, had the proposal been adopted, ASIC delegates would have operated under the same infringement notice regime for Tier 1 matters. Therefore, decisions made by the ASIC delegate would have been excluded from merits review by the Administrative Appeals Tribunal. Furthermore, decisions made by the ASIC delegate would also have been distinguished from decisions made by the MDP.

## Appendix: List of non-confidential respondents

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- ASX Limited
  - Australian Financial Markets Association
  - Chi-X Australia Pty Ltd
  - Hains, Dr Michael G
  - Stockbrokers and Financial Advisers Association Limited
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