

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

To: ASX Limited
ACN 008 624 691
16-20 Bridge Street
Sydney NSW 2000

Matter: ASX012024

Date given: 08 February 2024

TAKE NOTICE: The Australian Securities and Investments Commission (**ASIC**) gives this infringement notice to ASX Limited ACN 008 624 691 (**ASX**) under regulation 7.2A.04 of the *Corporations Regulations 2001* (**Regulations**), which is made for the purposes of section 798K of the *Corporations Act 2001* (**Act**).

To comply with this notice ASX must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **\$1,050,000**. This penalty amount represents 5,000 penalty units (being penalty units of \$210).

Unless otherwise defined, capitalised terms in this Notice have the same meaning as in the *ASIC Market Integrity Rules (Securities Markets) 2017* (**Rules**) as in force at the time of the conduct.

Background

1. At all relevant times ASX was the operator of the ASX Market, and required by subsection 798H(1) of the Act to comply with Rule 6.1.2 of the Rules.
2. Rule 6.1.2 provides as follows:

Operator to immediately make available Pre-Trade Information, subject to exceptions

(1) An Operator must make available Pre-Trade Information for each Market it operates:

- a. for all Orders received during Trading Hours for the Market, Continuously and in Real-Time; and
- b. for all Orders received outside of Trading Hours for the Market, by no later than the time Trading Hours next resume,

to all persons in this jurisdiction who have entered into an arrangement with the Operator to access the Pre-Trade Information on that basis.

(1A) An Operator must keep records of the Pre-Trade Information referred to in subrule (1) for a period of seven years.

(2) An Operator is not required to make available Pre-Trade Information in relation to:

- a. an Order on an Order Book that, if executed, would result in a Block Trade;
- b. an Order or series of Orders on an Order Book that, if executed, would result in a Large Portfolio Trade; and
- c. an Order on an Order Book that, if executed, would result in a Trade with Price Improvement.

(3) An Operator must take reasonable steps to ensure that all Pre-Trade Information it makes available under subrule (1) is and remains complete, accurate and up to date.

- 3. Rule 6.2.1 defines a Block Trade for the purposes of the exception in paragraph 6.1.2(2)(a) of the Rules as follows:

Exception—Block Trades

(1) In these Rules, ***Block Trade*** means a transaction where:

- (a) if the transaction is entered into other than by matching of Orders on an Order Book, the Relevant Participant acts:
 - (i) on behalf of a buying or selling client on one side of that transaction and on behalf of one or more clients on the other side;
 - (ii) on behalf of one or more buying or selling clients on one side of that transaction and as Principal on the other side; or
 - (iii) on behalf of a buying or selling client (***first client***) on one side of that transaction and on the other side on behalf of one or more clients and as Principal in the circumstances set out in paragraph (d);
- (b) the Relevant Product is issued by the same issuer, in the same class, with the same paid-up value;
- (c) the consideration for the transaction is not less than:
 - (i) \$1,000,000 or more for Tier 1 Equity Market Products;
 - (ii) \$500,000 or more for Tier 2 Equity Market Products;
 - (iii) \$200,000 or more for Tier 3 Equity Market Products; and
 - (iv) \$200,000 or more for CGS Depository Interests; and
- (d) if subparagraph (1)(a)(iii) applies—the consideration for the transaction that is payable by or to:
 - (i) the first client; and
 - (ii) all of the clients on the other side of the transaction in aggregate,

is not less than the relevant consideration threshold in paragraph (c).

(2) For the purposes of paragraph (1)(b), Relevant Products that differ only in relation to the amount of dividend or distribution payable are in the same class.

(3) For the purposes of paragraph (1)(c):

- (a) **Tier 1 Equity Market Products** means those Equity Market Products determined by ASIC under these Rules and in accordance with subrule (4);
 - (b) **Tier 2 Equity Market Products** means those Equity Market Products determined by ASIC under these Rules and in accordance with subrule (4); and
 - (c) **Tier 3 Equity Market Products** means all Equity Market Products that are not Tier 1 or 2 Equity Market Products.
- (4) For the purposes of subrule (3), ASIC may determine Tier 1 Equity Market Products and Tier 2 Equity Market Products in writing.
- (5) An instrument referred to in subrule (4) takes effect from 20 business days following the date the instrument is registered.
4. ASIC has reasonable grounds to believe that ASX contravened Rule 6.1.2 on 8,417 occasions during the period between 4 April 2019 and 22 December 2022 (**the Relevant Period**) and as further specified in ASIC's Statement of Reasons dated 19 January 2024, and therefore contravened section 798H(1) of the Act in respect of the following conduct.

Alleged contraventions

- 5. ASIC is satisfied as to all the matters in paragraphs 6 to 15 below.
- 6. ASX makes Pre-Trade Information available for Equity Market Products as required by Rule 6.1.2, and trading in those products occurs, on a trading platform known as ASX Tradematch.
- 7. ASX also operates a trading platform known as ASX Centre Point, where anonymous Orders for Equity Market Products are accepted and matched under the exceptions in paragraphs 6.1.2(2)(a) and (c) of the Rules.
- 8. ASX made an order functionality available to Market Participants to enable them to submit ASX Centre Point Orders. The order functionality had the capacity (among other things) to prevent execution of an Order on ASX Centre Point unless it met the relevant Block Trade minimum threshold for Tier 3 Equity Market Products (**Block Trade Exception**).
- 9. On 22 December 2022, following a query from a Market Participant on the same day, ASX identified that the system configuration for the order functionality referred to in paragraph 8 above was configured with a Block Trade minimum threshold for three types of Tier 3 Equity Market Products as blank (in effect, \$0), when the relevant threshold was \$200,000 (**Block Trade Validation Issue**).
- 10. Specifically, the Block Trade Validation Issue:

- a. occurred for three types of Tier 3 Equity Market Products listed on or after 20 April 2015: Exchange Traded Funds (**ETFs**); Warrants Managed Investment Units (**WMIUs**); and Index Warrants;
- b. affected 122 ETFs, 147 WMIUs and 16 Index Warrants (**Affected Products**);
- c. was manually corrected by ASX staff between 7 October 2016 and 8 May 2018 for some Affected Products, being 15 different ETFs and WMIUs, at or around the time of their admission to official quotation and prior to those products being available to trade.

11. As a result of the Block Trade Validation Issue:

- a. between 4 April 2019 and 24 June 2020 (**First Period**) ASX did not make Pre-Trade Information available as required by Rule 6.1.2 in relation to 609 Orders relating to Affected Products (as specified in ASIC's Statement of Reasons dated 19 January 2024) relying at least in part on the Block Trade Exception; and
- b. between 2 July 2020 and 22 December 2022 (**Second Period**) ASX did not make Pre-Trade Information available as required by Rule 6.1.2 in relation to 7,808 Orders relating to Affected Products (as specified in ASIC's Statement of Reasons dated 19 January 2024), relying at least in part on the Block Trade Exception.

12. None of the 609 Orders during the First Period resulted in transactions. For the Second Period, 165 transactions occurred in purported reliance on the Block Trade exception in paragraph 6.1.2(2)(a) of the Rules. The 165 transactions occurred between 11 July 2022 and 22 December 2022.

13. None of the 8,417 Orders referred to in paragraph 11 met the Trade With Price Improvement exception in paragraph 6.1.2(2)(c) of the Rules.

14. ASX:

- a. applied a manual fix for the Block Trade Validation Issue for the Affected Products that remained listed on ASX as at 22 December 2022 (about 200 Affected Products);
- b. met with ASIC staff on 23 December 2022 to notify ASIC of the Block Trade Validation Issue;
- c. implemented a system fix on 9 January 2023 so that the Block Trade Validation Issue would not affect any newly listed ETFs, WMIUs or Index Warrants;
- d. provided an incident report to ASIC on 24 January 2023;
- e. supplemented the incident report on 28 January 2023;

- f. gave a breach report to ASIC on 23 February 2022;
 - g. between 31 July 2023 and 29 August 2023 complied with two requests from ASIC under section 792D of the Act, to provide information to ASIC; and
 - h. cooperated with ASIC's investigation by voluntarily providing documents.
15. On 22 January 2024, ASIC gave ASX a Statement of Reasons dated 19 January 2024 under regulation 7.2A.05 of the Regulations in relation to the Block Trade Validation Issue. On the same day ASX advised ASIC that ASX agreed with the facts set out and penalty sought in the Statement of Reasons, and did not wish to appear at a hearing or make submissions in relation to the matter.

Determination of penalty

16. ASIC has published *ASIC Regulatory Guide 216 – Markets Disciplinary Panel (RG 216)* which sets out the policies the Markets Disciplinary Panel (**MDP**) will take into account when making decisions about alleged contraventions of the Rules by market participants. Alleged contraventions of the Rules by market operators are not referred to the MDP (see RG 216.15).
17. However, the principles for determining penalties set out in RG 216.81, are sound, and appropriate to take into account in determining the penalty in this matter. Those principles are that penalties be proportionate, in the sense of striking a reasonable balance between deterrence and oppressive severity, and that the penalty promotes market integrity by acting as a deterrent to any future misconduct, and as a general deterrent. The more detailed guidance in RG 216.82 to 216.112 also assists in determining a penalty in this matter. In particular, RG216.112 relevantly states that the penalty to be specified in an infringement notice is not solely a function of how many times a rule is alleged to have been contravened, but should take into account the totality of the conduct, and whether there are factually related contraventions.
18. The RG 216 principles are:
- a. the character of the conduct, including its nature, duration and whether it was intentional, reckless or careless;
 - b. the consequences of the conduct, including any benefit obtained, losses suffered by others, and damage to public confidence in the market;
 - c. compliance culture, including adequacy of internal controls, prompt reporting, extent of cooperation and past disciplinary or compliance history; and
 - d. remedial steps taken.

Character of the conduct

19. ASIC considers ASX's conduct was serious. The Block Trade Validation Issue occurred at least from 4 April 2019 to 22 December 2022, and was not detected until drawn to

ASX's attention by a Market Participant. On at least two occasions before 22 December 2022, ASX could have, but did not, identify the issue. Specifically:

- a. in August 2016 ASX was aware of a different system configuration issue with the ASX Centre Point order functionality, which ought to have put ASX on notice of the possibility of other issues with the order functionality; and
 - b. between 11 July 2022 and 22 December 2022, 165 trades executed in purported reliance on the Block Trade Exception, but below the relevant Block Trade exception threshold. This was undetected by ASX.
20. ASIC considers that the fact that the Block Trade Validation Issue went undetected despite the matters noted in paragraph 19 a and b above to be an aggravating factor. The circumstances giving rise to the issue are indicative of carelessness rather than recklessness or any intentional act.

Consequences of the conduct

21. The obligation to make Pre-Trade information available imposed on Market Operators in Rule 6.1.2 is fundamental to fair and transparent markets. It assists investors to trade at competitive prices, aids liquidity, enables investors to assess investment opportunities and value listed companies. ASX's failure to make pre-trade information available for the Affected Products during the Relevant Period undermined those benefits.
22. There was no evidence of other losses suffered as a result of the conduct, but the damage to public confidence in the operation of the market is such that the consequences of the conduct are an aggravating factor in the determination of penalty.

Compliance Culture

23. The adequacy of internal ASX controls to detect and remedy the Block Trade Validation Issue is an aggravating compliance culture factor, given:
- a. the issue was not detected and escalated for remediation until ASX was queried by a Market Participant in December 2022;
 - b. ASX ought to have been aware of the potential for configuration issues in August 2016;
 - c. ASX staff were applying manual corrections to the Block Trade Validation Issue for some Affected Products prior to December 2022, but the issue was not escalated for system-wide enquiry, rectification or reporting until December 2022.
24. Mitigating factors associated with ASX's compliance culture, and those which indicate ASX has a generally sound compliance culture include:
- a. immediate notification to ASIC upon receipt of the 22 December 2022 enquiry from a Market Participant;

- b. subsequent provision of an incident report and breach report;
 - c. cooperation with ASIC during its investigation by voluntarily providing documents;
 - d. ASX has had no matters involving non-compliance with the Rules before an ASIC delegate to date.
25. On balance the compliance culture factors are neither aggravating nor mitigating factors in the determination of penalty.

Remedial steps

26. The remediation timeline and steps taken by ASX are a mitigating factor in the determination of penalty. ASX took immediate steps to remedy the Block Trade Validation issue for Affected Products on 22 December 2022, and applied a system fix on 9 January 2023 so that the Block Trade Validation Issue would not affect any newly listed ETFs, WMIUs or Index Warrants.

Penalty

27. The maximum penalty for a single contravention of Rule 6.1.2 by a body corporate occurring after 13 March 2019 is 15,000 penalty units.
28. The infringement notice regime does not allow for global penalties to be determined for multiple contraventions because separate penalties must be specified for separate contraventions, but the regime does not otherwise restrict the approach that ASIC can take in relation to multiple contraventions where there is a factual overlap in the circumstances of the matter. For example, it is open to ASIC to specify a single penalty for one of the contraventions and specify no penalty for the other factually related contraventions.
29. The 8,417 contraventions of Rule 6.1.2 by ASX that ASIC has reasonable grounds to believe occurred, occurred in factually identical circumstances, arising from a single course of conduct related to a system configuration error. The factors mentioned in paragraphs 19 to 26 above are not all aggravating, nor are they all mitigating. Balancing those factors and their aggravating, mitigating or neutral weightings is not a science. In those circumstances the appropriate penalty range for the contraventions is in the medium range, and ASIC has determined that a total penalty of 5,000 penalty units is appropriate.
30. The amount of one penalty unit for each alleged contravention in the First Period is \$210, and for each alleged contravention in the Second Period is \$222. ASIC has decided to allocate 5,000 penalty units to the first of the alleged contraventions in the First Period, and allocate no penalty units to each other contravention in the First and Second Periods.
31. Accordingly the total penalty for the alleged contraventions of Rule 6.1.2 during the Relevant Period is \$1,050,000.

Other information

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 6.1.2 of the Rules on or after 13 March 2019 is:

- (a) \$3,150,000 per contravention for conduct between 13 March 2019 and 30 June 2020, and
- (b) \$3,330,000 per contravention for conduct between 1 July 2020 and 31 December 2022.

Note: The maximum pecuniary penalty is 15,000 penalty units for a body corporate: see subsection 798K(2) of the Act. The amount of a penalty unit was \$210 between 13 March 2019 and 30 June 2020, and \$222 between 1 July 2020 and 31 December 2022: see subsection 4AA(1) of the Crimes Act 1914.

The maximum pecuniary penalty that a Court could order ASX to pay for contravening subsection 798H(1) of the Act (a civil penalty provision), by reason of contravening Rule 6.1.2 of the Rules for conduct wholly on or after 13 March 2019 is determined by section 1317G of the Act.

Under subsections 1317G(2) and (4), the maximum pecuniary penalty is the greater 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.

To comply with this infringement notice, ASX must pay the penalty within the compliance period. The compliance period starts on the day on which this notice is given to ASX 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 ASX 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 ASX 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) ASX is not taken to have admitted guilt or liability in relation to the alleged contraventions; and
- (e) ASX is not taken to have contravened subsection 798H(1) of the Act.

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

ASX 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 ASX012024.



Kathleen Cuneo

delegate of the Australian Securities and Investments Commission