REGULATORY GUIDE 216

Markets Disciplinary Panel

March 2025

About this guide

This guide is for those who are subject to the market integrity rules—principally, market participants.

It explains the disciplinary framework for the market integrity rules, the function of the Markets Disciplinary Panel (MDP), and the policies that the MDP will take into account when making decisions about alleged contraventions of the market integrity rules.

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.

Document history

This guide was issued in March 2025 and is based on legislation and regulations as at the date of issue.

This guide replaces:

- Superseded Regulatory Guide 216, issued July 2010, updated August 2017 and reissued August 2019 and January 2021
- Superseded Regulatory Guide 225, issued May 2011

We intend to review this guide every four years to take account of any changes to MDP processes, or earlier in the event of law reform or case law that is material to the operation of the MDP.

Disclaimer

This guide 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.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A The Markets Disciplinary Panel

Key points

The Markets Disciplinary Panel (MDP) is a peer review panel that makes decisions on behalf of ASIC.

Sitting panels of the MDP make decisions about whether infringement notices should be issued for alleged contraventions of the market integrity rules.

As far as practicable, sitting panels of the MDP make decisions independently of ASIC.

Peer review

RG 216.1 The Markets Disciplinary Panel (MDP) is a peer review panel which consists of a pool of industry experts from which sitting panels are drawn. The sitting panels make decisions about whether infringement notices should be issued for alleged contraventions of the market integrity rules.

RG 216.2 The members of the MDP, including the MDP Chair and Deputy Chair, are appointed under s121 of the ASIC Act following an evaluation process involving the Executive Director of ASIC's Markets group and a senior member of ASIC's Legal Services group. All members have significant market or professional experience, and many of those appointed have current senior roles with market participants. A list of current MDP members is published on the ASIC website. Internal ASIC staff are not appointed to the MDP.

RG 216.3 The MDP is supported by a Panel Secretariat. The Panel Secretariat forms part of the Legal Services group and is comprised of internal ASIC staff, including a Counsel to the MDP. The Panel Secretariat is not involved in the investigation of matters referred to the MDP.

Legal structure of the MDP

RG 216.4 A Division of ASIC has been established to make decisions about alleged contraventions of the market integrity rules. The Division is comprised of three ASIC Commissioners (see Div 2 of Pt 4 of the ASIC Act).

RG 216.5 Each of the three Division members delegates their powers to each MDP member. Each delegation directs the MDP member to have regard to our

published policies in making a decision but does not direct the MDP member on how to decide a particular matter.

RG 216.6 A sitting panel is convened to deal with each matter referred to the MDP. The MDP Chair determines the composition of a sitting panel. In doing so, they take into account the nature of the matter and the expertise and experience of the available MDP members.

RG 216.7 The MDP Chair, in consultation with the Panel Secretariat, also assesses any potential conflicts of interest of MDP members when deciding who is available to form a sitting panel. If the potential conflict relates to the MDP Chair, the MDP Deputy Chair, in consultation with the Panel Secretariat, will determine if the MDP Chair should participate in the matter. If the MDP Chair is absent or is conflicted out of a matter, the MDP Deputy Chair determines the composition of the sitting panel.

RG 216.8 Each sitting panel is ordinarily comprised of three members of the MDP. Sitting panels make decisions by majority vote. Each member of the sitting panel, including its Chair, has one vote. The members of a sitting panel constitute the Division of ASIC in dealing with the particular matter.

Independence

RG 216.9 The members of a sitting panel independently make decisions on the merits of each matter.

RG 216.10 This independence is achieved through the following measures:

(a) MDP members are not involved in investigations undertaken by ASIC or decisions relating to ASIC investigations;

(b) the members of the Division of ASIC do not play any role in the consideration of a particular matter before a sitting panel; and

(c) material communications between a sitting panel and ASIC occur through the Panel Secretariat, copied to the market participant that is the subject of the referral.

RG 216.11 The Panel Secretariat may, from time to time, directly communicate with ASIC without copying the market participant. The Panel Secretariat may also, from time to time, directly communicate with the market participant without copying ASIC. Such communications are limited to non-contentious issues.

RG 216.12 The MDP encourages market participants and ASIC to liaise with the Panel Secretariat on an informal basis where appropriate.

Types of matters referred to the MDP

RG 216.13 Any matter involving alleged contraventions of the market integrity rules by market participants may be referred to the MDP unless ASIC decides to bring civil penalty proceedings in relation to the matter.

RG 216.14 However, some types of matters will generally not be referred to the MDP—for example, minor matters for which warning letters or alternative regulatory outcomes are considered appropriate.

RG 216.15 Any matter involving alleged contraventions of the market integrity rules by market operators will not be referred to the MDP.

B Regulatory outcomes

Key points

When a matter is referred to the MDP for consideration, it will generally result in either:

- a finding that the MDP does not have reasonable grounds to believe that a contravention has occurred; or
- an infringement notice being given if the MDP has reasonable grounds to believe a contravention has occurred.

If a market participant offers ASIC a court enforceable undertaking to address alleged contraventions of the market integrity rules, ASIC may consult a member of the MDP about the terms of the proposed court enforceable undertaking.

Enforcement options

RG 216.16 ASIC determines the appropriate regulatory response to suspected contraventions of financial services laws: see Information Sheet 151 *ASIC's approach to enforcement* (INFO 151).

RG 216.17 In particular, ASIC will consider whether conduct alleged to constitute a contravention of the market integrity rules warrants a civil penalty or other civil proceedings, or whether an infringement notice or a court enforceable undertaking is an appropriate regulatory response.

RG 216.18 A contravention of the market integrity rules will result in a contravention of a civil penalty provision. A court may order a person to pay the Commonwealth a pecuniary penalty if a declaration of contravention is made.

RG 216.19 The Corporations Act provides for a range of civil orders—including the payment of compensation and publication orders—to be made for a contravention of the market integrity rules.

RG 216.20 The MDP does not have the power to bring civil proceedings. The MDP has the power to give infringement notices, as an alternative to civil proceedings, under Pt 7.2A of the Corporations Act and Corporations Regulations.

Infringement notices

RG 216.21 The MDP may give an infringement notice to a market participant if the MDP has reasonable grounds to believe that the market participant has contravened the market integrity rules.

RG 216.22 An infringement notice may specify one or more of the following:

(a) a penalty for each alleged contravention;

(b) remedial measures that the market participant must undertake;

(c) sanctions that the market participant must accept;

(d) the terms of a court enforceable undertaking that the market participant must enter into.

Note: See reg 7.2A.02.

RG 216.23 The maximum penalty that may be specified in an infringement notice for an alleged contravention of a rule is lower than the maximum penalty that a Court may impose for a contravention of the rule. An infringement notice may be in relation to more than one contravention.

RG 216.24 A market participant that is given an infringement notice is not obliged to comply with it. If the participant complies with the notice, no further regulatory action may be taken by ASIC against the participant for the alleged contravention: see reg 7.2.A.10(2).

RG 216.25 If the market participant chooses not to comply with it, ASIC will bring civil proceedings against the participant in relation to the contravention.

Court enforceable undertakings

RG 216.26 As an alternative to civil proceedings, ASIC may accept a written court enforceable undertaking from a person who is alleged to have contravened the market integrity rules: see s798K.

RG 216.27 ASIC may accept a court enforceable undertaking to:

(a) take specified action within a specified period;

(b) refrain from taking specified action; or

(c) pay a specified amount within a specified period to the Commonwealth or to some other specified person.

RG 216.28 If ASIC is considering accepting a court enforceable undertaking to resolve a matter, it may consult a member of the MDP about the terms of the proposed court enforceable undertaking. The selected member of the MDP may give advice in their capacity as a consultant.

C MDP process

Key points

The MDP process for dealing with alleged contraventions of the market integrity rules is to:

- convene a sitting panel consisting of three MDP members;
- send a notice of hearing;
- give the participant the opportunity to make submissions;
- if the MDP has reasonable grounds to believe that the participant has contravened the rules—give an infringement notice; and
- publish the infringement notice.

Referral to the MDP

RG 216.29 ASIC refers matters to the MDP. The MDP does not determine which matters are referred to it or which alleged contraventions of the market integrity rules are put to it for its consideration.

RG 216.30 A matter is referred to the MDP when ASIC gives the Panel Secretariat and the market participant its reasons for believing a market participant has contravened the market integrity rules. These reasons are known as ASIC's Statement of Reasons.

Uncontested matters

RG 216.31 If ASIC and the participant wish to settle a matter following the provision of a Statement of Reasons, the terms of the proposed settlement are given to the Panel Secretariat by ASIC on behalf of both parties. ASIC may also give the Panel Secretariat an Agreed Statement of Facts on behalf of both parties. The Panel Secretariat will convene a sitting panel to consider the proposed settlement.

RG 216.32 If the terms of the proposed settlement involve giving an infringement notice, it is still necessary to give the participant an opportunity to appear at a hearing. However, the participant is not obliged to take up that opportunity.

RG 216.33 The MDP is not obliged to approve a negotiated infringement notice. If it does not, it will advise the parties of its reasons. The MDP may give an indication of its thinking at the time to facilitate continuing settlement negotiations. It is open to the parties to consider if they wish to enter into further negotiations to see if the matter can be settled subject to MDP approval. If not, the matter will proceed and the participant will be given an opportunity to appear at a hearing before the MDP.

Contested matters without a hearing

RG 216.34 A market participant may choose to contest a matter even if they decide not to take up the opportunity to appear at a hearing: see RG 216.48–RG 216.50. A market participant may contest the matter by making written submissions. They may take this approach regardless of whether they contest both the contravention and the penalty, or just the penalty.

RG 216.35 In either case, a sitting panel will be convened. The sitting panel will set out the timetable for making written submissions. The sitting panel will proceed to make a decision based on the submissions and documents before it. To the extent applicable, the decision-making process will apply the principles set out in RG 216.53–RG 216.56.

Sitting panel

RG 216.36 The MDP Chair will allocate a matter to three members of the MDP, taking into account the nature of the matter, the skills and experience of the MDP member, the absence of conflicts of interest, and their availability.

RG 216.37 The three members chosen will be the 'sitting panel' for the matter. The MDP Chair may allocate himself or herself to the matter.

Notice of hearing

RG 216.38 A notice of hearing will be sent to the market participant and to ASIC. The notice will set out:

(a) the nominated time, date and place of the hearing;

(b) details of the sitting panel members who will consider the matter; and

(c) a timetable of directions.

RG 216.39 A sitting panel has discretion to conduct the hearing, or allow a person to attend, by electronic means such as video conferencing. If a market participant or ASIC wishes to participate, or have a person participate, in a hearing by electronic means, it should contact the Panel Secretariat and the sitting panel will consider the request.

RG 216.40 If the sitting panel agrees to conduct the hearing, or allow a person to attend the hearing, by electronic means, it will require the technology to meet ASIC's security and information technology requirements. The MDP will adopt the same rules and procedures at a hearing by electronic means as if it were an in-person hearing, so far as the technology permits.

RG 216.41 The hearing is held in private.

RG 216.42 If a market participant objects to the membership of the sitting panel due to a conflict of interest or reasonable apprehension of bias they should inform the Panel Secretariat as soon as possible of the reasons for the objection.

RG 216.43 Objections based on other grounds will rarely, if ever, warrant the reconstitution of a sitting panel. The common law test for the existence of an apprehension of bias is whether a fair-minded observer might reasonably perceive that the decision-maker might not bring a fair and unprejudiced mind to the determination of the matter.

RG 216.44 The MDP Chair will determine if the objection warrants removal of the MDP member from the sitting panel. If the objection relates to the MDP Chair as a sitting member, the objection will be considered by the MDP Deputy Chair in consultation with the Counsel to the MDP.

RG 216.45 The timetable of directions will specify, among other things, the day by which the market participant is to give its written submissions in reply to ASIC's Statement of Reasons. This is known as the Reply. The Reply should also include submissions on the appropriate penalty or penalty range (if any).

RG 216.46 Generally, the MDP will not seek further submissions from either party but it will consider requests to make further submissions. The MDP may seek further information from the parties.

RG 216.47 The MDP expects that a matter will be dealt with in a single hearing. Generally, a participant will not be offered a hearing in relation to contravention and a separate hearing in relation to penalty.

Participant's choice not to require hearing

RG 216.48 A market participant may choose not to take up the opportunity to appear at a hearing and, instead, may choose to make written submissions.

RG 216.49 Participants are encouraged to inform the Panel Secretariat as early as possible if they choose not to take up the opportunity to appear at a hearing.

RG 216.50 Where the matter is to be considered without a hearing but based on written submissions only, the Panel Secretariat will arrange for the matter to be considered by the sitting panel based on the respective written submissions.

Hearing

RG 216.51 If a hearing is required, it will be conducted by the MDP as closely as possible in accordance with Regulatory Guide 8 *Administrative hearings: Principles and conduct* (RG 8). Key aspects of the hearing process are set out below.

The hearing is fact-finding, not adversarial

RG 216.52 The hearing is a fact-finding one. It is not an adversarial exercise, such as in a court. Hearings are conducted informally and as expeditiously as possible.

Rules of evidence do not apply

RG 216.53 The rules of evidence and the usual court rules of procedure and practice do not apply to the hearing. The MDP will nonetheless base its decision on material that is relevant and credible.

Procedural fairness

RG 216.54 The MDP will apply the rules of procedural fairness to ensure that a market participant has an opportunity to make submissions at a hearing. The parties should proceed on the basis that a sitting panel has read all written submissions by both parties.

Expert witnesses

RG 216.55 The MDP may, in addition to relying on its own expertise, consider the written reports of independent experts submitted by ASIC or the participant to establish elements of an alleged contravention of a market integrity rule. The MDP may ask an expert, whose report has been provided to it, to be present to assist at a hearing.

Confidentiality

RG 216.56 The MDP is required by law to take all reasonable measures to prevent the unauthorised use or disclosure of confidential information. This does not prevent the publication of infringement notices and ASIC media releases about outcomes of MDP decisions.

Transcript

RG 216.57 The MDP may record or make a transcript of the hearing. If a record or transcript is made, a copy of it may be provided, on request, to the parties. The provision of the transcript to the market participant will be conditional on the market participant using the transcript only for the purposes of the MDP matter, such as taking legal advice about any decision by the MDP following the hearing.

MDP decision

RG 216.58 A decision of the MDP is made by a simple majority of the votes of the three members of the sitting panel. Each member, including the Chair of the sitting panel, has one vote. The Chair also has a casting vote, if necessary.

RG 216.59 The Panel Secretariat will inform the market participant and ASIC of the MDP's decision as soon as practicable after the MDP has made it. The infringement notice (if any) will follow.

Adverse finding by MDP

RG 216.60 The MDP may give an infringement notice if it has reasonable grounds to believe that the participant has contravened the market integrity rules.

RG 216.61 The infringement notice is the main means by which the MDP's decision and the MDP's reasons for the decision are made known to the market participant concerned, and to all other market participants. The infringement notice will also set out the material findings of fact on which the MDP's decision is based.

RG 216.62 Where ASIC has alleged a contravention of more than one rule, and the MDP has reached an adverse finding for some but not all of the rules alleged by ASIC to have been contravened, the infringement notice will refer to the rules for which the MDP has made an adverse finding as well as the rules for which it has not made an adverse finding if the MDP considers it is beneficial to the market to include this information.

RG 216.63 The MDP will generally provide the proposed infringement notice to the market participant and ASIC to check for factual accuracy before it is issued. Any comments from the market participant and ASIC must be limited to matters of factual accuracy.

RG 216.64 There may also be occasions where the MDP wishes to make further comments on a matter but does not wish for those comments to be included in the published infringement notice. Where the MDP wishes to make further comments, the comments will be given to both the participant and ASIC.

RG 216.65 An infringement notice states the opinion of the MDP about the alleged misconduct—it does not represent a finding that the market integrity rules have been contravened. Any subsequent compliance with an infringement notice is not an admission of liability.

RG 216.66 A decision to give an infringement notice is excluded from merits review by the Administrative Review Tribunal (ART): see s1317C(gcc) of the Corporations Act.

No adverse finding by MDP

RG 216.67 If the MDP makes no adverse finding, it cannot give an infringement notice. The MDP will give its reasons for that finding to both the market participant and to ASIC. The reasons may be published but not in a way that identifies the participant: see RG 216.73.

Compliance with an infringement notice

RG 216.68 A market participant is not obliged to comply with an infringement notice. But if the participant wishes to comply with it, it must do so within 27 days after the day on which the notice is given.

RG 216.69 Compliance with an infringement notice will conclude the action ASIC can take against the market participant in relation to the conduct. If the participant does not comply with the notice, then ASIC may take civil proceedings against the participant in relation to the conduct. After the infringement notice is given, the MDP's involvement ceases.

RG 216.70 Compliance with an infringement notice by a market participant does not preclude ASIC from taking regulatory action against other persons who were involved in the misconduct (e.g. individual employees). Compliance with an infringement notice does not affect the rights of third parties who have been adversely affected by the market participant's conduct.

Note: See reg 7.2A.10.

Publication

RG 216.71 An infringement notice that is complied with will be published. This will normally occur soon after the end of the compliance period. The infringement notice will be published in full in the ASIC Gazette. A summary of the notice will be published in an ASIC media release.

RG 216.72 An infringement notice that is not complied with will also be published. This will normally occur at the time ASIC publishes a media release in relation to the commencement of civil proceedings. The infringement notice will be published in full in the ASIC Gazette.

RG 216.73 In circumstances where the MDP makes no adverse finding and therefore no infringement notice is given, ASIC may publish a summary of that outcome for the benefit of all market participants. The summary will not disclose the identity of the market participant to which the matter relates.

RG 216.74 ASIC maintains a register of MDP outcomes on its website. This register contains links to the infringement notices, media releases and summaries.

Methods of correspondence

RG 216.75 The Panel Secretariat encourages all written material to be provided to it electronically. However, the Panel Secretariat may request hard copies of submissions to be provided.

D Decision-making policies and principles

Key points

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.

The MDP endeavours to achieve an outcome that is proportionate to the conduct of the market participant and promotes market integrity when it determines the penalty for an infringement notice.

While the MDP is not bound by precedent, it is guided by three tiers of penalty ranges that help it to achieve consistent penalties. In determining a penalty that is just and appropriate, the MDP will also consider the totality of the conduct and whether there are factually related contraventions.

Consistency in approach

RG 216.76 A matter before the MDP must be decided according to the relevant circumstances of the matter. The MDP is not bound by precedent. However, it aims to be consistent in its approach to decision-making.

RG 216.77 Consistency in approach to decision-making does not necessarily mean the same or similar outcome in relation to penalty. This will particularly be the case where, as a result of law reform, there is an increase in the maximum penalties that may be specified in infringement notices: see RG 216.100–RG 216.102.

Reasonable grounds to believe

RG 216.78 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.

RG 216.79 The MDP follows the meaning of that phrase as determined by the High Court of Australia in *George v Rockett* (1990) 170 CLR 104. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition. 'Reasonable grounds to believe' requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

RG 216.80 The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief than is required for suspicion but need not establish on the balance of probabilities that a fact occurred or existed.

Determining the penalty

RG 216.81 The MDP is guided by the following principles in determining the appropriate regulatory outcome. The outcome should:

(a) be proportionate to the conduct of the market participant in the sense that it should strike a reasonable balance between deterrence and oppressive severity: see *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 at [41];

(b) promote market integrity by acting as a deterrent to any future misconduct by the participant and as a general deterrent to other participants; and

(c) be just and appropriate, taking into account the totality of the conduct and whether there are factually related contraventions.

RG 216.82 Table 1 sets out the four key factors that the MDP will consider when determining the penalty in an infringement notice.

Table 1: Key factors to determine penalty

Factors	Relevant considerations
1. Character of the conduct	• nature of the conduct • whether the conduct was intentional, reckless or careless • duration of the conduct
2. Consequences of the conduct	• whether the participant benefited • whether clients or others suffered loss • whether public confidence in the market may have been damaged
3. Compliance culture	• adequacy of internal controls • whether the conduct was promptly reported to ASIC • the extent of cooperation with ASIC during its investigation • past disciplinary or compliance history
4. Remediation	• steps taken to ensure that the conduct does not re-occur • steps taken to compensate clients or others who suffered loss

RG 216.83 In determining a penalty, the MDP generally classifies each of the four key factors as aggravating, mitigating or neither.

RG 216.84 A factor that is not aggravating does not mean that it is a mitigating factor. Market participants should not expect penalty discounts where their conduct did not have adverse consequences.

RG 216.85 For example, if the factor being considered is whether the conduct caused material loss to clients, the mere fact that clients did not suffer material loss does not necessarily make the factor a mitigating one. The MDP might consider it to be a mitigating factor if it is satisfied that the reason clients did

not suffer any material loss was because of the internal controls the participant had in place to avoid or minimise the loss.

Key factor 1: Character of the conduct

RG 216.86 Intentional, reckless or careless conduct is conduct ranging from the more serious to the less serious respectively. These expressions are not intended to be interpreted in their strict legal sense.

RG 216.87 Conduct is intentional if the market participant knew the conduct was a contravention of the rules. Intentional conduct is an aggravating factor.

RG 216.88 Conduct is reckless if the participant foresaw the real possibility that the conduct would be a contravention of the rules but nevertheless decided to engage in the conduct, indifferent to the consequences. This may occur where the market participant was aware of suspicious conduct by its clients or shortcomings in its controls (e.g. after being alerted to concerns by system alerts, its staff or the regulator) and did not adequately respond to the concerns. Reckless conduct is likely to be an aggravating factor.

RG 216.89 Conduct is careless if the participant failed to take reasonable care. Careless conduct can encompass a wide range of circumstances. It may be an aggravating factor (e.g. where the conduct continued for a prolonged period, the market participant should have been aware of deficiencies in its policies, procedures, staff or controls or it did not periodically review its policies and procedures).

Key factor 2: Consequences of the conduct

RG 216.90 Conduct from which the participant benefited is an aggravating factor if the benefit could not have been gained from conduct that complied with the rules.

RG 216.91 Conduct which results in loss or damage to clients or others is not limited to financial loss. It extends to other forms of loss or damage that might not have a financial consequence (such as loss of confidential information).

RG 216.92 Conduct that damages public confidence in the market must be more than notional or hypothetical damage. The MDP does not consider that every finding of a contravention of a market integrity rule will necessarily damage public confidence in the market. The MDP does not expect any asserted damage to public confidence in the market to be quantified.

RG 216.93 Conduct that results in a failure to give regulatory data or other information required by the market integrity rules to ASIC has the potential to undermine market integrity and hinder ASIC's ability to supervise the market and take appropriate regulatory action.

Key factor 3: Compliance culture

RG 216.94 A market participant's poor compliance or disciplinary history is an aggravating factor, particularly if the conduct being considered by the MDP is the same as or similar to conduct sanctioned in the past. The MDP may consider conduct to be the same or similar to conduct sanctioned in the past, even if the matters involve alleged contraventions of different rules.

RG 216.95 The MDP does not consider a participant to have a poor compliance or disciplinary history merely because of an adverse finding in the past. Adverse findings in relation to conduct that occurred more than six years before the conduct being considered by the MDP may be given little weight.

RG 216.96 A market participant's report to ASIC about conduct may be a mitigating factor if the report is a comprehensive self-report made before being alerted to the issue by ASIC and is coupled with full cooperation with ASIC. Compliance with compulsory notices to produce documents or provide information to ASIC is not considered to be a mitigating factor.

RG 216.97 The MDP will take into account the adequacy of the market participant's internal controls and procedures and the extent to which the participant has complied with those controls and procedures. The MDP considers that poorly designed internal controls and procedures are an aggravating factor, even if such controls and procedures are complied with. The MDP does not consider a participant to have poorly designed controls and procedures merely because they fail to work on a particular occasion.

Key factor 4: Remediation

RG 216.98 Subsequent steps taken by a participant to address and remedy conduct and its consequences once they become aware of it will only be a mitigating factor if such steps are taken promptly and effectively address the issue.

Indicative penalty ranges

RG 216.99 The maximum penalty that may be specified in an infringement notice for an alleged contravention of a rule will depend on when the conduct occurred.

RG 216.100 The maximum penalty for each alleged contravention is:

(a) if the conduct occurred **before 13 March 2019**—60% of the maximum penalty specified in the rule (being one of $1 million $100,000 and $20,000): see former s798K(2) of the Corporations Act;

(b) if the conduct occurred **wholly on or after 13 March 2019**—15,000 penalty units (for bodies corporate) or 3,000 penalty units (for individuals): see s798K(2) of the Corporations Act.

RG 216.101 The two categories of maximum penalty arise because of the legislative reforms made by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*.

RG 216.102 The maximum penalties that can be specified in an infringement notice for each alleged contravention of a rule in relation to conduct that occurs wholly on or after 13 March 2019 are significantly higher than in relation to conduct that occurred before 13 March 2019.

RG 216.103 The amount of the penalties specified in infringement notices in relation to conduct occurring before 13 March 2019 will be of limited precedent value in determining the appropriate penalties specified in infringement notices in relation to comparable conduct occurring on or after 13 March 2019.

Conduct occurring before 13 March 2019

RG 216.104 In determining the appropriate penalty to be specified in an infringement notice for an alleged contravention of a rule where the conduct occurred before 13 March 2019, the MDP will be guided by penalty ranges within each tier.

RG 216.105 The market integrity rules classify each rule into one of three tiers for the purposes of the applicable maximum penalty. In determining the appropriate penalty to be specified in an infringement notice for an alleged contravention of a rule, the MDP will be guided by penalty ranges within each tier as set out in Table 2.

RG 216.106 The purpose of the ranges is to provide an indicative framework to ensure a consistent approach in determining the appropriate penalty.

Table 2: Penalty ranges (conduct occurring before 13 March 2019)

Tier	Maximum penalty	Range	Penalty
Tier 1	$12,000	Low	< $4,000
		Medium	$4,000 – < $8,000
		High	$8,000 – $12,000
Tier 2	$60,000	Low	< $20,000
		Medium	$20,000 – < $40,000
		High	$40,000 – $60,000
Tier 3	$600,000	Low	< $200,000
		Medium	$200,000 – < $400,000
		High	$400,000 – $600,000

Conduct wholly occurring on or after 13 March 2019

RG 216.107 In determining the appropriate penalty to be specified in an infringement notice for an alleged contravention of a rule where the conduct occurred wholly on or after 13 March 2019, the MDP will be guided by the maximum penalty (being the penalty that should be specified for the most serious of alleged contraventions), taking into account the four key factors specified in Table 1 and the penalty ranges set out in Table 3.

Table 3: Penalty ranges (conduct occurring on/after 13 March 2019)

Person type	Maximum penalty units	Range	Penalty units
Bodies corporate	15,000	Low	< 5,000
		Medium	5,000 – < 10,000
		High	10,000 – 15,000
Individuals	3,000	Low	< 1,000
		Medium	1,000 – < 2,000
		High	2,000 – 3,000

RG 216.108 In addition to the above penalty range guide, in determining the appropriate penalty the MDP will consider the totality of the conduct, whether there are factually related contraventions and the principle that the penalty should strike a reasonable balance between deterrence and oppressive severity: see RG 216.81 and RG 216.112–RG 216.114.

RG 216.109 Where the penalty is determined by reference to penalty units, the infringement notice will specify the number of penalty units and the corresponding penalty amount expressed in dollars.

> Note: See Fines and penalties on the ASIC website for more information about penalties, including the value of a penalty unit.

Conduct spanning before and after 13 March 2019

RG 216.110 Where the MDP decides to give an infringement notice in relation to a matter that involves instances of conduct occurring before, on and after 13 March 2019 and which can be meaningfully separated into conduct occurring before that date and conduct occurring wholly on and after that date, the MDP will deal with the matter in one of the following ways:

(a) by giving two separate infringement notices, each covering the respective separate instances of conduct and specifying the appropriate penalty for each contravention occurring within each respective separate period; or

(b) by giving a single infringement notice that covers the entire period but separating the respective instances of conduct and specifying the appropriate penalty for each contravention occurring within each respective period.

RG 216.111 The total specified penalty for the matter will be the same, irrespective of which approach is taken.

Multiple factually related contraventions

RG 216.112 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.

RG 216.113 The regime does not otherwise restrict the approach the MDP can take in relation to multiple contraventions where there is a factual overlap in the circumstances of the matter. For example, the MDP may:

(a) break down multiple contraventions into groups of factually related contraventions as a starting point and then assess which of those contraventions should be the subject of an infringement notice; and

Note: The MDP is not obliged to give an infringement notice for each adverse finding.

(b) give an infringement notice for multiple factually related contraventions but only specify penalties for some of those contraventions so that the total of the penalties reflects the conduct as a whole.

Note: The MDP might specify a single penalty for one of the contraventions and specify no penalty for the other factually related contraventions.

RG 216.114 The MDP will be guided by the principle that the penalty to be specified in an infringement notice should be just and appropriate, and not excessive, taking into account the totality of the conduct. Where there are factually related contraventions, the total penalty should not be solely a function of how many rules have been contravened or how many times a rule has been contravened.

Key terms

Term	Meaning in this document
ART	Administrative Review Tribunal
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	*Corporations Regulations 2001*
court enforceable undertaking	A court enforceable undertaking that may be accepted by ASIC under reg 7.2A.01 of the Corporations Regulations
hearing	The meaning given by s5 of the ASIC Act
INFO 151	An ASIC information sheet (in this example numbered 151)
infringement notice	An infringement notice issued under reg 7.2A.04 of the Corporations Regulations
market integrity rules	Rules made by ASIC, under s798G of the Corporations Act, for trading on domestic licensed markets
MDP	ASIC's Markets Disciplinary Panel, through which ASIC exercises its power to issue infringement notices in relation to alleged contraventions of the market integrity rules
Pt 7.2A (for example)	A part of the Corporations Act (in this example numbered 7.2A), unless otherwise specified
reg 7.2A.01 (for example)	A regulation under the Corporations Regulations (in this example numbered 7.2A.01), unless otherwise specified
RG 8 (for example)	An ASIC regulatory guide (in this example numbered 8)
s798G (for example)	A section of the Corporations Act (in this example numbered 798G), unless otherwise specified

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Related information

Headnotes

court enforceable undertakings, hearings, infringement notices, market integrity rules, market participants, Markets Disciplinary Panel, MDP, penalties, remedial action, sitting panels, supervision

Regulatory guides

RG 8 *Administrative hearings: Principles and conduct*

RG 100 *Court enforceable undertakings*

Information sheets

INFO 151 *ASIC's approach to enforcement*

Legislation

ASIC Act, Div 2 of Pt 4 (Divisions of ASIC); s5

Corporations Act, Pt 7.2A; s798G, 798K, 1317C(gcc)

Corporations Regulations, Pt 7.2A; regs 7.2A.01–7.2A.02, 7.2A.04, 7.2A.10

Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019

Cases

Australian Building and Construction Commissioner v Pattinson [2022] HCA 13

George v Rockett (1990) 170 CLR 104