



ASIC
Australian Securities &
Investments Commission

Commonwealth of Australia Gazette
MDP02/23, Wednesday, 3 May 2023

Published by ASIC

ASIC Gazette

Contents

Markets Disciplinary Panel: Infringement Notice

Recipient: Ord Minnett Limited

The recipient has complied with the infringement notice. Compliance is not an admission of guilt or liability; and the recipient is not taken to have contravened subsection 798H(1) of the *Corporations Act 2001*.

ISSN 1445-6060 (Online version)
ISSN 1445-6079 (CD-ROM version)

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PART 7.2A OF THE CORPORATIONS REGULATIONS 2001



ASIC
Australian Securities &
Investments Commission



INFRINGEMENT NOTICE

To: Ord Minnett Ltd ACN 002 733 048
Level 18, 225 George Street
SYDNEY NSW 2000

Matter: MDP 1025/22

Date given: 31 March 2023

TAKE NOTICE: The Australian Securities and Investments Commission (**ASIC**) gives this infringement notice to Ord Minnett Ltd ACN 002 733 048 (**Ord Minnett**) under regulation 7.2A.04 of the *Corporations Regulations 2001* (the **Regulations**), which is made for the purposes of section 798K of the *Corporations Act 2001* (the **Act**).

To comply with this notice, Ord Minnett must pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of **\$888,000**. This penalty amount represents 4,000 penalty units (being penalty units at \$222).

Background

1. At all relevant times, Ord Minnett was a Market Participant of the ASX Market.
2. On 10 August 2021, AWN Holdings Ltd (**AWN**) announced its intention to conduct an on-market buy-back to acquire a maximum of 3,960,020 shares (**Buy-Back**) and the appointment of Ord Minnett to act on AWN's behalf in connection with the Buy-Back.
3. On 31 August 2021, AWN released an announcement to the ASX stating its intention to voluntarily delist from the ASX, and stated in the Chairman's letter to shareholders of the same date: '*... we are very mindful of providing liquidity so as to enable shareholders who do not wish to hold shares in an unlisted public company to exit their shareholding in an orderly manner and hence the accompanying on-market share buyback.*'
4. On 1 September 2021, Ord Minnett received instructions to commence the Buy-Back and purchased shares on behalf of AWN on 1 and 2 September 2021.
5. Between 15 and 27 September 2021 inclusive, Ord Minnett continued the Buy-Back, following a direction from AWN that it be paused between 7 and 14 September 2021.
6. AWN released Appendix 3E notices to the ASX that disclosed purchasing under the Buy-Back as follows:

Trading date	Quantity purchased under Buy-Back	Value	Maximum price allowed under Listing Rule 7.33*	Highest price paid	Lowest price paid	Amount remaining under Buy-Back
1 and 2 Sept 21 (combined)	232,669	\$174,063.19	\$0.7698	\$0.7500	\$0.7425	3,727,351
15 Sept 21	3,407	\$3,022.91	\$0.8996	\$0.8950	\$0.8750	3,723,944
16 Sept 21	4,889	\$4,400.10	\$0.9034	\$0.9000	\$0.9000	3,719,055
17 Sept 21	160,248	\$145,024.44	\$0.9069	\$0.9050	\$0.9050	3,588,807
20 Sept 21	35,533	\$32,512.70	\$0.9182	\$0.9150	\$0.9150	3,523,274
21 Sept 21	184,807	\$170,991.12	\$0.9430	\$0.9400	\$0.9150	3,338,467
22 Sept 21	56,940	\$54,587.24	\$0.9612	\$0.9600	\$0.9400	3,281,527
24 Sept 21	16,755	\$16,419.90	\$0.9846	\$0.9800	\$0.9800	3,264,772
27 Sept 21	2,464,772	\$2,445,635.45	\$0.9989	\$0.9950	\$0.9550	800,000

* The applicable price step for trades in AWN through the lit market was \$0.005, as such the maximum price at which shares could be acquired in the Buy-Back would be the relevant price step at or immediately below the maximum set out in this column.

7. On 27 September 2021, after the close of trading, Ord Minnett was instructed to pause the Buy-Back. No further buying was undertaken under the Buy-Back after this time.
8. The Markets Disciplinary Panel (**MDP**) has reasonable grounds to believe that Ord Minnett in conducting the Buy-Back contravened Rule 3.3.1(b) on 1 September 2021 and Rule 5.9.1 on 27 September 2021 of the *ASIC Market Integrity Rules (Securities Markets) 2017* (the **Rules**) and therefore contravened subsection 798H(1) of the Act in respect of the following conduct.

First Alleged Contravention

9. The MDP was satisfied as to the matters in paragraphs 10 to 19.
10. On 1 September 2021, an authorised representative of Ord Minnett (the **Adviser**), using the discretion granted by AWN with regards to time and price of entry of orders purchased 133,002 shares on behalf of AWN under the Buy-Back.
11. These purchases did not comply with ASX Listing Rule 7.33 that provides:

*‘A company may only buy back shares under an on-market buy-back at a price which is not more than 5% above the *volume weighted average market price for *securities in that *class, calculated over the last 5 days on which sales in the shares were recorded before the day on which the purchase under the buy-back was made.’*
12. Prior to market open on 1 September 2021, over the last 5 days of trade the volume weighted average market price (**VWAP**) for shares in AWN plus 5% was \$0.6775.
13. The shares purchased by the Adviser on behalf of AWN were at prices approximately 10% over the upper limit permissible under the Buy-Back, being between \$0.7425 and \$0.75 at an average price of \$0.7496.

14. Rule 3.3.1(b) of the Rules provides:

3.3.1 Market Participant restrictions

A Market Participant must not:

(b) enter into a Market transaction for a Client, except in accordance with the instructions of the Client, or of a person authorised in writing by a Client to give such instructions, or pursuant to an exercise of discretion in respect of that particular Client's Managed Discretionary Account or as otherwise permitted by these Rules or the operating rules of the relevant Market;

15. Ord Minnett accepted it was instructed to conduct an on-market buy-back for AWN but submitted that there was no express instruction to conduct the Buy-Back in accordance with Listing Rule 7.33. The MDP noted the only time an on-market buy-back is not conducted in accordance with Rule 7.33 is when a waiver of that rule is granted by ASX, which is uncommon, never given retrospectively and when given always disclosed to the market. Consistent with prior decisions, the MDP found that the instructions from a client to conduct an on-market buy-back **are** an instruction to conduct an on-market buy-back in accordance with Rule 7.33, **unless** the client (buy-back company) expressly instructs otherwise and the Market Participant confirms that the relevant waiver of Rule 7.33 has been granted and disclosed.
16. By purchasing AWN shares on 1 September 2021 at impermissible prices above the maximum limit allowable under ASX Listing Rule 7.33, the MDP considers there are reasonable grounds to believe that Ord Minnett contravened Rule 3.3.1(b) because:
- (a) it entered into a market transaction for a client that was not in accordance with the client's instructions to purchase the shares as part of an on-market buy-back in accordance with the listing rules; and
 - (b) which was not otherwise permitted by the operating rules of the ASX Market.
17. At 12:08pm that day AWN emailed the Adviser querying the VWAP limitation which the Adviser subsequently responded to at 1:18pm, after which time no further shares were acquired that day through the Buy-Back.
18. Throughout the Buy-Back, the trades of 1 September 2021 were the only ones undertaken above the VWAP price limitation.
19. Despite being on notice of the error, the Adviser did not alert Ord Minnett's management or compliance to the impermissible purchases. Ord Minnett did not separately identify the error and consequently booked the purchases to AWN's account, which reported the trades to the market on 3 September 2021 (together with the trades of 2 September 2021).

Second Alleged Contravention

20. The MDP was satisfied as to the matters in paragraphs 21 to 47.

21. On 14 September an AWN executive returned a telephone call from a director (**Director**) of a significant shareholder of AWN (**Selling Client**). Following that discussion, the AWN executive messaged the Director:
- (a) confirming that there was no regulatory impediment to selling into the Buy-Back as a substantial shareholder; and
 - (b) querying whether the Director would be open to taking a call from the Adviser managing the Buy-Back on behalf of AWN, regarding potential liquidity options.
22. AWN considered the Selling Client to be a dissenter to anything the company did or proposed.
23. At the time, the Adviser either knew or was advised by AWN that the Selling Client was a long term substantial shareholder of AWN, dissatisfied with the performance of the share price and hostile toward AWN.
24. On 15 September 2021, as arranged, the Adviser spoke with the Director. In an email exchange following that discussion titled '*Confidential * Terms for sale of shares of AWN within buy back period*' the Director on behalf of the Selling Client confirmed its instructions to sell [the then total number of shares] held in AWN at \$1.00 a share. The Adviser's email of 11:26 am seeking confirmation of the Selling Client's instructions in part stated:
- 'The timing of this sale I anticipate is subject to listing rule 7.33. This means the transaction is likely to be facilitated within the next 5 business days. We hope this might be sooner than this for you [redacted]. The cost for us to achieve this outcome will be .5% + GST of sale proceeds payable in the form of brokerage charged.*
- Can I ask that you respond to my email if these terms are acceptable. If you can provide me the relevant banking details for the settlement of funds so we can pay you for the sale once the sale has settled?'*
25. An executive of AWN stated that the Adviser subsequently telephoned him and advised that the Selling Client's price at which it would sell its holding was \$1.00 per share and if the Buy-Back price were to get to that level, then the Adviser was mandated to sell the holding into the Buy-Back. The Adviser did not specifically recall the telephone discussion and denied conveying such information to AWN's executive.
26. On 15 September 2021 at 4:37pm, the Adviser emailed the AWN executive forwarding the advice of Ord Minnett's compliance which stated in part:
- 'I couldn't find any rule prohibiting crossings during on market buybacks in either the attached info sheet or ASIC Information Sheet 69.*
- Looks like you can undertake a crossing.'*
27. On 15 September 2021 at 4:55pm, the AWN executive emailed the Adviser a link to Market Supervision Update 60 and asked:

'Hi [redacted], I just came across this: [link provided to Market Supervision Update 60]

Would you mind checking in with [Ord Minnett compliance] at your end to see whether this update notice might impact us? Priority would be to ensure anything we do complies with ASIC's definition of 'on-market transactions.'

28. ASIC 'Market Supervision Update 60' provided amongst other things, information in relation to trading during on-market buy-backs. It noted that: 'On-market transactions' are:

- (a) trades (other than crossings) effected during trading hours by matching of trading messages; and
- (b) crossings during trading hours where the crossing was arranged solely by a participant, there has been no prearrangement between the principals and each principal is indifferent as to the identity of the other.

29. On 16 September 2021 at 12:47pm, the AWN executive emailed the Adviser a link to an additional update, being Market Supervision Update 46 stating:

'Hi [redacted], Here is some further clarification on the definition of 'special crossings' which are not allowed in an on-market buy-back.

It seems to imply that if a trade is entered into by matching of orders on the order book, then it won't be deemed a 'special crossing'.

As such, we are not necessarily saying it can't be done but I would appreciate your consideration of both of these ASIC market supervision updates – perhaps we can have another chat on this later today.'

30. On 16 September 2021 at 12:58pm, the AWN executive again queried the Adviser messaging a link to ASIC Media Release 19-207 'Finclear Execution pays \$70,000 infringement notice' regarding a pre-arranged trade in a buy-back, and stated:

'Hi [redacted] - not suggesting the circumstances are the same here because I don't know enough about how this works on your side, but just wanted to add this to the discussion. Let's chat later today on this if that works?'

31. On 16 September 2021 at 1:17pm the Adviser texted in response:

'I'm sure I know why they had trouble on this example. Happy to explain the differences how we will do this.'

32. On 17 September 2021, the Adviser:

- (a) arranged for an account with a brokerage rate of 0.5% (plus GST) to be opened for the Selling Client with Ord Minnett; and

- (b) using the discretion granted by the Selling Client with regards to the timing of placement of orders, transmitted an order on behalf of the Selling Client to the market to sell 143,750 shares at \$1.00 per share.

33. On 22 September 2021 at 10:48am, the Director emailed the Adviser asking:

'I was enquiring as to whether you have inveigled [AWN] into buying any of those shares as yet?'

34. At 11:23 am the Adviser responded:

'The short answer is YES. The reporting of the sale will go through as at the earliest time permissible. So it is a timing issue essentially. There is an ASX market rule around the Volume Weighted Average Price in a stock which can only be increased by a maximum of 5% on a rolling 5 day average. So there is a small chance your sale can make this parameter and be reported tomorrow, but I suspect the volume required may not get there and your sale will be reported this Friday. As soon as mathematically possible, we will report the sale. Hoping this gives you some comfort. Give me a call if you need any clarification.'

35. On 23 September 2021, a Microsoft Teams chat between various representatives of AWN stated as follows:

AWN first executive:	<i>"Is today d-day for [Selling Client] shares"</i>
AWN second executive:	<i>"Max. we can pay today is 98"</i>
AWN third executive:	<i>"If over 100k trade both today and tomorrow at 98 or above we should be able to take [Selling Client] out on Monday".</i>

36. On 23 September 2021 at 10:03am, 70,189 shares of the Selling Client's first parcel of shares offered in AWN were purchased at \$1.00 through the market by a third party. At 10:19am the Adviser using his discretion as to timing entered a second order on behalf of the Selling Client to sell 200,000 shares at \$1.00 per share.

37. On 23 September 2021 at 4:07pm a new ask was entered into the market by a third party to sell 500,000 shares at \$1.00 per share. This order had time priority over any further orders to sell shares at \$1.00, including those of the Selling Client not already entered. Those shares, if they remained on offer would need to be purchased before the Selling Client's additional shares could be purchased at \$1.00. That day, as part of the daily updates on the Buy-Back the impact of this order was discussed between an AWN executive and the Adviser. The Adviser did not recall the conversation. The AWN executive stated *'it looked like the strategy could be impacted'* by the ask of 4:07pm. The AWN executive stated that he was asked by the Adviser to help find other buyers to absorb some of the stock at that price.

38. Between 16 and 24 September 2021 (noting there were no purchases under the Buy-Back on 23 September 2021), Ord Minnett, using the discretion granted by AWN as to the timing and price of bids in conducting the Buy-Back:

- a) purchased more than 60% of shares in aggregate through this period at the highest price step permitted by Rule 7.33; and
 - b) paid an average price each day that was above the highest price paid by AWN the day prior.
39. On Friday 24 September 2021 at 3:54pm, the Selling Client's order within Ord Minnett's IRESS order records was amended from a limit instruction of \$1.00 to \$0.995 per share, without specific instructions of the Selling Client.
40. On Monday 27 September 2021, the maximum price permissible to buy AWN shares under the Buy-Back was \$0.995.
41. The buy-back laws and crossing rules require trades be conducted '*in the ordinary course of trading*' and '*without pre-arrangement*'. In respect of buy-backs, section 257B(6) of the Act defines an on-market buy-back:

'A buy-back is an on-market buy-back if it results from an offer made by a listed corporation on a prescribed financial market in the ordinary course of trading on that market.'

42. The ASX Market is a prescribed financial market for the purposes of the Act: see Regulations 1.0.02A.
43. ASIC Regulatory Guide 110: Share Buy-Backs, issued in July 2007, is a guide for companies, their advisers and investors involved in or affected by share buy-backs. RG 110.61 explains what is '*in the ordinary course of trading*':

'In Australia, this phrase means that the trading is in strict order of price and time priority, with indifference as to the identity of counterparties, and no pre-agreements or selection of counterparties: see Attorney-General (Vic) v Walsh's Holdings Ltd [1973] VR 137.'

44. In respect of crossings, ASX Operating Rule 4060 provides:

'A Crossing of Cash Market Products, Derivative Market Contracts or Combinations may be effected only in the circumstances set out in the Procedures, or, if it constitutes a Special Crossing in accordance with Rule [4810].'

45. ASX Operating Rule Procedure 4060 provides in relation to crossings in Cash Market Products and Cash Only Combinations:

1. Crossings during Open Session State

Crossings during Open Session State may be effected as follows.

- (i) ...
- (b) *Crossings using pre-existing Bid or Offer*

(i) *A Crossing can be effected by matching in a Trading Platform a Bid or Offer with a pre-existing Bid or Offer of the Trading Participant if the Trading Participant has not pre-arranged the entry of the Bids or Offers."*

46. On 27 September 2021, Ord Minnett executed a crossing of AWN shares between AWN and the Selling Client as follows:

- (a) Before the market opened, Ord Minnett had three asks in the market for the Selling Client all for \$1.00 being 73,561 shares (being the residual order from 17 September 2021 partially filled on 23 September 2021) and 2 separate orders of 200,000 shares each at \$1.00.
- (b) Before the market opened, Ord Minnett also had three bids in the market for AWN for 14,772 shares at \$0.98 (which was the priority bid), 50,000 shares at \$0.98 and 50,000 shares at \$0.97.
- (c) Between 09:43:37 and 09:55:47, Ord Minnett cancelled the asks for the Selling Client for 200,000, 73,561 and 200,000 shares at \$1.00.
- (d) At 09:56:22, Ord Minnett entered a new ask for the Selling Client for 500,000 shares at \$0.995.
- (e) At 10:00:09, Ord Minnett entered a new ask for the Selling Client for 1,573,561 shares at \$0.995.
- (f) At 10:00:10, the market having opened, AWN bought 46,900 shares at \$0.98 across four different trades. This meant that Ord Minnett still held the top two bids for AWN being 17,872 shares at \$0.98 and 50,000 shares at \$0.97.
- (g) At 10:00:15, Ord Minnett entered a new bid for AWN for 2,200,000 shares at \$0.985, immediately cancelled this bid and then re-entered a new bid for AWN for 2,196,640 shares at \$0.995, taking priority over the other two bids that Ord Minnett had for AWN.
- (h) This bid immediately crossed the spread and traded with the following asks, causing two price increases (previous traded price for AWN was at \$0.98):
 - (i) 6,501 shares at \$0.985;
 - (ii) 3,360 shares at \$0.985;
 - (iii) 7,411 shares at \$0.99;
 - (iv) 89,262 shares at \$0.99.
- (i) The bid then crossed with the asks for 500,000 shares and 1,573,561 shares at \$0.995 that Ord Minnett had entered on behalf of the Selling Client, causing a third price increase and resulting in the Selling Client selling 2,073,561 shares at \$0.995 (**Relevant Trades**).
- (j) This bid with the remaining volume of 19,905 shares remained in the market until it was eventually filled by a third party with a final trade at 10:03:04.
- (k) Ord Minnett entered new bids on behalf of AWN at \$0.995 which were quickly filled as follows:
 - (i) At 10:06:44, a bid for 10,000 shares at \$0.995 was filled at that price across a number of trades by 10:07:20;

- (ii) At 10:08:41, a bid for 8,641 shares at \$0.995 was fill across two orders (1,731 shares at \$0.98 and 6,910 at \$0.995) by 10:08:54;
 - (iii) At 10:27:21, a bid for 10,000 shares at \$0.995 was immediately filled from existing asks (4,957 at 0.98 and 5,043 at 0.995).
- 47. Ord Minnett booked the Relevant Trades to the Selling Client's account without charging any brokerage rather than the agreed 50 basis points of brokerage plus GST. Notably the net consideration payable to the Selling Client from the Relevant Trades at \$0.995 with no brokerage was the same outcome as if it had sold its shares at \$1.00 at the originally agreed brokerage rate of 15 September 2021.
- 48. Based on the facts as set out above, the MDP considered the orders placed in the market resulting in the Relevant Trades were:
 - (a) pre-arranged on or shortly after 15 September 2021, by or with the assistance of the Adviser acting as agent for both AWN and the Selling Client. The questions of the AWN executive on 15 and 16 September 2021 were all focused on 'pre-arranged' trades in a buy-back. The email of the Adviser to the Director of 22 September 2022 was not careless language of a busy broker as submitted by Ord Minnett but a confirmation of what had been pre-arranged and was to transpire. The conversation between the AWN executive and the Adviser on 23 September 2021 confirms the purchase of the Selling Client's shares under the Buy-Back was pre-arranged;
 - (b) entered as if having taken place on-market in the ordinary course of trade. Whilst impermissible in a buy-back, the true nature of how buyer and seller had come together to form the Relevant Trades should ordinarily have been reflected in the execution of a single special crossing, being above the minimum size. Instead, Ord Minnett:
 - i. placed the asks for the Selling Client at \$0.995 on 27 September 2021 knowing it would place a bid for AWN shortly after at a price and quantity, using its discretion, to result in the Relevant Trades; and
 - ii. placed the bid for AWN, using its discretion, about 4 minutes after the Selling Client's first ask and 6 seconds after the Selling Client's second ask at a price and quantity to match the existing priority sellers in the market at lower prices and match all the volume of the Selling Client's asks;
 - (c) not undertaken with indifference as to the identity of buyer and seller and were therefore not in compliance with ASX Operating Rule Procedure 4060; and
 - (d) facilitated by Ord Minnett not charging brokerage to the Selling Client so that AWN could purchase the Selling Client's shares when the maximum price allowable under the Buy-Back on 27 September 2021 was \$0.995.
- 49. The MDP did not consider it was necessary to establish a binding contract between the parties to find that the orders resulting in the Relevant Trades were pre-arranged. The MDP did not consider it was material that the Relevant Trades occurred at \$0.995

instead of \$1.00 noting the brokerage reduction which resulted in the same consideration being payable to the Selling Client.

50. The MDP considered that, as the Relevant Trades did not comply with the ASX crossing procedures having been pre-arranged and were not done with indifference as to the identity of the counterparties, the shares purchased by AWN under the on-market buy-back were not in the ‘*ordinary course of trading*’ as required by s257B(6) of the Act.

51. Rule 5.9.1 provides:

‘A Market Participant must not do anything which results in a market for a financial product not being both fair and orderly, or fail to do anything where that failure has that effect.’

52. The MDP considered that, when applying this rule, consideration should be given to the operation and intent of the ASX Operating Procedures and the buy-back laws.

53. The MDP considered that it has reasonable grounds to believe that Ord Minnett contravened Rule 5.9.1 by conducting the Relevant Trades which resulted in the market for AWN shares not being fair or orderly, as it:

- (a) conducted the Relevant Trades knowing them to be pre-arranged contrary to the ASX crossing procedures;
- (b) did not undertake the Relevant Trades in the ‘ordinary course of trading’ as required by s257B(6) of the Act;
- (c) created a misleading impression in the market that the trades executed between AWN and the Selling Client occurred as an ordinary crossing, when in fact the transactions were pre-arranged;
- (d) gave information to AWN that the Selling Client would sell all its shares for \$1.00;
- (e) gave information to one shareholder, the Selling Client, that was not available to others in the market, namely that AWN would pay \$1.00 per share for its shares under the Buy-Back when the market conditions and ASX Listing Rule 7.33 allowed it to do so;
- (f) gave preferential treatment to the Selling Client to participate in the Buy-Back. It used its discretion as to timing to submit the Selling Client’s orders first and then to submit AWN’s bid (in one case 4 minutes and the other case 6 seconds later) to ensure it matched all priority sellers and then matched the Selling Client’s asks in full at \$0.995. This resulted in the Relevant Trades occurring at the highest price offered under the Buy-Back up to that time and represented 65.6% of the total shares purchased under the Buy-Back and 52.4% of the maximum to be purchased (if it had not been cancelled later that day); and

- (g) acted to the detriment of other AWN shareholders who did not get the same opportunity to sell their shares into AWN's bid for 2,200,000 shares at \$0.995 (other than to participate in the small residual bid from the order).

The determination of penalty

54. In determining the appropriate penalty for each alleged contravention, the MDP considered the four key factors set out in *ASIC Regulatory Guide 216: Markets Disciplinary Panel (RG 216)*, namely:

- (a) the character of the conduct;
- (b) the consequences of the conduct;
- (c) the participant's compliance culture; and
- (d) remedial steps taken by the participant.

55. The MDP considers the following penalties are appropriate:

- (a) Rule 3.3.1(b) – \$111,000 or 500 penalty units
- (b) Rule 5.9.1 – \$777,000 or 3,500 penalty units

Penalty – First Alleged Contravention – Rule 3.3.1(b)

Character of the conduct – first alleged contravention

56. The MDP characterised Ord Minnett's first alleged contravention as a genuine error and inadvertent.

Consequences of the conduct

57. The alleged contravention did not have a significant impact on the market for AWN shares. While the purchases were at impermissible prices under the Buy-Back, the prices paid for the purchases were in line with other transactions in AWN shares undertaken by other parties that day. The VWAP for shares in AWN on 1 September 2021 was not materially higher than it would have otherwise been but for the impermissible transactions undertaken in the Buy-Back. There was no evidence of any loss to any other party as a result of the impermissible trades.

Compliance culture

58. The MDP considered that Ord Minnett did not have adequate operational controls in place to prevent or detect the first alleged contravention. Notably its compliance manual was silent as to the manner in which buy-backs were to be managed by the market participant. The MDP was informed that this was because it was rare for Ord Minnett to conduct on-market buy-backs for clients.

59. On being alerted to the contravention, the Adviser did not take any steps to alert Ord

Minnett's management or compliance to his error. Consequently, Ord Minnett did not take any remedial steps to extract AWN from its breach of ASX Listing Rule 7.33. As at 17 February 2023 Ord Minnett had not registered the event on its breaches or incident registers, nor updated its Compliance Manual, policies, or procedures. Ord Minnett submitted it would not conduct an on-market buy-back until it did so, following the conclusion of the MDP's process.

60. Ord Minnett has not been the subject of an adverse regulatory outcome from either ASIC or ASX in at least 10 years. This is a material mitigating factor.

Remedial steps

61. Ord Minnett was unable to remedy its breach, due to the Adviser's failure to draw the matter to management or compliance's attention. The MDP would expect an informed and pro-active market participant to have booked the impermissible purchases to its errors account from which it could be sold back into the market, entered the matter as an incident in its register, reviewed its policies and processes and updated its Compliance Manual accordingly. Further a check should have been taken as to whether the Adviser's error was a simple oversight or potentially a knowledge gap and taken appropriate steps to remedy the situation, among other steps available.
62. The Panel noted that Ord Minnett had placed an internal hold on conducting any on-market buy-backs and submitted it has drafted an additional compliance policy to be finalised at the conclusion of the hearing.

Penalties

63. The maximum penalty for a single contravention is 15,000 penalty units. The low range would be up to 5,000 penalty units. The MDP considered the contravention of Rule 3.3.1(b) to be in the low end of the low range.
64. The conduct wholly occurred after 13 March 2019. Therefore, the MDP considered the applicable penalty under the new penalty regime imposed by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*, which has significantly increased 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.
65. Having regard to the circumstances of the first alleged contravention, including it being assessed as a genuine error and inadvertent, the insignificant consequences that arose and the prior good regulatory standing of Ord Minnett within the last 10 years, the Panel was minded to recommend a penalty in line with that levied of Finclear for its breach of Rule 3.3.1(b) being \$20,000 or 3% of the then applicable maximum penalty.
66. The Panel however noted significant differences between the actions of Finclear in response to its alleged relevant contravention and Ord Minnett. Notably Finclear proactively contacted ASIC regarding the issue seeking guidance to resolve the matter, self-reported its breach and reversed the impermissible trade on the same trading day. Ord Minnett did not do any of those things, in large part because the Adviser had not

advised management or compliance of his error. The unresolved impermissible trades left Ord Minnett's client in breach of ASX Listing Rule 7.33 and open to a potential adverse regulatory action. Those differences coupled with the failure to have an appropriate process in place to detect and respond to the breach, without the need to rely upon the Adviser, led the MDP to decide that a total penalty of 3.3% of the maximum penalty applicable under the new penalty regime being 500 penalty units was appropriate, even though it calculates to be a meaningful uplift in financial impost.

67. The amount of one penalty unit is \$222 at the time the alleged contravention occurred on 1 September 2021.
68. Accordingly, the total penalty for the alleged contraventions of Rule 3.3.1(b) is **\$111,000**.

Penalty – Second Alleged Contravention - Rule 5.9.1

Character of the conduct

69. The MDP characterised the Adviser's conduct as intentional in that Ord Minnett was involved in pre-arranging the orders resulting in the Relevant Trades and intended the Relevant Trades to occur. The contravening conduct is noted to be the result of the actions of a single authorised representative who at least initially may have sought to undertake the Relevant Trades with good intent, having proactively asked whether it was permissible to conduct a crossing in a buy-back of Ord Minnett's compliance department.
70. The MDP does not consider that Ord Minnett intended to breach the Rules. Ord Minnett considered its obligations regarding crossings in buy-backs, noting it was a service it rarely provided. Unfortunately, Ord Minnett failed to adequately investigate the question of crossings within a buy-back and overlooked key market supervision updates and recent MDP decisions, which its client was able to readily identify, despite it not being a market participant.
71. The conduct was serious given the nature of the prohibition. It is critical to the operation of the markets that they be *orderly and fair*. Pre-arranging crossings contrary to the Rules creates unfairness in the market. This is particularly so in an on-market buy-back where all eligible shareholders should have an equal opportunity to participate.

Consequences of the conduct

72. Ord Minnett did not give AWN shareholders an adequate opportunity to participate in the Buy-Back at the highest price offered of \$0.995. Until the Relevant Trades, no shares had been purchased under the Buy-Back at this price and after filling the Selling Client's ask, only the small residual number of shares and three further smaller bids were placed at this price. Each of these bids was quickly filled. In total, Ord Minnett purchased 2,115,419 AWN shares under the Buy-Back at \$0.995, but only 41,858 (2%) of these were available to shareholders other than the Selling Client.
73. While a significant number of shares were bought under the Buy-Back from other

shareholders prior to the Relevant Trades, they were at lower prices. AWN had not announced its intention to pay up to \$1.00 in its Buy-Back. AWN shareholders, other than the Selling Client, were disadvantaged as they may not have sold into the Buy-Back at lower prices if they had been informed AWN would pay more.

74. The unfairness of the conduct also has the potential to damage public confidence in the market more broadly.
75. The MDP did not find that Ord Minnett knew the Buy-Back would be cancelled after 27 September 2021. Any additional unfairness resulting from the cancellation of the Buy-Back was not as a result of Ord Minnett's conduct, although if it had continued AWN was only able to acquire a further 800,000 shares or 20% of the upper limit of the originally proposed Buy-Back.
76. The MDP acknowledges that Ord Minnett did not obtain any material commercial benefit from the conduct.

Compliance culture

77. The MDP considered that Ord Minnett did not have adequate compliance procedures to manage the Buy-Back or any buy-back generally. It did not have appropriate arrangements in place to manage the inherent conflict of interests that arose from the Adviser acting for both buyer and seller, particularly when granted discretion as to entry of orders of both clients. Its compliance manual was silent as to buy-backs.
78. Prior to the Relevant Trades the Adviser, and therefore Ord Minnett, courtesy of the queries of AWN's executives, was alerted to ASIC's guidance regarding buy-backs and the Finclear Decision. Despite this, the Adviser on behalf of Ord Minnett proceeded to conduct the Relevant Trades.
79. While the Adviser made a proactive query of Ord Minnett's compliance department as regards conducting crossings during a buy-back, the guidance provided only discussed standard crossings. The Adviser was deficient in not forwarding the further queries of AWN's executive to Ord Minnett's compliance department, which included links to pertinent guidance and decisions relevant to what was being contemplated.
80. Without the benefit of considering the client's communications with the Adviser, Ord Minnett may have genuinely believed it was allowed to conduct the Relevant Trades in the way it did, but the MDP considered Ord Minnett was reckless in its inadequate consideration of its obligations and in its decision to proceed with conducting the Buy-Back without suitable controls and processes in place.
81. At 3.36pm on 27 September 2021, being the day of the Relevant Trades, ASIC emailed Ord Minnett querying the identity of the Selling Client and seeking an explanation/chronology of events in relation to the Relevant Trades. That ASIC had queried the trades on the day they were undertaken should have been cause for concern and spurred a meaningful review by Ord Minnett.
82. On 29 September 2021 Ord Minnett responded. Much of the content of the response was limited to publicly available information.

83. On 20 July 2022, ASIC issued a notice of direction to Ord Minnett, pursuant to section 912C of the Act, requesting a written statement from it addressing queries in relation to the Buy-Back.
84. On 25 July 2022, Ord Minnett provided its response to the 912C notice stating, among other things, that Ord Minnett had complied with Market Integrity Rule 5.9.1 which *'was obvious and warrants no further explanation'*. The Response was provided by an individual who had not, at that time, reviewed the Adviser's emails or messages or spoken to the Selling Client.
85. Consequently, Ord Minnett failed to recognise the contraventions or implement any changes to its systems to prevent or mitigate the risks of further breaches. Ord Minnett submitted it has refused to conduct any further buy-backs pending the outcome of this matter by the MDP.
86. Despite the above compliance deficiencies and as stated at 60 above, Ord Minnett has not been the subject of an adverse regulatory outcome from either ASIC or ASX in at least 10 years. This was a material mitigating factor.

Remedial steps

87. Ord Minnett submitted it will, with the benefit of the Panel's findings and reasons finalise its compliance policy for the management of future buy-backs, currently in draft form, addressing matters including:
- a) approval requirements to proceed with a buy-back before agreeing to conduct such activity on behalf of an issuer;
 - b) segregation so that conduct of the buy-back activity is undertaken by a select team;
 - c) provision of the buy-back policy to the team to ensure awareness of ASIC MIR requirements and Operating Rule Requirements (ASX / CBoe), including prohibited activity (special crossings and pre-arranged trades, among other matters);
 - d) adding the buy-back stock to a watch list of products in IRESS/IOS so that standard client orders route to the operators for review and management prior to entry into the market (separate from the team managing the buy-back on behalf of the issuer);
 - e) requirement to not give sell side advice in relation to the relevant financial products whilst acting for the issuer in conducting the buy-back;
 - f) implementing adequate arrangements to manage any potential or actual conflicts of interests prior to undertaking the buy-back;
 - g) notification requirements including timeliness of reporting to ensure appropriate management of issues;
 - h) training of booking staff to check for pricing prior to issuing a confirmation;
 - i) nominating an appropriate contact person for queries and to conduct regular reviews of the trading throughout the buy-back period; and
 - j) refresher training for dealing and advisory staff as to those compliance requirements.
88. Upon becoming aware of the issue, Ord Minnett has declined to participate in other

buy-backs and as detailed above drafted an additional compliance policy, but as at 17 February 2023 had not otherwise taken any remediation steps, choosing to wait the outcome of this matter by the MDP.

Penalties

89. The maximum penalty for a single contravention is 15,000 penalty units. The medium range is between 5,000 and 10,000 penalty units. The MDP considered the alleged contravention of Rule 5.9.1 would be in the medium range but considered this should be reduced to the low range due to Ord Minnett's good compliance history.
90. Having regard to the circumstances of the alleged contravention, including the:
- (a) intentional and serious nature of the conduct (the fair and orderly gatekeeper obligations are paramount), the absence of relevant compliance policies and controls in order to appropriately conduct an on-market buy-back and the deficient compliance investigation; as may be weighed against
 - (b) the very limited time period within which the alleged contravening conduct occurred, that the contravening actions were those of a single authorised representative and having due regard to Ord Minnett's reasonably long compliance history of good standing,

the MDP decided that a total penalty of 3,500 penalty units was appropriate.

91. The amount of one penalty unit is \$222 at the time the alleged contravention occurred on 27 September 2021.
92. Accordingly, the total penalty for the alleged contraventions of Rule 5.9.1 is **\$777,000**.
93. This makes the total penalty for the two alleged contraventions **\$888,000**.

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 3.3.1(b) and Rule 5.9.1 of the Rules, is \$3,300,000 per contravention.

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 as at the time of the conduct to which this infringement notice relates was \$222: see subsection 4AA(1) of the Crimes Act 1914.

The maximum pecuniary penalty that a Court could order Ord Minnett to pay for contravening subsection 798H(1) of the Act (a civil penalty provision), by reason of contravening Rule 3.3.1(b) and Rule 5.9.1 of the Rules, is determined by section 1317G of the Act.

Note: Under subsections 1317G(2) and (4), the maximum pecuniary penalty per contravention is the greatest 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, Ord Minnett must pay the penalty within the compliance period. The compliance period starts on the day on which this notice is given to Ord Minnett 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:

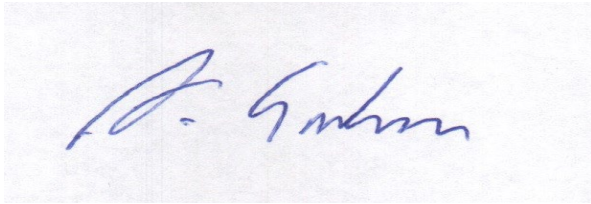
- (a) any liability of Ord Minnett to the Commonwealth for the alleged contraventions of subsection 798H(1) of the Act is discharged; and
- (b) no civil or criminal proceedings may be brought or continued by the Commonwealth against Ord Minnett for the conduct specified in the infringement notice as being the conduct that made up the alleged contraventions of subsection 798H(1) of the Act; and
- (c) no administrative action may be taken by ASIC under sections 914A, 915B, 915C or 920A of the Act against Ord Minnett 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) Ord Minnett is not taken to have admitted guilt or liability in relation to the alleged contraventions; and
- (e) Ord Minnett is not taken to have contravened subsection 798H(1) of the Act.

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

Ord Minnett 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 MDP 1025/22.

**Anthony Graham**

Counsel to the Markets Disciplinary Panel

with the authority of a Division of the Australian Securities and Investments Commission

Note: Members of the Markets Disciplinary Panel constitute a Division of ASIC as delegates of the members of the Division for the purposes of considering the allegations covered by this notice.