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Markets Disciplinary Panel Secretariat
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To: Markets Disciplinary Panel Secretariat

Markets Disciplinary Panel Regulatory Guide Consultation (CP 306)

The Australian Financial Markets Association (AFMA) welcomes the opportunity to make comment on Consultation Paper 306 Markets Disciplinary Panel (CP 306).

Summary

AFMA agrees with the premise of CP 306 that it is timely to review the regulatory guidance relating to the Market Disciplinary Panel (MDP) in the light of more than seven years' experience and seek to streamline processes. Drawing attention to the MDP processes is most useful and provides the opportunity to reassess what matters should be dealt with by the MDP based on experience. AFMA considers that CP 306 is not just proposing changes at the margins but is setting forth two points of fundamental change. Firstly, the proposed role of an internal ASIC delegate as substitute decision-maker. Secondly, the proposal that the MDP no longer give reasons for decisions as a matter of course.

The most significant issue in our view relates to the blurring of the MDP's role as a body for making determinations in cases where ASIC staff, acting as internal delegates, are decision makers in relation to less serious matters. It is our view that the functions should be transparently delineated and only matters actually considered by MDP members should be described as having gone through the MDP process. The proper point of consideration relates to what matters should be referred to the MDP and what matters would be dealt with by an ASIC staff related process.

Our comments reflect on the importance of providing reasons for decisions as a matter of course and also suggest consideration also be given to the consequences of the penalty reform legislation currently before Parliament.

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Peer review supported

AFMA continues to support the principle of peer review as the means to consider possible Market Integrity Rules (MIR) contraventions assessed as appropriate for infringement notice assessment. The work of the MDP is valued by AFMA members and the indication in CP 306 that no fundamental change to peer review is proposed is welcomed. The desire by ASIC to see that MDP processes deliver timely completion of matters is shared by our members and the rationalisation of the regulatory guidance in the form of a simplified RG 216 is a welcome development.

Comments in response to Questions

Proposal B1 *- ASIC proposes to expressly state the key factors the MDP takes into account in determining penalties and what the MDP considers to be mitigating or aggravating factors.*

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

> Table 1 on draft RG 216 setting out the Key Factors does provide a simplified presentation of the factors compared to the current guide. The reference to "nature of the conduct" as a consideration does not convey any additional meaning.

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

> The key factors in why conduct is referred to the MDP should also be articulated.
>
> As a threshold matter, it should be more clearly explained that the referral of a matter to the MDP by ASIC is on the basis of a determination that there is evidence of a contravention and that the matter warrants an infringement notice rather than civil proceedings. As part of this exposition it should be made clear to the reader the importance of the distinction between 'reasonable grounds to believe' in MDP decision-making versus the 'balance of probabilities' evidential burden applying in civil penalty cases as a key factor in the referral assessment process by ASIC enforcement staff. As is explained by reference in RG 216.72 to the decision in *George v Rockett* by the High Court this is a very low evidential threshold, merely being the inclination of the mind towards assenting to, rather than rejecting, a proposition. This is a key element of guidance not just to the decision-makers but also in understanding the referral process by the lay reader.

Proposal B2

We propose that where a matter referred to the MDP results in an infringement notice being given, the MDP will not give separate reasons for the decision unless requested to do so by the market participant within seven days of being given the infringement notice.

B2Q1 *Do you agree that, where an infringement notice is given by the MDP, the infringement notice itself is a sufficient vehicle for explaining the MDP's findings and conclusions?*

> No.

The provision of reasons is a matter of great importance to market participants. AFMA members see great value as a source of instruction in having reasons for decisions. Given the heightened level of focus on market conduct behaviours, the reasons provided for decisions, particularly as they reflect the thinking of experienced industry people, are of considerable instructional value as they represent real world scenarios. It educates and provides guidance to market participants on the MIR, promotes confidence in the MDP's decision-making process as being open, fair and transparent, and promotes accountability.

It is also fundamental to the principles of natural justice, which are no doubt familiar to the Chief Legal Office so do not need to be expounded upon, that reasons be given as a matter of process and not just on request. More broadly, current community standards expect this level of transparency and accountability of both the regulators and the industry.

As regard the goal of administrative convenience to ASIC, our proposal to look at whether some matters need to be referred to the MDP would also address this issue by reducing the volume of work that needs to be done by the MDP.

B2Q2 *Do you agree that seven days would be sufficient for the market participant to submit a request for separate reasons for the decision?*

No.

While our position is that reasons should be provided publicly as a matter of course, seven days is not considered to be sufficient time for a recipient to make such a request as internal decision making processes in firms can typically take longer than this.

Proposal B3

We propose that where a matter referred to the MDP does not result in an infringement notice being given, the MDP will not give reasons for the decision unless requested to do so by the market participant within seven days of receiving written notification of the MDP's decision.

B3Q1 *Do you agree that, where the MDP makes no adverse finding, reasons for the decision should only be provided when requested by the market participant within seven days of being informed of the MDP's decision?*

There has been a longstanding desire expressed through the relevant AFMA equities committees for reasons to be provided for all decisions, including those where the decision was not to impose an infringement notice. This is for the same reasons given in answer to question B2Q1.

Proposal B4

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

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

No.

The impact of contraventions by market operators on market participants is of high importance to the industry. As users of the services of market operators MDP members are especially well placed to objectively assess the factors that go into determining a penalty. MDP panel members have the appropriate market and professional experience to make determinations involving alleged contraventions of the market integrity rules by market operators. MDP members are at the cutting edge of market and industry changes and they understand market conventions through practical application. Therefore, we believe the MDP are best equipped to determine matters against market operators.

Proposal B5

We propose that matters involving alleged contraventions of Tier 1 rules by market participants will generally not be referred to a sitting panel of the MDP but, instead, will be determined by a single ASIC delegate. We propose this approach irrespective of whether the matter is contested by the market participant.

B5Q1 *Should a single delegate, rather than a three person sitting panel, be used for matters only involving Tier 1 rules?*

No.

In considering the substantive value of the MDP as a peer review body we have given thought to the underlying principles relating to an ASIC internal delegate performing the function of the MDP in respect of Tier 1 contraventions. The performance of this function by an ASIC staff member in the guise of the MDP is not agreed to.

We emphasise that AFMA is not calling into question the model where conduct that would be considered to be at the lower end of the spectrum of seriousness is dealt with by an ASIC staff member. Rather this is a question of the appropriateness of presenting matters as being handled by the MDP when an ASIC internal delegate is actually performing the function of making a decision rather than a panel of peers.

The internal administrative analysis leading to this proposal appears to be flawed. The administrative goal stated in CP 306 is to streamline procedures. This situation arises because MIR contraventions not justifying referral to the civil penalty legal process go to the MDP. If the argument put forward in CP 306 is accepted that there are a number of offences in the so-called Tier 1 group that do not require peer review expertise then the logical solution is not to refer them to the MDP at all.

B5Q2 *Are there any Tier 1 rules that would be more appropriately heard by a three-person sitting panel?*

Our previous responses suggest that ASIC should do further thinking about what matters are referred to the MDP at a threshold level - if matters will in practice be dealt with by an ASIC internal delegate then they should not be presented as being the result of peer review. Given that the administrative arrangements surrounding the MDP are entirely within the scope of ASIC's discretionary powers such change is easy to implement.

Matters that call into question professional conduct judgment should be reviewed by the MDP. Contraventions which relate to just a simple fact situation can be dealt with outside the MDP process. The answer below to question B5Q3 amplifies this point.

Penalties and tiering - Table 2

There is uncertainty surrounding the tiering structure adopted for the indicative penalty ranges set out in Table 2 of draft RG 216. We refer you to the implications of *Treasury Laws Amendment (ASIC Enforcement) 2018 Bill* (the Bill) and supporting Explanatory Memorandum (EM) currently before Parliament. Under the *Corporations Act,* ASIC has the ability to make a number of rules including market integrity rules under section 798G of the Corporations Act. ASIC may make rules in relation to market integrity rules and the penalty amount cannot exceed the prescribed limit. Subsection 798G(2) of the Corporations Act currently says "The market integrity rules may include a penalty amount for a rule. A penalty amount must not exceed $1,000,000."

Under the amending Bill these rules fall under the civil penalty provisions and therefore are subject to the new maximum pecuniary penalty formula. The Bill makes consequential amendments to remove the existing penalty amounts. Schedule 1 of the Bill at item 38 says "Subsection 798G(2) Repeal the subsection." While ASIC will still be able to make rules, the maximum penalty amounts will now be set in the legislation. Infringement notice penalty amounts remain unchanged for these rules for individuals under a global limit. Infringement notice penalty amounts for bodies corporate are being made more proportionate to the new civil penalty increases for bodies corporate. The infringement notice amounts are the maximum penalty that ASIC can specify in an infringement notice for an alleged contravention of a rule. ASIC may, in its discretion, specify the penalty (if any) payable up to the maximum for each alleged contravention [see the Bill Schedule 1, item 39]. Table 1.8 in the EM sets out infringement penalty amounts for MIR as follows:

- Individual penalty - 3000 penalty units [3,000 x $210 = $630,000]; and
- Body corporate penalty – 15,000 penalty units [15,000 x $210 = $3,150,000].

The practical effect of these amendments will be that individual maximum penalties will no longer be set by ASIC at a granular level but will be subject to the global maximums described above. As a consequence penalty range tiers will no longer exist, which means this will no longer serve as a simple rule of thumb for assessing the seriousness of a contravention with regard, for example, to referring

to a matter as being Tier 1. While alternative means for achieving the same outcome can be envisaged, ASIC should include this rationale in RG 216.

In summary, we believe that given the legislative penalties reform further thought will have to be given to the segmentation of contraventions, their presentation and recommendations with regard to appropriate fines.

B5Q3 *If a single delegate model is used for matters only involving Tier 1 rules, should the delegate be an internal ASIC delegate or an MDP member?*

Our fundamental point on this question is that a decision by an ASIC staff member should not be presented as if it were made by a peer review process. If a decision is to be presented as that of the MDP it should be made by MDP members.

If a matter involves purely procedural facts, such as the example cited in relation to Rule 2.4.21, where no industry professional experience is required, we agree that the matter could be handled by an ASIC staff member outside the MDP process. On the other hand, if the matter involves an element of professional judgment or industry practice then it should be dealt with by the MDP.

Proposal B6

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

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

Yes.

As court enforceable undertakings typically result from a process of extended engagement by ASIC with the affected party on a bilateral basis they are not suited to the process of decision-making by the MDP.

On the other hand, enforceable undertakings often address many practical matters of dealing with systems, supervision, training and operational processes where industry experience in getting settings right could be of high real value to achieve outcomes which are of substance rather than just form. Therefore, AFMA agrees that an MDP member should be used in a consultancy or advisory capacity.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au if further clarification or elaboration is desired.

Yours sincerely

David Love
General Counsel & International Adviser