



## ASX Circular

Date: 7 April 2010

**Key topics**

1. Merrill Lynch Equities (Australia) Limited

**Reading List**

Client Advisers  
 Compliance Managers  
 DTR Operators  
 Managing Directors  
 Office Managers  
 Operations Managers (back office)

**Contact**

Angus Cameron

**Telephone**

(02) 9227 0329

ASX Limited  
 ABN 98 008 624 691  
 Exchange Centre  
 20 Bridge Street  
 Sydney NSW 2000  
 PO Box H224  
 Australia Square NSW 1215

Internet: <http://www.asx.com.au>

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## DISCIPLINARY MATTERS

The ASX Disciplinary Tribunal ('the Tribunal') has determined the following:

Merrill Lynch Equities (Australia) Limited ('MLEA') has been fined a total of \$160,000 (plus GST) for various contraventions of the ASX Market Rules. The misconduct involved failing to report transactions in accordance with the requirements under ASX Market Rules and Procedures and failing to ensure that certain client orders were directed through the correct Open Interface Device, in that incorrect Clearing Participant IDs were reported such that they could not be directed to the Relevant Clearing Participant.

The determination of the Tribunal is summarised as follows:

**Contraventions 1 - 15: ASX Market Rule 16.12.3 (Procedures for reporting)**

- On fifteen occasions, between 1 August 2007 and 19 August 2008, MLEA failed to report each transaction by the time and/or in the manner set out in the Procedures.

For these contraventions the Tribunal imposed a penalty of \$150,000 (plus GST).

**Contravention 16: ASX Market Rule 5.2.4 (Allocation of client orders)**

- On 9 September 2008 MLEA failed to ensure that certain client orders were directed through the correct Open Interface Device which meant the transactions could not be directed to the Relevant Clearing Participant.

For this contravention the Tribunal imposed a penalty of \$10,000 (plus GST).

Total penalty imposed: \$160,000 (plus GST)

The Tribunal, ASX and MLEA are cognisant of the complexity of the contraventions considered in this Determination. The circumstances of the contraventions are set out in Attachment A.

MLEA indicated at an early stage that it would not contest the proceedings but did not agree with ASX regarding the appropriate level of penalty. MLEA cooperated fully with ASX in the investigation of these matters.

The Tribunal noted the following:

**Contraventions 1 to 15 - ASX Market Rule 16.12.3 ('Reporting Contraventions')**

The Tribunal found that the particular factual circumstances of each of the Reporting Contraventions meant that the misconduct varied in seriousness. For example, the contraventions involved varying degrees of lateness regarding the reporting requirements.

The Tribunal had regard to the purpose of ASX Market Rule 16.12.3 in ensuring that transactions executed for overseas clients or otherwise under late trading rules are reported to the market before market open, so that the market is informed as to activity which may have occurred since the previous trading close. The total sanction imposed reflects the Tribunal's view of the seriousness of these contraventions.

The systemic nature of these breaches was relevant as an aggravating factor when considering an appropriate penalty.

The Tribunal did not consider that Rule 2.4.3 (Penalty where conduct arises from the same circumstances) in the ASX Disciplinary Processes and Appeals Rulebook applied to the fifteen reporting contraventions.

The Tribunal noted that the contraventions involved substantially similar conduct however, while a number of the contraventions occurred on the same day (contraventions 2, 3 and 4 occurred on 30 January 2008; contraventions 7 and 8 occurred on 18 March 2008; and contraventions 9, 10, 11, and 12 occurred on 28 March 2008), the remainder of the breaches occurred on different days during different months. For the most part, the breaches involved discrete courses of conduct. Of those breaches that occurred on the same day, the same security (BHP) was traded in contraventions 2 and 3 only.

It may be that Rule 2.4.3 has some limited application when considering penalty for those contraventions that occurred around the same time or involved what the Tribunal considers to be a single course of conduct, such as the trading of the same security on the same day. This would limit the maximum penalty that the Tribunal could impose in respect of those contraventions only. It does not limit the maximum penalty that was available to be imposed for all 15 Reporting Contraventions.

The Tribunal considered the appropriateness of the aggregate sanction imposed for the Reporting Contraventions, as well as the totality of the sanction imposed for all contraventions.

In considering appropriate sanction, the Tribunal had regard to the disciplinary history of MLEA and to previous contraventions of ASX Market Rule 16.12.3. Importantly, in the Tribunal's view, MLEA conducted internal training to ensure that its employees were made aware of their responsibilities and obligations regarding ASX Market Rule 16.12.3. The Tribunal recognises this as an important consideration since one of the primary purposes of the imposition of sanctions is to deter future contraventions.

#### Contravention 16 - ASX Market Rule 5.2.4 ('Clearing ID Contravention')

The Tribunal categorises the misconduct as a Level 1 Contravention. The applicable penalty range is a censure to \$20,000 (plus GST).

The Tribunal noted the importance of ASX Market Rule 5.2.4 that ensures all orders are directed to the correct Open Interface Device. The Tribunal accepts that the misconduct was an isolated incident and that remedial action was taken to prevent a recurrence of the breach. It was also noted that ASX identified the breach.

In the circumstances the Tribunal considers that a fine of \$10,000 (plus GST) is appropriate for the Clearing ID Contravention.

#### Deterrence

The Tribunal considers that this sanction sends an appropriate regulatory message to the wider market and MLEA. An important function of the ASX is to maintain the reputation of the market and promote confidence in the integrity of the market and facilities operated by ASX. The contraventions in this matter had the potential to undermine the integrity of the market and the level of sanction must take that into account.

For the reasons above the Tribunal has imposed a fine on MLEA in the amount of \$150,000 (plus GST) for the reporting contraventions of ASX Market Rule 16.12.3 and \$10,000 (plus GST) for a contravention of ASX Market Rule 5.2.4.

In making this determination, the Tribunal has borne closely in mind the overarching purpose of the ASX Market Rules and the place that those Rules have in the fulfilment of the obligations of a market licensee under the Corporations Act to do all things necessary to ensure that the market is a fair, orderly and transparent market.

## Disciplinary Tribunal Sanction Guidelines

As the contravening conduct straddled the effective date 31 March 2008, that being the effective time under the ASX Disciplinary Processes and Appeals Rulebook, the Tribunal referred to the sanction guidelines contained in both Annexure A to the Rulebook and in Guidance Note 18 in making its determination as to sanction in this matter.

In accordance with the sanction guidelines, the Tribunal determined that sanction to be imposed in regards to the fifteen Reporting Contraventions should be determined in aggregate and determined \$150,000 as an appropriate sanction in the circumstances.

The Tribunal considered that contravention 16 was a Level 1 Contravention of Concern for which the applicable penalty range is a censure to \$20,000 (plus GST). The Tribunal considered the aggravating and the mitigating circumstances in this matter, and determined that a fine of \$10,000 was an appropriate sanction in the circumstances.

The Tribunal considered the totality of the fine imposed for the 16 contraventions and is satisfied that the correct message has been sent to the market to deter future misconduct of a similar kind.

#### Contravention 1 – 1 August 2007

During the Close Session State on the morning of 1 August 2007 MLEA entered into a Crossing of 450,000 fully paid ordinary shares of Perseverance Corporation Limited ('PSV') at \$0.15.

The transaction was a Crossing during overnight trading within the meaning of ASX Market Rule 17.7.

MLEA was required to report the Crossing of 450,000 PSV by 09:45 on 1 August 2007.

MLEA reported the Crossing of 450,000 PSV at 11:01:35 on 1 August 2007.

#### Contravention 2 – 30 January 2008

Prior to the commencement of the Open Session State on 30 January 2008, MLEA entered into a Crossing of 47,600 fully paid ordinary shares of BHP Billiton Limited ('BHP') at \$37.00.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 47,600 BHP by 09:45 on 30 January 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 47,600 BHP at 09:50:13 on 30 January 2008 in conjunction with Condition Code 'LT'.

#### Contravention 3 – 30 January 2008

Prior to the commencement of the Open Session State on 30 January 2008, MLEA entered into a Crossing of 78,000 BHP at \$36.66.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 78,000 BHP by 09:45 on 30 January 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 78,000 BHP at 09:51:37 on 30 January 2008 in conjunction with Condition Code 'LT'.

#### Contravention 4 – 30 January 2008

Prior to the commencement of the Open Session State on 30 January 2008, MLEA entered into a Crossing of 50,000 fully paid ordinary shares of Paladin Energy Limited ('PDN') at \$4.71.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 50,000 PDN by 09:45 on 30 January 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 50,000 PDN at 09:52:19 on 30 January 2008 in conjunction with Condition Code 'LT'.

#### Contravention 5 – 5 February 2008

During the Adjust Session State on 5 February 2008, MLEA entered into a Crossing of 46,414 fully paid ordinary shares of Macquarie Infrastructure Group ('MIG') at \$3.03.

At 16:12:00 on 5 February 2008 MLEA reported a Crossing of 46,414 MIG at \$3.03 in conjunction with Condition Code 'LT'.

The transaction was an overnight transaction within the meaning of ASX Market Rule 16.3.10, transacted during the Adjust Session State.

In addition to reporting the transaction immediately in the Trading Platform, MLEA was required to forward a summary email from MLEA detailing the purposes of the transaction to ASX Market Control by 18:00 on 5 February 2008.

MLEA failed to forward a summary email to ASX Market Control by 18:00 on 5 February 2008 detailing a Crossing of 46,414 MIG.

## Contravention 6 – 17 March 2008

Prior to the commencement of the Open Session State on 17 March 2008, MLEA entered into a Crossing of 50,000 fully paid ordinary shares of Equinox Minerals Limited ('EQN') at \$5.757.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 50,000 EQN by 09:45 on 17 March 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 50,000 EQN at 11:00:58 on 17 March 2008 in conjunction with Condition Code 'LT'.

## Contravention 7 – 18 March 2008

Prior to the commencement of the Open Session State on 18 March 2008, MLEA entered into a Crossing of 90,000 fully paid ordinary shares of Lihir Gold Limited ('LGL') at \$4.369.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 90,000 LGL by 09:45 on 18 March 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 90,000 LGL at 10:02:22 on 18 March 2008 in conjunction with Condition Code 'LT'.

## Contravention 8 – 18 March 2008

Prior to the commencement of the Open Session State on 18 March 2008, MLEA entered into a Crossing of 50,000 EQN at \$5.617.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 50,000 EQN by 09:45 on 18 March 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 50,000 EQN at 10:08:44 on 18 March 2008 in conjunction with Condition Code 'LT'.

## Contravention 9 – 28 March 2008

Prior to the commencement of the Open Session State on 28 March 2008, MLEA entered into a Crossing of 30,000 BHP at \$35.956.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 30,000 BHP by 09:45 on 28 March 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 30,000 BHP at 10:35:06 on 28 March 2008 in conjunction with Condition Code 'LT'.

## Contravention 10 – 28 March 2008

Prior to the commencement of the Open Session State on 28 March 2008, MLEA entered into a Crossing of 100,000 LGL at \$3.548.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 100,000 LGL by 09:45 on 28 March 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 100,000 LGL at 10:36:44 on 28 March 2008 in conjunction with Condition Code 'LT'.

## Contravention 11 – 28 March 2008

Prior to the commencement of the Open Session State on 28 March 2008, MLEA entered into a Crossing of 200,000 fully paid ordinary shares of Resmed Inc. ('RMD') at \$4.518.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 200,000 RMD by 09:45 on 28 March 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 200,000 RMD at 10:37:16 on 28 March 2008 in conjunction with Condition Code 'LT'.

#### Contravention 12 – 28 March 2008

Prior to the commencement of the Open Session State on 28 March 2008, MLEA entered into a Crossing of 45,600 fully paid ordinary shares of Sims Metal Management Ltd ('SGM') at \$29.056.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 45,600 SGM by 09:45 on 28 March 2008 in conjunction with Condition Code 'OS'.

MLEA reported the Crossing of 45,600 SGM at 11:41:15 on 28 March 2008 in conjunction with Condition Code 'LT'.

#### Contravention 13 – 16 May 2008

During the Close Session State on the morning of 16 May 2008, MLEA entered into a Crossing of 111,000 BHP at \$47.837.

The transaction was a Crossing during overnight trading within the meaning of ASX Market Rule 17.7.

MLEA was required to report the Crossing of 111,000 BHP by 09:45 on 16 May 2008.

MLEA reported the Crossing of 111,000 BHP at 09:48:56 on 16 May 2008.

#### Contravention 14 – 18 June 2008

During the Close Session State on the morning of 18 June 2008, MLEA entered into a Crossing of 7,573 fully paid ordinary shares of Orica Limited ('ORI') at \$29.90.

The transaction was a Crossing during overnight trading within the meaning of ASX Market Rule 17.7.

MLEA was required to report the Crossing of 7,573 ORI by 09:45 on 18 June 2008.

MLEA reported the Crossing of 7,573 ORI at 09:48:29 on 18 June 2008.

#### Contravention 15 – 19 August 2008

Prior to the commencement of the Open Session State on 19 August 2008, MLEA entered into a Crossing of 20,000 BHP at \$37.67.

The transaction was a Crossing prior to the commencement of the Open Session State involving an overseas resident client on both sides of the transaction within the meaning of ASX Market Rule 17.6.

MLEA was required to report the Crossing of 20,000 BHP by 09:45 on 19 August 2008.

MLEA reported the Crossing of 20,000 BHP at 12:10:48 on 19 August 2008.

#### Contravention 16 – 9 September 2008

On 4 September 2008 Clarity Capital became a Direct Market Access client of MLEA.

On 9 September 2008 MLEA, on behalf of Clarity Capital, placed 10 Orders in which the Clearing Participant ID was incorrectly entered as 'ML'. The Clearing Participant ID field should only contain a numerical reference. In this case the correct Clearing Participant ID was '3'.

The 10 Orders resulted in 10 Market Transactions which were subsequently cancelled by ASX Market Control when ASX's systems would not recognise the participant ID.