

# Fact sheet: ASX's process for handling reports of misconduct by Participants



The purpose of this document is to outline the process ASX Limited ('ASX') follows when it receives a complaint, tip-off or other communication (a '**report of misconduct**') from a person (an '**informant**') alleging that a broker, clearer or other participant in an ASX market or clearing and settlement facility (a '**participant**') has engaged in some form of misconduct.

## 1. ASX's FAQs on reporting misconduct

Before an informant submits to ASX a report of misconduct by a participant, ASX recommends that they first read the *Reporting Misconduct FAQs* on ASX's website at:

<https://www2.asx.com.au/about/contact-asx/report-misconduct/reporting-misconduct-to-asx-faqs>

The FAQs have information about the regulatory body to which different types of misconduct by a participant should be reported.

In this regard, ASX can take action against a participant only for conduct that breaches the operating rules of the various ASX financial markets and clearing and settlement facilities<sup>1</sup> to which the participant has been formally admitted as a participant ('ASX's rules').

A significant proportion of the reports of misconduct by participants that ASX receives involve matters that are regulated by the Australian Securities and Investments Commission ('ASIC') under the Corporations Act 2001 (Cth),<sup>2</sup> rather than by ASX under ASX's rules. These reports of misconduct should be submitted to ASIC rather than to ASX.

Information about the types of matters involving participants that are regulated by ASIC under the Corporations Act, and those that are regulated by ASX under ASX's rules, is available on the ASX website at:

<https://www2.asx.com.au/content/dam/asx/about/corporations-act-vs-operating-rules-matters.pdf>

A report of misconduct can be submitted to ASIC via the ASIC online complaint service at:

<https://asic.gov.au/about-asic/contact-us/how-to-complain/report-misconduct-to-asic/>

## 2. How to report misconduct by a participant to ASX

For legal and other reasons, ASX generally requires all communications from third parties alleging misconduct by a participant to be in writing<sup>3</sup> and, preferably, sent to ASX via its online facility for reporting misconduct at:

<https://www2.asx.com.au/about/contact-asx/report-misconduct>

The online facility has been designed to collect all of the information that ASX needs to pursue an allegation that a participant has breached ASX's rules, and to ensure that this information is promptly delivered to the team at ASX responsible for overseeing these matters.

Reports of misconduct can be made anonymously. There is also an option in ASX's online facility for an informant to indicate that they do not wish to receive any communications from ASX regarding their report of misconduct.

<sup>1</sup> Being the ASX and ASX 24 markets and the ASX Clear, ASX Clear (Futures), ASX Settlement and Austraclear clearing and settlement facilities. ASX Settlement operates the settlement and sub-register platform known as 'CHESS'.

<sup>2</sup> Referred to in this fact sheet as the 'Corporations Act'.

<sup>3</sup> References to a report of misconduct being 'in writing' include reports of misconduct made using ASX's online service for reporting misconduct or by email.

### **3. Acknowledgement of receipt**

When ASX receives a written report of misconduct by a participant, it will usually send an acknowledgment of receipt to the informant, so that the informant knows that ASX has received the report and is considering it.

If the report of misconduct is submitted through ASX's online facility mentioned above, the informant will receive an email acknowledging receipt upon its successful submission to that facility. If the report of misconduct is submitted by email or letter, ASX will use its best efforts to acknowledge receipt of the report by email within five business days of receiving it.

The acknowledgement will usually attach a copy of this Fact Sheet so that the informant is aware of the process that ASX will follow with respect to their report.

Of course, if an informant makes an anonymous report or does not provide their email address, ASX will not be able to email them an acknowledgement of receipt. Also, if an informant indicates in their report of misconduct that they do not wish to receive any communications from ASX regarding the report, ASX will respect that request and not send an acknowledgment of receipt.

### **4. Obscene, abusive or threatening reports of misconduct**

For the safety and well-being of its staff, ASX may decline to accept or act upon a report of misconduct from an informant that contains obscenities or that uses abusive or threatening language against an ASX staff member. For serious or repeat offenders, ASX may also advise the informant that ASX will not accept any future reports of misconduct from the informant.

### **5. Initial assessment by ASX Compliance**

As mentioned previously, ASX has the power to take action against a participant only for conduct that breaches ASX's rules.

When ASX receives a written report of misconduct by a participant, it is first referred to ASX Compliance, the ASX division responsible for monitoring and enforcing compliance by participants with ASX's rules. ASX Compliance will make an initial assessment whether the reported misconduct may have breached those rules and, if so, whether it merits further enquiries by ASX.

If ASX's initial assessment is that the reported misconduct may have breached ASX's rules and merits further enquiries by ASX, ASX will undertake those enquiries (see section 6 below).

If ASX's initial assessment is that the reported misconduct does not raise any issues under ASX's rules or otherwise does not merit further enquiries by ASX, ASX will end its review of the report of misconduct.

### **6. Further enquiries by ASX**

If ASX's initial assessment of a report of misconduct is that the reported misconduct may have breached ASX's rules and merits further enquiries by ASX, ASX will invoke its formal powers under those rules to conduct those enquiries.

These powers vary between the different markets and clearing and settlement facilities operated by the ASX group of companies. However, they typically include the right to require the participant to provide information and access to books and records that may be relevant to assessing its compliance with ASX's rules. In some cases, ASX may require the information provided to it to be verified by an independent auditor or other expert and may also require employees of the participant to submit to an interview by ASX.

It should be noted that ASX's ability to investigate misconduct by a participant is limited to its powers under ASX's rules mentioned above. ASX does not, for example, have the power to conduct searches, seize

evidence, examine people on oath or penalise people who do not cooperate with its enquiries, in the way that ASIC and other government regulators can.

## 7. Determination of breach and resulting action

Once ASX completes its enquiries into a report of misconduct by a participant, it will make a determination as to whether the reported misconduct constituted a breach by the participant of ASX's rules and, if it did, what (if any) action ASX should take in relation to the breach.

The type of action ASX may take in relation to a breach of ASX's rules will depend on the nature and seriousness of the breach. For less serious breaches, for example, ASX may:

- send a formal warning letter to the participant acknowledging the breach and noting that ASX is likely to take further action if the breach is repeated or if the participant does not implement steps to avoid the breach being repeated; or
- send a "no escalation" letter to the participant acknowledging the breach but indicating that ASX does not intend to take the matter further.<sup>4</sup>

For more serious breaches, ASX may:

- impose a requirement that the participant engage an independent expert to review its operations or compliance framework;
- impose a requirement that the participant pay additional margin or hold a secondary capital requirement to cover an otherwise unacceptable level of risk;
- add a condition or restriction on the participant's right to deal in particular products or its admission or access to a particular market or facility (usually directed to reducing the risk of the breach occurring again);
- refer the matter to the Enforcement Unit in ASX Compliance for the commencement of formal enforcement proceedings under the ASX Enforcement and Appeals Rulebook (see section 0 below); or
- suspend or terminate the participant's right to deal in particular products or its admission or access to a particular market or facility.

It should be noted that ASX does not have the power to order a participant to pay compensation to a client for breaching ASX's rules.<sup>5</sup> A client who wishes to claim compensation from a participant for its misconduct will need to raise that with the participant in the first instance and, if they are not satisfied with the outcome, to invoke the participant's dispute resolution procedures<sup>6</sup> or initiate legal proceedings against the participant.

Most participants in the markets and clearing and settlement facilities operated by the ASX group of companies will hold an Australian financial services licence requiring them to have internal and external dispute resolution procedures, and compensation arrangements for retail clients, that meet the regulatory standards prescribed by ASIC.

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<sup>4</sup> This may be given on a conditional basis (ie that ASX will not take further action provided the participant meets certain conditions specified in the letter).

<sup>5</sup> Noting that if ASX takes formal enforcement proceedings against a participant for a breach of ASX's rules under the ASX Enforcement and Appeals Rulebook, one of the factors it will take into account in deciding whether a penalty should be imposed against the participant for the breach and the amount of that penalty is whether the participant has compensated its clients for any loss they have suffered as a result of the breach.

<sup>6</sup> A market or clearing and settlement participant that holds an Australian financial services licence is required under the Corporations Act to have internal and external dispute resolution procedures and compensation arrangements for retail clients that meet certain standards prescribed by ASIC.

If you are not satisfied with the outcome of any internal dispute resolution procedure you engage in with a participant, you may be able to seek the assistance of the Australian Financial Complaints Authority, the external dispute resolution service used by most participants, to help resolve your dispute. For further details about this service, please visit:

<https://www.afca.org.au/>

Finally, the ASIC MoneySmart website also has information about how to pursue a complaint against a participant, which you may find helpful – see:

<https://www.moneysmart.gov.au/tools-and-resources/how-to-complain>

## **8. Formal enforcement proceedings**

If ASX finds that a participant has breached ASX's rules, one course it may take is to institute formal enforcement proceedings in relation to the breach under the ASX Enforcement and Appeals Rulebook. Generally, ASX will only do this where it considers the breach to be sufficiently serious that it warrants imposing a monetary penalty on the participant.

Under the ASX Enforcement and Appeals Rulebook, ASX may impose a monetary penalty of up to \$250,000 against a market participant, and up to \$1,000,000 against a clearing and settlement participant, for breaching ASX's rules. ASX may also impose a range of other sanctions, including a censure, an order for the participant to institute an education and compliance program, or the imposition of conditions or restrictions on the participant's admission or access to the relevant market or clearing and settlement facility.

The decision to impose a sanction on a participant under the ASX Enforcement and Appeals Rulebook is made by the ASX Chief Compliance Officer (CCO). If the participant is dissatisfied with the decision of the CCO, it has the right to appeal that decision to the ASX Appeal Tribunal.

## **9. ASX's discretion in enforcing ASX's rules**

ASX's rules confer on ASX the power to decide what (if any) action should be taken against a participant for breaching those rules. In making that decision, ASX will have regard to a number of factors, including:

- the nature and seriousness of the breach;
- how long ago the breach occurred;
- what (if any) action the participant has taken to correct the breach;
- whether the participant has a history of repeatedly breaching ASX's rules;
- the likely impact that ASX's decision will have on innocent third parties, including clients of the participant who had no involvement in the breach; and
- most importantly, ASX's view of what is in the interests of the broader market.

Different stakeholders may have a different view to ASX as to how a breach of ASX's rules should be addressed. Ultimately, however, that is a decision for ASX to make, consistent with its obligation as the licensed operator of markets and clearing and settlement facilities in Australia to have adequate arrangements for monitoring and enforcing compliance with its rules.<sup>7</sup> ASX is held to account in this respect by its regulator, ASIC.

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<sup>7</sup> Sections 792A(c)(ii) and 821A(c)(ii) of the Corporations Act.

## 10. Further communications with an informant

There are three scenarios in which ASX will communicate with an informant after it has received a report of misconduct:

- (1) as mentioned above, when ASX receives a written report of misconduct, it will usually send a written acknowledgment of receipt to the informant so that the informant knows that ASX has received the report and is considering it;
- (2) if ASX needs more information from the informant to address the matters in their report of misconduct, it will get in touch with the informant to ask for that information; and
- (3) if ASX receives a report of misconduct alleging that a participant has not complied with an obligation owed to the informant personally and:
  - the participant has provided information to ASX that is relevant to whether or not the participant has complied with that obligation and, if not, what the participant is proposing to address its non-compliance; and
  - the participant has given its consent for ASX to pass that information to the informant,

ASX may convey that information to the informant.

Outside of the three scenarios mentioned above, once ASX has received a report of misconduct by a participant from an informant, it is ASX's firm policy not to have any further communications with the informant about the matters in the report or about ASX's progress in addressing them.<sup>8</sup> The reasons for this policy include the risk of further communications with the informant:

- giving rise to legal action against ASX or the informant (for example, for defamation);
- being alleged to have put the informant in a privileged position by having information about ASX's enquiries that is not available to the rest of the market;
- being deliberately or inadvertently leaked by the informant, potentially compromising ASX's enquiries or enquiries by other regulators; or
- being used by the informant for collateral purposes not connected with the enforcement of ASX's rules.

In light of these risks, the only parties with whom ASX will have private communications about its enquiries into alleged misconduct by a participant are:

- the participant and its representatives and advisers;
- persons who have specific information that may assist ASX in its enquiries; and
- relevant regulators, including ASIC and the Reserve Bank of Australia.

If ASX considers it appropriate to make the market aware that ASX:

- is enquiring into a potential breach by the participant of ASX's rules; or
- has concluded following its enquiries that the participant has breached ASX's rules and ASX has decided to take action against the participant in relation to that breach,

ASX will do so publicly, usually by publishing a market circular with that information.

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<sup>8</sup> This includes responding to any enquiries or other communications from the informant on the matters mentioned in the text.

## 11. Privacy matters

ASX will not, in the course of its enquiries into a report of misconduct by a participant, share with the participant personal information about the informant, except where:

- ASX considers it reasonably necessary to do so in order to act on the report of misconduct;
- ASX is required or authorised by law to do so; or
- the informant has given their consent for ASX to do so.

It should be noted that there are limits to what ASX can do to protect the privacy of an informant. For example, if the informant has already had communications with the participant or publicly engaged with the media about the matters mentioned in their report of misconduct, it is quite possible that when ASX makes enquiries with the participant about the same matters, the participant may be able to infer that it was the informant who raised those matters with ASX.

Further, if ASX has reason to suspect that someone has committed, is committing, or is about to commit, a significant contravention of the Corporations Act or ASX's rules, ASX is required under that Act<sup>9</sup> to give a notice to ASIC with details of the contravention and ASX's reasons for its suspicion. If ASX has to give such a notice to ASIC in relation to the matters mentioned in a report of misconduct, ASX may have to provide ASIC with the personal details of the informant, as well as a copy of their report of misconduct and any other information that they have provided to ASX about those matters.

Finally, ASX may be subject to legal process that could compel it to provide a copy of an informant's report of misconduct and any related documents to a regulator or other party.

[ASX's Privacy Statement](#) has further details on how ASX handles personal information and your rights in relation to your personal information held by ASX.

## 12. Informants who are not satisfied with ASX's handling of a report of misconduct

An informant who is not satisfied with ASX's handling of their report of misconduct by a participant may make a formal complaint to ASX's regulator, ASIC, via ASIC's online complaint service at:

<https://asic.gov.au/about-asic/contact-us/how-to-complain/report-misconduct-to-asic/>

In addition, if the reported misconduct did in fact amount to a breach of ASX's rules by the participant concerned, the informant may be able to obtain a court order under section 793C or 822C of the Corporations Act directing ASX to enforce ASX's rules against the participant and/or directing the participant to comply with its obligations under ASX's rules. An informant should take their own legal advice on their prospects of success in, and the likely costs of, legal action seeking such an order.

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<sup>9</sup> Sections 792B(2)(c) and 821B(2)(c) of the Corporations Act.