

Fair, Orderly and Transparent Markets



The purpose of this document is to articulate how the ASX group interprets its obligation under section 792A(a) of the Corporations Act 2001 (Cth)¹ to do all things necessary, to the extent that it is reasonably practicable to do so, to ensure that each of its licensed markets is **fair, orderly and transparent**.

ASIC guidance

The primary guidance the Australian Securities and Investments Commission (“ASIC”) has given in relation to section 792A(a) appears in the following passages of ASIC Regulatory Guide 172 *Financial markets: Domestic and overseas operators* (May 2018) (“RG 172”):

“Outcomes of market operator regulation

In approaching financial market regulation, our objectives are to facilitate effective capital formation and risk management, and to support the interests of fundamental investors such as Australian families and institutions. This helps to maintain the integrity, quality and international reputation of the Australian financial system and, in doing so, enables Australian businesses to efficiently access capital from investors at a lower risk premium than would otherwise be the case.

We believe that market operators play an important role in enabling the financial system to achieve this by operating markets that are fair, orderly and transparent. In seeking to ensure financial market operators meet this statutory obligation, our regulatory focus is directed at market operators delivering the following outcomes:

- (a) **Price formation:** *Price formation on the market reflects genuine supply and demand. There is transparency to users about the consequences of trading decisions, including an indication of whether and at what price/volume trading may occur on the market as well as the reliable distribution of price-sensitive information.*
- (b) **Orderly functioning of the market:** *The market is able to operate as intended with controls for undue aberrations or extreme volatility. The operation of the market is also supported by robust technology and operational risk resourcing and controls, enabling it to function reliably in all appropriate circumstances.²*
- (c) **Fair access:** *Access to facilities and services is provided in a fair, transparent and non-discriminatory manner, including as to commercial terms. This includes access to order types, products, data and other services. Fair access is provided to users and, where appropriate, other stakeholders.*
- (d) **Users are informed and receive fair treatment:** *Sufficient information is available to enable informed use of the market, including about how the market operates. Where market operators provide information to market users, they do so in an efficient and effective way. The interests of different users are appropriately balanced, with like treatment for like circumstances and no market users are unduly favoured over others.*
- (e) **Admission:** *Operators have rules and practices to ensure that admission of participants, users and products is designed to achieve high-quality outcomes—and apply appropriate ongoing expectations and transparency about when discipline, removal or suspension may occur. ...*
- (f) **Market integrity:** *Operators have capacity and arrangements to administer and oversee the market so that market integrity outcomes are achieved.”³ ...*

“Fair, orderly and transparent”

... ‘Fair, orderly and transparent’ should be treated as a composite phrase. If there is a conflict between the elements of the phrase, we expect a licensee to achieve an appropriate balance between the demands of each element.

The obligation ‘to do all things necessary’ is qualified by the phrase ‘to the extent it is reasonably practicable to do so’. In other words, a licensee must do everything reasonably practicable to ensure that the market venue is fair, orderly and transparent.

As market venues evolve (e.g. with increased reliance on third-party services or the use of different trading protocols), licensees should assess how these developments may affect their obligation to operate the market venue in a fair, orderly and transparent manner. Licensees should consider the impact on direct users of the venue, other stakeholders and, for tier 1 venues in particular, the wider Australian financial system.

All licensees should be transparent about how the market venue is operated. Licensees should also be transparent about the activities conducted on the venue to the extent appropriate. For example, tier 1 venues in particular should provide an appropriate degree of pre- and post-trade transparency about the transactions conducted on the venue. It may also be appropriate for tier 1 venues—especially exchanges—to publish information about the fee incentives they may offer to certain participants to post offers or invitations on the venue. We also expect that all market participants seeking access to a licensee’s systems or services (including co-location services) should have access on fair, non-discriminatory terms.

If a licensee is not doing something that we think is necessary for the market venue to be fair, orderly and transparent, we will only assess it as complying with this obligation where the licensee can satisfy ASIC that it is not reasonably practicable for it to do that thing. Cost by itself will not make it ‘not reasonably practicable’ to do a particular thing, unless the cost to the licensee is manifestly excessive or unreasonable when compared to the market integrity, investor protection or other benefits that would result from doing the thing.

Some licensees and/or participants are subject to specific obligations that also help to promote fairness, orderliness and transparency, such as volatility controls and pre- and post-trade transparency obligations in market integrity rules. These specific obligations are only a subset of a licensee’s overall obligation to operate a fair, orderly and transparent market venue, and do not absolve a licensee from compliance with this overall obligation.”⁴

ASX agrees with ASIC’s guidance above. ASX would observe, however, that while ASIC has outlined various steps a market operator should undertake to have a fair, orderly and transparent market, it has not given specific guidance on the meaning it ascribes to the terms “fair”, “orderly” and “transparent”. In the absence of specific guidance from ASIC on this issue, ASX believes it is helpful for it to articulate how it interprets these words in the context in which they are used in section 792A(a). Among other things, the meaning given to those terms also bears upon the scope of the power conferred on ASX under ASX Operating Rule 3100 “to take any action it considers necessary to ensure that a market for one or more products is fair, orderly and transparent.”⁵

Context

In interpreting the scope of its obligation under section 792A(a) to operate a fair, orderly and transparent market, ASX considers it both appropriate and important to have regard to the statutory context in which that obligation appears and also to the commercial context in which ASX’s licensed markets operate.

The statutory context includes the definition of “financial market” in section 767A(1), that is, a facility⁶ through which:

- offers to acquire or dispose of financial products are regularly made or accepted; or
- offers or invitations are regularly made to acquire or dispose of financial products that are intended to result or may reasonably be expected to result, directly or indirectly, in the making of offers to acquire or dispose of financial products or the acceptance of such offers.

By defining a market as, in effect, a facility through which orders to buy and sell financial products are matched, section 767A suggests that it is that facility (and, in particular, the process within that facility by which such orders are matched) which must be fair, orderly and transparent.⁷

The statutory context also includes the framework within which the operating rules⁸ of a licensed market are made, which:

- requires the Minister, before he or she can grant a licence to operate a market, to be satisfied that the operator has adequate rules for the market to ensure, as far as is reasonably practicable, that the market will operate in a fair, orderly and transparent manner;⁹ and
- empowers the Minister to disallow any change to the operating rules of a licensed market,¹⁰ having regard to whether the change is consistent with the licensee's obligations under the Corporations Act, including in particular its obligation to ensure, as far as is reasonably practicable, that the market is fair, orderly and transparent.¹¹

Once an operating rule of a licensed market comes into effect, the licensee and each participant in the market comes under a statutory obligation to comply with the rule.¹²

The statutory context further includes the capacity of ASIC, under the oversight of the Minister, to make Market Integrity Rules¹³ that deal not only with the activities or conduct of licensed markets, but also the activities or conduct of persons in relation to licensed markets or in relation to financial products traded on licensed markets. As the name suggests, ASIC's rule making power is intended to promote "market integrity" in the broadest sense of that phrase. In making such rules, ASIC can address both structural and behavioural issues across all licensed markets. ASIC's Market Integrity Rules therefore effectively set the parameters within which an individual licensed market operator must do all things necessary to ensure that its market operates in a fair, orderly and transparent manner.¹⁴

The commercial context includes the systemically important role that the ASX and ASX 24 markets play in the Australian financial system in facilitating price discovery, the raising and allocation of capital and the hedging of risk. This suggests that the enquiry as to whether ASX is meeting its obligations under section 792A(a) in relation to the ASX and ASX 24 markets should be answered at a systemic level, by reference to whether those markets are operating in a fair, orderly and transparent manner from the perspective of participants in those markets generally,¹⁵ rather than from the perspective of an individual participant.¹⁶

The meaning of "fair"

The word "fair" can have many different meanings, depending on the context in which it is used.¹⁷

In ASX's opinion, in the context of section 792A(a), the word "fair" is used in one (or possibly both) of two senses – "something that conforms to the applicable rules" (as in a *fair* contest) and/or "free from bias or injustice" (as in a *fair* decision).¹⁸

As mentioned previously, once an operating rule of a licensed market comes into effect, the market operator and each participant comes under a statutory obligation to comply with the rule. At that point, it is no longer open to a participant to argue that it should not have to comply with the rule because it is unfair. Hence, the enquiry as to whether a market is meeting its ongoing obligation to operate in a "fair" manner is not intended to be a value judgment as to whether its operating rules are fair – that value judgment has already been made by the Minister in deciding to grant a licence to the market operator with its rules as in force at that

time and not to disallow any rule change subsequently)¹⁹ – but rather whether the operating rules are being applied in a fair manner (that is, consistently and without inappropriate bias).

ASX considers that a market is likely to meet its specific obligation under section 792A(a) to be fair if the rules governing the operation of the market clearly set out:

- the criteria and process for someone to become a participant in the market;
- the rights and obligations of participants under the rules;
- when participants can have their participation in the market suspended or terminated; and
- if the market provides listing or quotation services:
 - the criteria and process for entities to be admitted to its official list or as approved product issuers and for their financial products to be quoted;
 - the rights and obligations (including, but not limited to, disclosure obligations) of listed entities and approved product issuers under the rules; and
 - when entities may have their admission to the official list or their approval to issue quoted financial products terminated, or trading in their financial products halted, suspended or terminated,

and those rules are applied by the operator of the market consistently and without inappropriate bias.²⁰

ASX considers that this view of the meaning of “fair” is supported by the decision in *Transmarket Trading Pty Limited v Sydney Futures Exchange Limited*. In that case, Perram J observed that the notion of fairness in section 792A(a):

“relates to a state of affairs in which all market participants are placed in an equal position such that there is level playing field.”²¹

This is not to say that a market must treat all participants equally in all circumstances. Plainly, a market can still meet its obligation of fairness, even though it may provide for different categories of participants with different rights and obligations under the rules, or charge different fees to participants who deal in different products or in different volumes.

Fairness requires a level playing field and that participants in like circumstances are treated in like manner, rather than that all participants in all circumstances are treated equally.

In saying this, ASX acknowledges that different views have been expressed in the past as to what is encompassed within the notion of a market being “fair”. For example, there have been numerous statements in financial and regulatory literature equating the fairness of a market to it being free of manipulation, insider trading and other forms of market misconduct. Indeed, in *Transmarket Trading Pty Limited v Sydney Futures Exchange Limited*, Perram J referred to an SEC order,²² which he described as informative but not determinative, which defined a fair market as one that is “free from manipulative and deceptive practices, and affords no undue advantage to any participant”.²³

ASX believes that those statements should mostly be understood as referring to a or the “market” in a broader and more ephemeral sense than that term is used in section 792A(a). Those statements use the term “market” in the sense of the broad interplay of the forces of supply and demand and the conduct of participants in bringing those forces into equilibrium (the market as an economic or behavioural phenomenon) rather than the particular facility on which orders to buy and sell financial products are matched (the market as a functional or physical phenomenon).

In some cases those references can also be understood as arising from a conflation of the different statutory obligations of a licensed market operator. This was particularly the case prior to the enactment of the

Corporations Amendment (Financial Market Supervision) Act 2010, when market licensees had an obligation to have adequate arrangements to supervise their market and to monitor the activities of participants on or in relation to their market.²⁴ In that context, it was easy to confuse or conflate a licensee's obligation to have adequate supervisory arrangements designed to ensure that participants did not engage in market misconduct with its obligation to operate a fair market.

Since the enactment of the Corporations Amendment (Financial Market Supervision) Act 2010, however, the Corporations Act has drawn a clear distinction between the operation of licensed markets and their supervision. Operational matters unambiguously are within the remit of the market operator,²⁵ while supervisory matters (including the regulation of the activities or conduct of persons in relation to licensed markets and in relation to financial products traded on such markets via Market Integrity Rules) unambiguously are within the remit of ASIC.²⁶

ASX submits that Perram J was therefore right to confine his analysis of fairness under section 792A(a) to whether or not there is a level playing field between market participants, and not to import the SEC's notion that the market must be free of manipulative or deceptive practices in order to be fair. The obligation in section 792A(a) is that the *market* – that is, according to the definition of that term in section 767A(1), the facility through which orders to buy and sell financial products are matched – is fair, not that the participants using that facility behave in a fair or lawful manner.

ASX considers that this interpretation is reinforced by the inclusion in section 792A(a) of the qualification “to the extent that it is reasonably practicable to do so”. In terms of what is both reasonable and practicable, a market operator can plainly exercise a large measure of control over the design and behaviour of its market infrastructure to ensure that it operates fairly. It can exercise much less control over the designs and behaviours of the participants who use that infrastructure.²⁷

The meaning of “orderly”

In ASX's opinion, the word “orderly” is used in section 792A(a) in the sense of “arranged or disposed in order, in regular sequence, or in a tidy manner” or “according to established order or rule”.²⁸

ASX again considers that this view of the meaning of “orderly” is supported by the decision in *Transmarket Trading Pty Limited v Sydney Futures Exchange Limited*. In that case, Perram J observed that the notion of orderliness in section 792A(a) connotes:

*“reliable market operations displaying price continuity and depth and in which unreasonable price variations between sales are avoided.”*²⁹

ASX considers that a market is likely to meet its specific obligation under section 792A(a) to be “orderly” if the market has clear rules or processes governing:

- how and when buy and sell orders will be matched;
- the application of trading halts;
- the correction or cancellation of trading errors; and
- the ability of the market operator to suspend trading, correct or cancel trades, or take other corrective action³⁰ to help avoid or rectify a disorderly market,

and its trading systems are secure, reliable and have sufficient capacity to handle reasonably foreseeable peak levels of trading.

In the case of a market operator that sets the specifications for derivative contracts traded on its market, the obligation to ensure that the market is orderly would also extend to taking reasonable steps to ensure that there is nothing built into those specifications that is inherently likely to lead to a disorderly market.³¹

ASX notes that in relation to shares, managed investment products, certain other equity market products and CGS depository interests admitted to quotation on the ASX market, some aspects of the requirement for orderliness have been codified in Parts 8.1 and 8.2 of the ASIC Market Integrity Rules (Securities Markets) 2017. Those Parts require the operators of licensed markets that deal in relevant equity market products to have order entry controls to prevent anomalous orders, to calculate and disseminate an extreme trade range and to have controls that prevent transactions being executed in that range.³² The imposition of these requirements is consistent with the interpretation of the word “orderly” put forward in this document.

The meaning of “transparent”

In ASX’s opinion, the word “transparent” in relation to a market in section 792A(a) is used in the sense that information about the operation of the market is visible or readily accessible to all participants, including in particular information about the prices and volumes at which orders to buy and sell financial products are being matched in the market.

ASX again considers that this view of the meaning of “transparent” is supported by the judgment in *Transmarket Trading Pty Limited v Sydney Futures Exchange Limited*. In finding that the market events in that case did not infringe section 792A(a), Perram J commented:

“Nor is there anything which would suggest that the operation of the market was other than transparent. The market log of all trades was available and it was not put, at any point, that there were market events which were concealed or not sufficiently exposed.”³³

ASX considers that a market is likely to meet its specific obligation under section 792A(a) to be “transparent” if:

- the market operator makes its operating rules³⁴ and procedures and the specifications for any derivative contracts traded on its market publicly available and readily accessible to all market participants;
- participants and their clients know with an appropriate degree of certainty whether, and at what prices and in what volumes, they can deal when they choose to use the market and have timely access to information about the prices and volumes of all individual transactions concluded on the market;
- if the market operator cancels trades, the market is made aware of the cancellation and the parties to those trades are informed of the reasons why;
- the market operator publishes information about any fee incentives it offers to participants to place orders in the market;³⁵
- if the market operator provides listing or quotation services:
 - the operating rules³⁶ provide for the prompt disclosure by listed entities and approved product issuers of information that a reasonable person would expect to have a material effect on the price or value of their financial products;
 - it has systems and processes in place to enable the prompt dissemination of material information provided by listed entities or approved product issuers to the market so that participants and their clients can make informed trading decisions; and
 - it has effective rules and processes in place for halting or suspending trading in financial products where listed entities or approved product issuers do not comply with their obligations under the operating rules³⁷ or where there is a false market³⁸ in their financial products; and
- if the market operator takes material enforcement action against a participant,³⁹ listed entity⁴⁰ or approved product issuer,⁴¹ at an appropriate time, the market is made aware of that action and the reasons for it.

ASX again notes that in relation to shares, managed investment products and certain other equity market products admitted to quotation on the ASX market, some aspects of the requirement for transparency have been codified in Chapter 6 and Part 8.3 of the ASIC Market Integrity Rules (Securities Markets) 2017. Those provisions require the operators of licensed markets that deal in relevant equity market products to meet certain pre-trade and post-trade transparency requirements and to have transparent trade cancellation policies.⁴² The imposition of these requirements is consistent with the interpretation of the word “transparent” put forward in this document.

Balancing fairness, orderliness and transparency

The phrase “fair, orderly and transparent” is a composite phrase of three potentially conflicting elements. It is conceivable, for example, that something could be fair but not orderly or transparent, orderly but not fair or transparent, or transparent but not fair or orderly. It is also conceivable that something could affect different participants differently – that is, something might be fair to some participants but unfair to others.

As noted above, ASIC has said in RG 172 *that*:

“‘Fair, orderly and transparent’ should be treated as a composite phrase. If there is a conflict between the elements of the phrase, we expect a licensee to achieve an appropriate balance between the demands of each element.”⁴³

Judicial guidance on how to interpret another composite phrase – the obligation of financial service licensees to provide their services “efficiently, honestly and fairly”⁴⁴ – similarly suggests that for a licensed market operator to meet its obligations under section 792A(a), the market must be fair having regard to the dictates of orderliness and transparency, orderly having regard to the dictates of fairness and transparency, and transparent having regard to the dictates of fairness and orderliness.⁴⁵

ASX would add that, in its view, the appropriate balance between fairness, orderliness and transparency is one which has regard to the systemically important role that the ASX and ASX 24 markets play in the Australian financial system. ASX considers that the test in section 792A(a) should be biased towards an outcome that achieves fairness from the perspective of most participants and orderliness and transparency from the perspective of the market as a whole rather than an outcome that delivers fairness to an individual participant at the expense of the orderliness and transparency of the market.

¹ Referred to in this paper as the “Corporations Act”. Unless otherwise stated, references to sections are to sections of the Corporations Act.

² ASX would note that for a market “to operate as intended” and to “function reliably in all appropriate circumstances”, as referred to in the quoted passage from RG 172, there may be circumstances where the market as a whole or in an individual financial product may need to be halted or suspended.

³ RG 172, at paragraphs 24-25.

⁴ RG 172, at paragraphs 71-78.

⁵ See ASX Operating Rules Guidance Note 10 *Maintenance of a Fair, Orderly and Transparent Market*.

⁶ “Facility” is not defined in the Corporations Act. ASIC has expressed the view that a “facility” includes any form of technology or physical infrastructure (see RG 172, at paragraph 30). This is consistent with the decision in *Carragreen Currency Corporations Pty Ltd v Corporate Affairs Commission (NSW)* (1986) 11 ACLR 298, 312-3.

⁷ ASX therefore would not regard the fact that another market may be affected by circumstances that cause it to be operating in an unfair, disorderly or non-transparent manner, or that it has halted trading in response to, or to avoid, that occurring, to be relevant factors in assessing whether an ASX market is fair, orderly and transparent. The latter issue would have to be assessed by reference to the particular circumstances affecting the ASX market.

⁸ In this context, the operating rules of a licensed market include not only those rules governing the activities or conduct of the market or of persons in relation to the market, but also any listing rules that are made by the market operator (see the definition of “operating rules” in section 761A).

⁹ Section 795B(1)(c).

-
- ¹⁰ Before it can change its operating rules, a market operator must lodge written notice of the change with ASIC under section 793D. The Minister can disallow the change within 28 days of that lodgement under section 793E.
- ¹¹ Section 793E.
- ¹² Section 793B and 793C. Although, in the case of the licensee, this is subject to any discretion that the operating rules may afford to the licensee in terms of granting a waiver or exemption from, or not enforcing, a particular rule. Any such discretion is one that would have to be exercised by the licensee “fairly”, as that term is defined later in this Guidance Note.
- ¹³ Section 798G. ASIC’s Market Integrity Rules take primacy over the operating rules of a licensed market (section 793B(2)).
- ¹⁴ For example, Part 8.3 of the ASIC Market Integrity Rules (Securities Markets) 2017 requires a market operator to have in place transparent policies and procedures for the cancellation of erroneous trades. A market operator can determine how it satisfies this obligation within the parameters set by the Market Integrity Rules and having regard to its statutory obligation to ensure, as far as practicable, that its market is fair, orderly and transparent. To date, ASIC has elected to make Market Integrity Rules on a range of matters where the absence of a rule could result in loss of market fairness, orderliness or transparency across financial markets that trade the same financial products if the actions of individual market operators were inconsistent. There may be further instances where ASIC intervention is required, for example to eliminate fee incentives that operate unfairly or that could distort trading activity.
- ¹⁵ ASX regards ASIC’s observation in RG 172 that in considering whether their market is fair, orderly and transparent, licensed market operators “*should consider the impact on direct users of the venue, other stakeholders and, for tier 1 venues in particular, the wider Australian financial system*”, as supporting a systemic, rather than an individual, perspective of that obligation.
- ¹⁶ ASX therefore would not regard a short term loss of connectivity to one of its markets by an individual participant or group of participants as rendering the market unfair, disorderly or not transparent.
- ¹⁷ The Macquarie Dictionary (2006) lists 22, and Dictionary.com lists over 30, different meanings for the word “fair”.
- ¹⁸ See the Macquarie Dictionary (2006) at page 420.
- ¹⁹ See the discussion of the Minister’s powers under sections 795B(1)(c) and 793E in the text at notes 9 and 11 above.
- ²⁰ This is consistent with ASIC’s guidance in RG 172, at paragraph 76, that: “*We also expect that all market participants seeking access to a licensee’s systems or services (including co-location services) should have access on fair, non-discriminatory terms.*”
- ²¹ [2010] FCA 534, at paragraph 95. This formulation of fairness was accepted and applied by the ASX Disciplinary Tribunal in *ASX Compliance Pty Ltd and Timber Hill Australia Pty Ltd* (15 December 2010) Matter No. 2009018 & 2009026, at paragraph 5.14.1.
- ²² “Order Instituting Administrative and Cease-And-Desist Proceedings”, Exchange Act Release No. 34-49500, 82 SEC Docket 1903 (March 30 2004).
- ²³ [2010] FCA 534, at paragraph 94.
- ²⁴ Section 792A(c).
- ²⁵ Section 792A(c).
- ²⁶ Section 798F and 798G. Note, however, that this is not to say that market operators have no responsibility in relation to the conduct of market participants. Under section 792B, a licensed market operator must give written notice to ASIC if it has reason to suspect that a person has committed, is committing, or is about to commit, a significant contravention of the market’s operating rules or of the Corporations Act.
- ²⁷ Such control is more appropriately exercised by ASIC, whose enforcement powers are grounded in criminal and civil law rather than contract (as ASX’s enforcement powers are under section 793B) and which has the capacity to suspend or cancel the licences of participants to provide financial services (section 915C). ASIC also has the power to supervise the actions of participants and enforce the Corporations Act and the Market Integrity Rules across multiple markets, whereas ASX can only monitor and enforce its operating rules in relation to the markets it operates.
- ²⁸ See the Macquarie Dictionary (2006) at page 854.
- ²⁹ [2010] FCA 534, at paragraph 95. This formulation of orderliness was accepted and applied by the ASX Disciplinary Tribunal in *ASX Compliance Pty Ltd and Timber Hill Australia Pty Ltd* (15 December 2010) Matter No. 2009018 & 2009026, at paragraph 5.14.2. That decision was affirmed on appeal by the ASX Appeal Tribunal (2 May 2011).
- ASX notes that Perram J’s statement quoted in the text above was qualified by an observation ([2010] FCA 534, at paragraphs 95 and 100) that:

“I do not think that the pursuit of orderly markets carries with it the eradication of volatile or unpredictable markets. ... I conclude that the trading behaviour exhibited in [this case] was highly unusual, unprecedented over nearly a decade and inconsistent with an informed response to the data. However, I also accept ... that the actual price fluctuations observed were caused by everyday market phenomena. There is no particular contradiction involved in concluding that the events were highly anomalous but nevertheless caused only by ordinary market events: a once in fifty year market event will eventually occur; someone always wins the lottery. The occurrence of such a market anomaly does not, however, indicate the absence of reliable operations nor the absence of price continuity or depth. Markets, from time to time, exhibit chaotic behaviour but without more that does not, I think, render them disorderly.”

The ASX Appeal Tribunal explained this observation in the *Timber Hill* matter as follows

“... the impact of trading must be considered on a case by case basis. The Appeal Tribunal does not understand Perram J to have laid down an immutable rule concerning the meaning of the phrase ‘fair and orderly’. His Honour was commenting on the facts as they emerged from the evidence before him and, in particular, the evidence that the price fluctuations had been caused by everyday market phenomena. In the present case, there was, as the Disciplinary Tribunal found, an absence of regular and reliable operations with price continuity. There were, in the circumstances, unreasonable price variations and disorderly markets.”

³⁰ For example, the imposition of position limits or exercise limits on derivative positions.

³¹ This might arise, for example, if a derivatives market contract imposed physical delivery requirements that, in practice, were difficult for market participants to meet.

³² Noting ASIC’s caveat in RG 172, at paragraph 78, that:

“Some licensees and/or participants are subject to specific obligations that also help to promote fairness, orderliness and transparency, such as volatility controls and pre- and post-trade transparency obligations in market integrity rules. These specific obligations are only a subset of a licensee’s overall obligation to operate a fair, orderly and transparent market venue, and do not absolve a licensee from compliance with this overall obligation.”

³³ [2010] FCA 534, at paragraph 96. In this regard, ASX construes Perrem J’s reference to market events being sufficiently exposed as a reference to information about the price and volume of trades done on the market being published promptly after they were executed.

³⁴ Including, where the market provides listing services, its listing rules (see note 8 above).

³⁵ This is consistent with ASIC’s guidance in RG 172, at paragraph 76, that:

“All licensees should be transparent about how the market venue is operated. ... It may also be appropriate for tier 1 venues—especially exchanges—to publish information about the fee incentives they may offer to certain participants to post offers or invitations on the venue.”

³⁶ Including, where the market provides listing services, its listing rules (see note 8 above).

³⁷ Including, where the market provides listing services, its listing rules (see note 8 above).

³⁸ The term “false market” refers to a situation where there is material misinformation or materially incomplete information in the market that is compromising proper price discovery. This may arise, for example, where:

- a listed entity or approved product issuer has made a false or misleading announcement;
- there is other false or misleading information, including a false rumour, circulating in the market; or
- a segment of the market is trading on the basis of market sensitive information that is not available to the market as a whole (see section 6.1 of ASX Listing Rules Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*).

³⁹ This would include the market operator imposing a material monetary penalty against a participant, censuring a participant, or suspending or terminating a participant’s admission to the market for breaching the operating rules of the market.

⁴⁰ This would include the market operator suspending the quotation of a listed entity’s securities, censuring a listed entity or removing a listed entity from the official list for breaching the listing rules of the market.

⁴¹ This would include the market operator suspending the quotation of an issuer’s financial products or terminating its approval to issue quoted products for breaching the operating rules of the market.

⁴² See note 32 above.

⁴³ RG 172, at paragraph 73. The inclusion in section 792A(a) of the qualification “to the extent that it is reasonably practicable to do so” also lends support to this construction. In this regard, the Explanatory Memorandum for the Financial Services Reform Bill (2002), which enacted section 792A(a), made the following observations (at paragraph 7.38) about that section:

“In interpreting the phrase ‘fairness, orderliness and transparency’, it is desirable that all the words in the phrase be considered together. One word taken out of context may lead to a course of action which conflicts with the other words in the phrase. Thus, transparency may on occasions be in conflict with liquidity, yet liquidity is needed for an orderly market. The tensions between the three words need to be resolved sensibly, so that an appropriate balance is struck between the demands of different market participants. This is specifically acknowledged in the clause ‘to the extent that those objectives are consistent with one another.’”

The phrase “to the extent that those objectives are consistent with one another” was replaced in the final form of section 792A by the phrase “to the extent that it is reasonably practicable to do so”.

⁴⁴ Section 912(1)(a).

⁴⁵ *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661. The following observations of Young J, at 672, are a good illustration of the issues at play here.

“Thus I turn to the phrase ‘efficiently, honestly and fairly’. In one sense it is impossible to carry out all three tasks concurrently. To illustrate, a police officer may very well be most efficient in control of crime if he just shot every suspected criminal on sight. It would save a lot of time in arresting, preparing for trial, trying and convicting the offender. However, that would hardly be fair. Likewise a judge could get through his list most efficiently by finding for the plaintiff or the defendant as a matter of course, or declining to listen to counsel, but again that would hardly be the most fair way to proceed. Considerations of this

nature incline my mind to think that the group of words "efficiently, honestly and fairly" must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty ... "