

## PRIVACY MATTERS

<b>The purpose of this Guidance Note</b>	<ul style="list-style-type: none"><li>• To outline ASX's information gathering and disclosure powers under the ASX 24 Operating Rules</li><li>• To suggest some measures ASX 24 participants may wish to consider to meet their privacy obligations in relation to information that they are required to give to ASX under the ASX 24 Operating Rules</li><li>• To confirm that an ASX 24 participant may not refuse to provide information to ASX under the ASX 24 Operating Rules on the basis that it would involve an unauthorised disclosure of personal information about an individual without their consent</li></ul>
<b>The main points it covers</b>	<ul style="list-style-type: none"><li>• The Privacy Act and the Australian Privacy Principles</li><li>• ASX's information gathering and disclosure powers</li><li>• The privacy ramifications of those powers for ASX 24 trading participants</li><li>• Where ASX's privacy policy can be found</li><li>• Anonymity and pseudonymity</li></ul>
<b>Related materials you should read</b>	<ul style="list-style-type: none"><li>• ASX's privacy policy on the ASX website: <a href="http://www.asx.com.au/legal/privacy-statement.htm">http://www.asx.com.au/legal/privacy-statement.htm</a></li><li>• More information about the Privacy Act and the Australian Privacy Principles can be found on the Office of the Australian Information Commissioner's website at: <a href="http://www.oaic.gov.au/privacy-portal/about_privacy.html">http://www.oaic.gov.au/privacy-portal/about_privacy.html</a></li></ul>

**History:** Guidance Note 6 amended 15/06/15. A previous version of this Guidance Note was issued in 03/14.

**Important notice:** ASX has published this Guidance Note to assist participants to understand and comply with their obligations under the ASX 24 Operating Rules. It sets out ASX's interpretation of the ASX 24 Operating Rules and how ASX is likely to enforce those rules. Nothing in this Guidance Note necessarily binds ASX in the application of the ASX 24 Operating Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and participants should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person.

### Table of Contents

1. Introduction	2
2. The Privacy Act and the Australian Privacy Principles	2
3. ASX's information gathering powers	4
4. ASX's information disclosure powers	4
5. ASX's privacy policy	5
6. Privacy ramifications for ASX 24 participants	5
7. Anonymity and pseudonymity	6

## 1. Introduction

The purpose of this Guidance Note is to outline the information gathering and disclosure powers of Australian Securities Exchange Limited (ASX) under the ASX 24 Operating Rules and to suggest some measures ASX 24 participants may wish to consider to meet their privacy obligations in relation to information that they are required to give to ASX under those rules.

## 2. The Privacy Act and the Australian Privacy Principles

The Privacy Act 1988 (Cth)<sup>1</sup> protects an individual's personal information (that is, information that identifies, or could reasonably identify, the person). It also contains provisions regulating the collection and use of sensitive information, tax file numbers, credit information and health or medical information.

Under the Privacy Act, businesses with an annual turnover greater than \$3 million or that have opted into the Privacy Act are required to comply with the Australian Privacy Principles. These requirements apply to ASX, as the operator of the ASX 24 market, and are likely also to apply to most ASX 24 participants.

Among other things, an entity subject to the Australian Privacy Principles is required to have a clearly expressed and up to date privacy policy about the management of personal information by the entity.<sup>2</sup> The policy must set out:

- the kinds of personal information that the entity collects and holds;
- how the entity collects and holds personal information;
- the purposes for which the entity collects, holds, uses and discloses personal information;
- how an individual may access personal information about the individual that is held by the entity and seek the correction of such information;
- how an individual may complain about a breach of the Australian Privacy Principles, or a registered APP code (if any) that binds the entity, and how the entity will deal with such a complaint;
- whether the entity is likely to disclose personal information to overseas recipients; and
- if the entity is likely to disclose personal information to overseas recipients, the countries in which such recipients are likely to be located if it is practicable to specify those countries in the policy.<sup>3</sup>

The entity must take such steps as are reasonable in the circumstances to make its privacy policy available free of charge and in such form as is appropriate.<sup>4</sup> If a person requests a copy of the privacy policy in a particular

<sup>1</sup> Referred to in this Guidance Note as the Privacy Act.

<sup>2</sup> Australian Privacy Principle ("APP") 1.3.

<sup>3</sup> APP 1.4.

<sup>4</sup> APP 1.5. This will usually be done on the entity's website.

form, the entity must also take such steps as are reasonable in the circumstances to give the person a copy in that form.<sup>5</sup>

At or before the time or, if that is not practicable, as soon as practicable after, an entity subject to the Australian Privacy Principles collects personal information about an individual, the entity must take such steps (if any) as are reasonable in the circumstances to notify the individual of the following matters or to otherwise ensure that the individual is aware of any such matters:

- the identity and contact details of the entity;
- if the entity collects the personal information from someone other than the individual or the individual may not be aware that the entity has collected the personal information, the fact that the entity so collects, or has collected, the information and the circumstances of that collection;
- if the collection of the personal information is required or authorised by or under an Australian law or a court/tribunal order, the fact that the collection is so required or authorised (including the name of the Australian law, or details of the court/tribunal order, that requires or authorises the collection);
- the purposes for which the entity collects the personal information;
- the main consequences (if any) for the individual if all or some of the personal information is not collected by the entity;
- any other entity, body or person, or the types of any other entities, bodies or persons, to which the entity usually discloses personal information of the kind collected by the entity;
- that the privacy policy of the entity contains information about how the individual may access the personal information about the individual that is held by the entity and seek the correction of such information;
- that the privacy policy of the entity contains information about how the individual may complain about a breach of the Australian Privacy Principles, or a registered APP code (if any) that binds the entity, and how the entity will deal with such a complaint;
- whether the entity is likely to disclose the personal information to overseas recipients; and
- if the entity is likely to disclose the personal information to overseas recipients, the countries in which such recipients are likely to be located if it is practicable to specify those countries in the notification or to otherwise make the individual aware of them.<sup>6</sup>

If an entity subject to the Australian Privacy Principles holds personal information about an individual that was collected for a particular (primary) purpose, the entity must not use or disclose the information for another (secondary) purpose unless the individual has consented to the use or disclosure of the information or certain other circumstances apply.<sup>7</sup>

More information about the Privacy Act and the Australian Privacy Principles can be found on the Office of the Australian Information Commissioner's website at:

[http://www.oaic.gov.au/privacy-portal/about\\_privacy.html](http://www.oaic.gov.au/privacy-portal/about_privacy.html).

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<sup>5</sup> APP 5.1 and 5.2.

<sup>6</sup> APP 1.6. This is usually done in the form of a privacy information collection statement.

<sup>7</sup> APP 6.1. The other relevant circumstances where information can be used for a secondary purpose are set out in APP 6.2.

### 3. ASX's information gathering powers

Under the ASX 24 Operating Rules, an ASX 24 participant is required to disclose to ASX personal information about individuals, including its directors, employees and customers, on a number of fronts.<sup>8</sup> This includes details of any changes in directors; information about significant breaches of the ASX 24 Operating Rules or Procedures; and when action is being taken or may be taken by ASIC, an exchange, a market operator, a clearing and/or settlement facility, or any other regulatory body against the participant or an employee.

ASX<sup>9</sup> may also at any time investigate the activities of a participant in relation to the performance of its obligations under the ASX 24 Operating Rules or as ASX otherwise considers appropriate.<sup>10</sup> As part of the investigation, ASX may require the participant to provide any information known to the participant.<sup>11</sup> It may also issue a notice requiring the participant:

- to provide or permit inspection at the offices of the participant or any other place notified by ASX of any records in the custody, control or possession of the participant;
- to appear, and have its employees appear, for interviews before ASX to give any information required by ASX in relation to the activities of the participant; or
- to provide specified information relating to any dealings in products of the participant.<sup>12</sup>

The participant is obliged to provide such information and/or comply with such a notice.<sup>13</sup>

### 4. ASX's information disclosure powers

ASX may, where it considers it appropriate,<sup>14</sup> disclose information regarding an ASX 24 participant and its activities that are relevant to ASX to:

- the Australian Securities and Investments Commission;
- the Reserve Bank of Australia;
- the Australian Prudential Regulation Authority;
- an approved clearing facility;
- an approved settlement facility; or
- any governmental agency or regulatory authority.<sup>15</sup>

ASX may also disclose information regarding a participant and its activities (including specifically client information) in the following circumstances:

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<sup>8</sup> See for example the information disclosure requirements in ASX 24 Operating Rules 1400(e) and 5000 and ASX 24 Operating Rules Procedures 1400(e) and 5000.

<sup>9</sup> ASX may appoint an agent to conduct such investigations on its behalf. If ASX does so, the participant must do all things required under the ASX 24 Operating Rules as if the investigation were conducted by ASX: see ASX 24 Operating Rule 5013.

<sup>10</sup> In deciding whether an investigation is "appropriate", among other things, ASX has regard to the obligations, duties, powers and discretions which it has as the holder of an Australian market licence under Part 7.2 of the Corporations Act: see ASX 24 Operating Rule 6120.

<sup>11</sup> ASX 24 Operating Rule 5010(a).

<sup>12</sup> ASX 24 Operating Rule 5010(b)-(d).

<sup>13</sup> ASX 24 Operating Rule 5011. The participant is also obliged to ensure that all information which it or its employees give to ASX is complete, accurate and not misleading: ASX 24 Operating Rule 6704.

<sup>14</sup> Again, in deciding whether or not the disclosure of such information is "appropriate", among other things, ASX has regard to the obligations, duties, powers and discretions which it has as the holder of an Australian market licence under Part 7.2 of the Corporations Act: see ASX 24 Operating Rule 6120.

<sup>15</sup> ASX 24 Operating Rule 6720.

- pursuant to any agreement or arrangement between ASX and any governmental agency or regulatory authority (including, without limitation, an exchange, market operator, clearing house or clearing and settlement facility) in Australia or elsewhere whose functions include the regulation of trading in, or clearing and settlement of financial products, which provides for the disclosure of information between ASX and the other party in relation to dealings in, or clearing and settlement of, derivatives or securities;
- if required to be disclosed by ASX under any law or any order of any court or tribunal, authority or regulatory body;
- which at the time of disclosure to or by ASX, was generally available to and known by the public;
- for the purposes of monitoring compliance with, or the enforcement of, the ASX 24 Operating Rules or the adjudication of those matters (including, without limitation, to the Appeal Tribunal);
- to a related body corporate of ASX, for the purpose of enabling that related body corporate to assess whether the participant is complying with, will comply with or has complied with the operating rules of, or any contractual arrangement with, that related body corporate;
- to an approved clearing facility, for the purpose of enabling the facility to assess whether the participant (or clearing participants which clear market transactions of the participant) is complying with, will comply with or has complied with the facility's operating rules or procedures;
- to the approved settlement facility, for the purpose of enabling the facility to assess whether the participant is complying with, will comply with or has complied with the facility's operating rules or procedures; and
- to any governmental agency or regulatory authority including, without limitation, another market operator, clearing house or clearing and settlement facility (in Australia or elsewhere) which requests ASX to provide the information to it, in the proper exercise of its powers relating to:
  - the order and good government of trading participants; or
  - the efficient, honest, fair, competitive and informed trading, clearing and settlement of financial products (in Australia or elsewhere); and
- to any entity which provides financial backing or insurance to ASX for the purpose of enabling that entity to assess the risk to ASX or that entity from trading activities generally or to assess any claim made in connection with the participant's activities.<sup>16</sup>

In addition, ASX may disclose to the operator of a disputes or complaints resolution scheme, or similar scheme to which a trading participant is a party, such information relating to the participant as ASX has and which it considers relevant to a request for information from the operator or to some other aspect of a complaint involving the participant.<sup>17</sup>

## 5. ASX's privacy policy

ASX has a privacy policy which outlines how and when it collects, stores and distributes personal information about individuals. The policy is available on the ASX website at:

<http://www.asx.com.au/legal/privacy-statement.htm>.

## 6. Privacy ramifications for ASX 24 participants

Having regard to the obligations referenced in the preceding sections of this Guidance Note, an ASX 24 participant should acknowledge in its privacy policy and in its privacy information collection statements that it may

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<sup>16</sup> ASX 24 Operating Rule 6721.

<sup>17</sup> ASX 24 Operating Rule 6723.

be obliged to provide personal information about individuals to ASX under the ASX 24 Operating Rules and that the information may be used by ASX for its purposes (for example, in the course of ASX's compliance activities).

It is also good practice for a participant to include in its client agreements a clause specifically stating that the client consents to the disclosure of their personal information to ASX in accordance with the ASX 24 Operating Rules.<sup>18</sup>

Having said this, it is no defense or excuse for a participant to refuse to provide information to ASX under the ASX 24 Operating Rules on the basis that it would involve an unauthorised disclosure of personal information about an individual without their consent.<sup>19</sup>

A participant who refuses to provide information to ASX when required to do so under the ASX 24 Operating Rules may be subject to enforcement action for breaching those rules.<sup>20</sup>

## 7. Anonymity and pseudonymity

Finally, ASX 24 participants should note that an entity subject to the Australian Privacy Principles is ordinarily required to give individuals the option of not identifying themselves, or of using a pseudonym, when dealing with them.<sup>21</sup> This does not apply, however, if the entity is required or authorised by or under an Australian law to deal with individuals who have identified themselves; or if it is impracticable for the entity to deal with individuals who have not identified themselves or who have used a pseudonym.<sup>22</sup>

ASX 24 participants who acquire or dispose of a security or derivative on behalf of a customer in the course of a carrying on a business of acquiring or disposing of securities or derivatives are required by the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)<sup>23</sup> to carry out a procedure to verify the customer's identity before providing that service to the customer.<sup>24</sup>

They are therefore not required by the Australian Privacy Principles, and it would be contrary to the AMLCTF Act for them, to give their customers the option of not identifying themselves, or of using a pseudonym, when taking an order to acquire or dispose of a security or derivative.

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<sup>18</sup> The inclusion of such a clause may avoid any dispute with the client as to whether they have consented to the use or disclosure of the information under APP 6.1(a).

<sup>19</sup> The ASX 24 Operating Rules are effectively given the force of law by the Corporations Act 2001 (Cth): see sections 793B and 793C. The disclosure of personal information about an individual to ASX under the ASX 24 Operating Rules is therefore required or authorised by or under an Australian law and, under APP 6.1(b) and 6.2(b), does not require the consent of the individual under APP 6.1(a).

<sup>20</sup> ASX 24 Operating Rule 5100.

<sup>21</sup> APP 2.1.

<sup>22</sup> APP 2.2.

<sup>23</sup> Referred to in this Guidance Note as the AMLCTF Act.

<sup>24</sup> Under Section 6 Table 1 Item 33 of the AMLCTF Act, the acquisition of a security or derivative in these circumstances is a "designated service". The trading participant is therefore a "reporting entity" (see section 5 of the AMLCTF Act) and required by section 32 of the AMLCTF Act to carry out a procedure to verify a customer's identity before providing that service to the customer.