

The purpose of this document is to articulate how ASX meets its obligations under the *Corporations Act 2001* (Cth)<sup>1</sup> to have adequate arrangements for enforcing compliance with the Operating Rules that govern the ASX and ASX 24 markets<sup>2</sup> and the ASX Clear, ASX Clear (Futures), ASX Settlement (CHESS) and Austraclear clearing and settlement facilities.<sup>3</sup>

## The obligation to comply with the Operating Rules

Under its participation agreement with ASX, each participant<sup>4</sup> in an ASX market or clearing and settlement facility is contractually bound to ASX to comply with the Operating Rules governing that market or facility. This contract is effectively given the force of law under the Corporations Act.<sup>5</sup>

Participants are required by the Operating Rules to notify certain matters to ASX, including to self-report significant<sup>6</sup> breaches of those rules.<sup>7</sup>

## The role of ASX Compliance

The responsibility for ensuring that ASX has adequate arrangements for enforcing compliance with the Operating Rules resides primarily with the Participants Unit in ASX Compliance.

The Participants Unit assigns each participant in an ASX market or clearing and settlement facility a compliance adviser, who is their primary point of contact at ASX on Operating Rule issues. The compliance adviser is available to advise the participant on any questions or concerns it may have, and will liaise with the participant on any questions or concerns ASX may have, under the Operating Rules. They receive and review any self-report by the participant of a significant breach of the Operating Rules. They also review any complaint from a third party which alleges that the participant has breached the Operating Rules and will discuss with the participant whether there has been a breach and, if so, how the participant intends to remedy it and prevent it re-occurring.

The Participants Unit may decide that it is appropriate to institute an investigation into a possible breach of the Operating Rules. In some cases, this may be because whether there has been a breach and, if so, the magnitude of the breach may not be immediately apparent. In other cases, this may be because the breach is considered so significant that formal enforcement proceedings may be warranted (see below) and the investigation will be a precursor to those proceedings. In the latter case, the investigation will be carried out by the Reviews and Investigations team in the Participant's Unit.

Under the Operating Rules, ASX may require participants to provide information and access to books and records that may be relevant to assessing their compliance with those rules. ASX may also require any such information to be verified by an independent auditor or other expert. ASX can, and does, use these powers when it conducts an investigation into a possible breach of the Operating Rules.

If a determination is made that ASX should institute formal enforcement proceedings against a participant, the matter will be referred to the Enforcement Unit in ASX Compliance<sup>8</sup> for it to conduct those proceedings.

## Follow-up action in relation to breaches

Where ASX finds that a participant has breached the Operating Rules, it may take action to redress the breach. Whether it does so, and the type of action it will take, will vary depending on the seriousness of the breach and a range of other factors,<sup>9</sup> including whether the participant has a good or poor history of complying with the Operating Rules. Such action may include (in ascending order of significance):

- a simple noting of the matter on ASX's internal breach register for future reference;
- a conditional 'no escalation' letter noting the breach but indicating that ASX does not intend to take the matter further provided the conditions specified in the letter are met by the participant;

- a formal warning that if the breach is repeated, the matter will be referred to the ASX Enforcement Unit for consideration of enforcement proceedings;
- the imposition of a requirement that the participant engage an independent expert to review its operations or compliance framework;
- the imposition of a requirement that the participant pay additional margin or hold a secondary capital requirement to cover an otherwise unacceptable level of risk;
- the addition of 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);
- the referral of the matter to the Enforcement Unit in ASX Compliance for the commencement of formal enforcement proceedings under the ASX Enforcement and Appeals Rulebook (see below); or
- in a serious case, the suspension or termination of 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 legal authority to order a trading or clearing participant in the ASX or ASX 24 markets or clearing and settlement facilities to pay compensation to a client for breaching the Operating Rules of those markets or facilities.<sup>10</sup>

## **Formal enforcement proceedings**

If ASX finds that a participant has breached the Operating 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 for a breach of the ASX or ASX 24 Operating Rules and up to \$1,000,000 for a breach of the ASX Clear, ASX Clear (Futures) or ASX Settlement Operating Rules or the Austraclear Regulations. 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 under the ASX Enforcement and Appeals Rulebook is made on behalf of ASX by the Chief Compliance Officer (CCO). A right of appeal lies to the ASX Appeal Tribunal if a participant is dissatisfied with the decision of the CCO.

## **Referrals to ASIC**

If ASX suspects that a participant has committed a significant contravention of the Operating Rules or the Corporations Act, it is required under that Act<sup>11</sup> to give a notice to the Australian Securities and Investments Commission (ASIC) with details of the contravention. The purpose of the notice is so that ASIC can then consider whether it wishes to take criminal or other regulatory action in relation to the breach.

ASX is also required to notify ASIC of any disciplinary action it takes against a participant for breaching the Operating Rules.<sup>12</sup>

## **The limits on ASX's investigation and enforcement powers**

ASX is not an arm of the government that can exercise police powers. It cannot conduct searches, seize evidence, examine people on oath or arrest people who don't co-operate, in the way that ASIC or other government regulators can. Its ability to investigate is limited to its power under the Operating Rules to request a participant to provide information or access to books and records mentioned above.

ASX can only investigate and take action in relation to matters that are regulated by the Operating Rules.

Many of the complaints ASX receives relate to conduct that is not regulated by the Operating Rules. In particular, ASX often receives complaints about matters that are regulated by ASIC under the Corporations Act<sup>13</sup> rather than by ASX under the Operating Rules. ASX is powerless to do anything about these, other than refer them to ASIC under the provisions mentioned above.

More information about the types of matters that are regulated by ASIC under the Corporations Act and those that are regulated by ASX under the Operating Rules is available on the ASX website at:

<http://www.asx.com.au/documents/about/corporations-act-vs-operating-rules-matters.pdf>

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<sup>1</sup> Referred to in this document as the "Corporations Act". References in this document to sections are to sections of the Corporations Act.

<sup>2</sup> Section 792A(c)(ii).

<sup>3</sup> Section 821A(c)(ii).

<sup>4</sup> The expression "participant" includes brokers who trade on the ASX or ASX 24 market, clearers who clear in the ASX Clear or ASX Clear (Futures) clearing facilities and settlement participants who settle transactions through the ASX Settlement (CHES) and Austraclear settlement systems.

<sup>5</sup> Sections 793B, 793C, 822B and 822C.

<sup>6</sup> ASX Clear Futures Operating Rule 4.10 currently does not limit the self-reporting obligation to "significant matters". There is currently no breach reporting obligation in the Austraclear Regulations.

<sup>7</sup> See ASX Operating Rule 5000, ASX Clear Operating Rule 19.2.3, ASX Settlement Operating Rule 12.18.1, ASX 24 Operating Rule 5000 and ASX Clear (Futures) Operating Rule 4.10.

<sup>8</sup> The Enforcement Unit is part of the ASX Compliance Executive Office.

<sup>9</sup> The full list of factors ASX takes into account in this regard are spelt out in Annexure A (the sanction guidelines) of the ASX Enforcement and Appeals Rulebook Procedures.

<sup>10</sup> Although, if ASX does take formal enforcement proceedings against a trading or clearing participant under the ASX Enforcement and Appeals Rulebook, one of the factors that 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>11</sup> Sections 792B(2)(c) and 821B(2)(c).

<sup>12</sup> Sections 792B(2)(b) and 821B(2)(b).

<sup>13</sup> Including the Market Integrity Rules adopted by ASIC under the Corporations Act.