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1. s 792A Corps Act
2. s 793B Corps Act
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4. s.822B Corps Act

Enforcement Action and Appeals from Enforcement Decisions

Purpose

The purpose of this Guidance Note is to outline the practices and procedures commonly followed by ASX and the Appeal Tribunal in respect of:

- enforcement action against Participants; and
- appeals by Participants against ASX enforcement decisions.

This Guidance Note does not deal with the procedures for appealing other types of ASX decisions, although a number of the procedures are essentially the same.

Enforcement obligations & powers

Section 792A of the Corporations Act obliges ASX to have adequate arrangements for monitoring and enforcing compliance with the Operating Rules for its licensed markets (ASX and ASX 24).

Section 821A of the Corporations Act obliges ASX to have adequate arrangements for enforcing compliance with the Operating Rules for its licensed clearing and settlement facilities (ASX Clear, ASX Clear (Futures), ASX Settlement and Austraclear).

Under sections 793B and 822B of the Corporations Act, these Operating Rules have effect as a contract between ASX and relevant Participants pursuant to which all parties agree to observe and comply with the provisions of the Operating Rules which apply to them.

The rules and procedures governing enforcement action against Participants for contraventions of the Operating Rules and appeals from enforcement decisions are contained in the ASX Enforcement and Appeals Rulebook (“Rules”) and the accompanying ASX Enforcement and Appeals Rulebook Procedures (“Procedures”).

Overview – ASX Enforcement & Appeals Rulebook

The Rules and Procedures cover, among other things:

- the framework within which ASX makes enforcement decisions;
- the ASX decisions that may be appealed;
- the process for appealing such decisions; and
- the constitution and role of the Appeal Tribunal.

Under Rule 2.1.1 of the Rules, ASX may take enforcement action if it considers that a Participant has contravened an Operating Rule or a condition imposed by ASX under the Operating Rules. For the purposes of this Guidance Note, references to contravening the Operating Rules include contravening a condition imposed under the Operating Rules.

Rule 2.2 provides the ASX with a range of sanction powers in relation to such contraventions. Those powers include:

- imposing a censure;
- imposing a monetary penalty of up to \$250,000 (for Participants of the ASX & ASX 24 markets) or \$1,000,000 (for Participants of the ASX Clear, ASX Clear (Futures), ASX Settlement & Austraclear clearing and settlement facilities);
- imposing a requirement that staff of a Participant undertake an education or compliance programme specified by ASX; and
- imposing a condition on a Participant's right to participate in the facilities of the relevant ASX licensee.

Steps in the enforcement process

Commencement of enforcement action

Where ASX proposes to take enforcement action against a Participant for contravening the Operating Rules, ASX will issue a Submission Notice to the Participant under Rule 2.3.1 outlining the alleged contravention and inviting the Participant to make written submissions in response to the Notice.

Under Procedure 2.3, a Submission Notice will include:

- the Operating Rule or condition alleged to have been breached;
- the factual circumstances giving rise to the alleged contravention;
- a preliminary indication of the range of sanction that may apply to the contravention;
- the principles or factors under Annexure A to the Procedures taken into account by ASX in indicating the range of sanction;
- a preliminary indication of the type of notice under which ASX may take enforcement action against the Participant (that is, either an Alleged Minor Infringement Notice or an Enforcement Notice);
- the process for responding to the Submission Notice; and
- the steps ASX may take following receipt and consideration of a Participant's response.

Opportunity for “without prejudice” discussions

When a Submission Notice is issued, the Participant will be notified that ASX will, at the Participant's request, provide an opportunity to engage in “without prejudice” discussions to explore the parties' respective positions and, in particular, whether the parties may be able to

reach an agreed position on enforcement action. While these discussions may occur at any time following the issue of a Submission Notice, it is often useful for them to occur before the Participant prepares its response to the Submission Notice.

“Without prejudice” discussions are intended to remain “off the record” and are not to be referred to:

- in any subsequent ASX Decision Recommendation, Alleged Minor Infringement Notice, Enforcement Notice or Enforcement Circular without the Participant’s consent, other than to state any agreed position on the enforcement action reached between ASX and the Participant; or
- in any subsequent Appeal Tribunal proceedings, without the consent of both ASX and the Participant.

It should be noted that any agreement reached during “without prejudice” discussions on the sanction to be imposed for a contravention of the Operating Rules will be subject to the approval of the Group Executive and Chief Compliance Officer (“CCO”) of ASX¹, who has delegated authority to make enforcement decisions on behalf of the various ASX licensees. The CCO will need to be satisfied that the agreed sanction is appropriate, having regard to the relevant matters set out in the sanction guidelines in Annexure A to the Procedures.

Examples of the types of matters that may be covered in “without prejudice” discussions include:

- whether the Participant intends to contest liability for the contravention and, if so, why;
- any errors in, or additions to, the factual information outlined in the Submission Notice that the Participant wishes to raise with ASX for consideration;
- any aggravating or mitigating factors that ASX or the Participant may view as relevant to the assessment of an appropriate sanction for the alleged contravention;
- ASX’s and the Participant’s respective views as to the nature and size of the sanction that ought to be imposed in relation to an alleged contravention under the sanction guidelines in Annexure A to the Procedures; and
- whether the matter may appropriately be dealt with by way of an Alleged Minor Infringement Notice under Rule 2.4, having regard to the matters set out in Procedure 2.4.1(c).

In any “without prejudice” discussions, ASX will generally seek to highlight for a Participant the practical application to the case at hand of the relevant principles and factors² that ASX takes into account in determining the sanction to be imposed for a contravention of the Operating Rules. This may include the seriousness of the contravention (ie whether it is a Level 1, 2 or 3 contravention), the culpability of the Participant in committing the contravention, any relevant aggravating or mitigating factors that ASX is likely to take into account in determining the sanction for the contravention and the types of sanctions that have been imposed for similar contraventions previously.

¹ Such approval, if provided, occurs at the enforcement decision stage when, following receipt of the Decision Recommendation from ASX Compliance, the CCO decides to issue an Enforcement Notice or Alleged Minor Infringement Notice (as applicable) which imposes sanctions consistent with the “agreed position” – see “Decision Recommendation” and “CCO Decision” below.

² In most cases, these will be the principles or factors set out in Annexure “A” to the Procedures, although ASX is not limited to considering those principles and factors only and may have regard to all relevant circumstances in any individual case.

Should it be possible to reach an agreed position on enforcement action before a Participant responds in writing to ASX's Submission Notice, it will generally not be necessary for a Participant to so respond, thereby saving it time and cost³.

If a Participant is interested in exploring the option of having "without prejudice" discussions about an enforcement action, it should contact ASX Compliance at the earliest opportunity to discuss the matter.

Agreed positions on enforcement action

If during the course of a "without prejudice" discussion (or otherwise), it becomes apparent that ASX Compliance and a Participant may be able to reach an agreed position on enforcement action, ASX Compliance will normally discuss the proposed agreed position with the CCO and obtain the CCO's in principle support to the proposed agreed position.

If the CCO declines to give in principle support to the proposed agreed position, the Participant will be notified of this and the reasons why. It may be appropriate in such a case, for ASX and the Participant to have a further "without prejudice" discussion to determine whether the CCO's objections can be addressed in a further agreed position.

If the CCO gives in principle support to the proposed agreed position, ASX Compliance will then write a letter to the Participant outlining the agreed position, including details of the alleged contravention(s) and the proposed sanction. In the letter, the Participant will be requested to confirm the agreed position in writing within 7 days and to state in their written confirmation that if an Enforcement Notice or Alleged Minor Infringement Notice (as applicable) is issued which imposes sanctions consistent with the agreed position, the Participant will comply with the Notice.

If the agreed position includes that the Participant is to be given an opportunity to comment upon any Enforcement Circular to be issued by ASX in relation to the matter, a draft Circular will also be enclosed with the letter for comment. It should be noted, however, that in such a case, while ASX will consider any comments the Participant may make on the draft Circular, the final form of the Circular remains at ASX's discretion and is subject to amendment by ASX without reference to the Participant.

Following receipt of written confirmation from the Participant as referred to above, ASX Compliance will prepare a Decision Recommendation to the CCO (see below) for the issue of an Enforcement Notice under Rule 2.5.1 or an Alleged Minor Infringement Notice under Rule 2.4.1 (as applicable) in accordance with the agreed position.

It should be noted that notwithstanding that the CCO may have given in principle support to the proposed agreed position, the CCO nevertheless retains the discretion, following the CCO's receipt and consideration of the Decision Recommendation, to make an enforcement decision which differs from the agreed position⁴.

³ Where the Participant wishes to rely on certain matters relevant to the contravention or sanction which are not identified in the agreed position (because these not having been accepted by ASX) but which it nevertheless wishes to be put before the CCO when making an enforcement decision, the Participant may set out those further matters in its written response to the Submission Notice.

⁴ This retained discretion arises from the fact that the CCO can only formally decide to issue an Enforcement Notice under Rule 2.5.1 or an Alleged Minor Infringement Notice under Rule 2.4.1 (as applicable) once he/she has considered the Decision Recommendation and is satisfied, on the basis of the material before him/her, that there has been a

Contested enforcement action

If a Participant decides to contest liability and/or penalty, it must submit a written response to the Submission Notice to ASX Compliance outlining its reasons for doing so and stating any mitigating factors that it wishes ASX to take into account in determining the appropriate penalty. A full copy of this response will be included with the Decision Recommendation made by ASX Compliance to the CCO (see below).

Decision Recommendation

If following the steps above ASX determines that it intends to pursue enforcement action against a Participant, ASX Compliance will prepare a Decision Recommendation to the CCO recommending that he or she exercise the CCO's delegated authority to make an enforcement decision on behalf of the relevant ASX licensee. That decision will be documented in an Enforcement Notice under Rule 2.5.1 or, in an appropriate case, in an Alleged Minor Infringement Notice under Rule 2.4.1.

In all cases, the Decision Recommendation will include:

- the Submission Notice;
- the Participant's written submissions in response (if any);
- a draft of the Enforcement Notice or Alleged Minor Infringement Notice (as applicable) proposed to be issued to the Participant in relation to the contravention;
- the rationale for the sanction set out in the Enforcement Notice or Alleged Minor Infringement Notice (as applicable), by reference to the relevant factors and general principles set out in the sanction guidelines in Annexure A to the Procedures; and
- a draft of the Enforcement Circular proposed to be published in relation to the contravention.

If an agreed position on the enforcement action has been reached with the Participant, the Decision Recommendation will also include:

- particulars of the agreed position; and
- a copy of the Participant's written confirmation of the agreed position and that it will comply with the sanctions outlined in the draft Enforcement Notice or Alleged Minor Infringement Notice (as applicable).

CCO decision

The CCO will consider the Decision Recommendation and if he or she considers that a Participant has contravened the Operating Rules and that it is appropriate to impose a sanction in relation to that contravention, then the CCO will decide to issue an Enforcement Notice under Rule 2.5.1 or an Alleged Minor Infringement Notice under Rule 2.4.1 (as applicable).

Prior to making a decision on the Decision Recommendation, the CCO may, in the interests of amplifying a disputed issue:

- grant a Participant an opportunity to make oral submissions before the CCO; or
- facilitate further exchanges of papers between a Participant and ASX.

contravention of the Operating Rules and that the sanction proposed in respect of that contravention is appropriate, having regard to the relevant matters set out in the sanction guidelines in Annexure A to the Procedures. In practice, it would be an unusual case for the CCO to make an enforcement decision which differs from a position agreed between ASX Compliance and a Participant with the CCO's in principle support.

For the CCO to decide to issue an Enforcement Notice or Alleged Minor Infringement Notice, he or she must be satisfied on the materials before him or her that the Participant has contravened an Operating Rule. If the CCO is not satisfied that there has been a contravention based on the materials in the Decision Recommendation, he or she may:

- call for the parties to provide additional materials; or
- decline to make an enforcement decision against the Participant.

The CCO must also be satisfied that the sanction proposed in an Enforcement Notice or Alleged Minor Infringement Notice is appropriate, having regard to the relevant matters set out in the sanction guidelines in Annexure A to the Procedures. Hence, the CCO may decide to impose greater or lesser sanctions than those recommended in the Decision Recommendation (although, as a practical matter, this is unlikely to occur where ASX and the Participant have reached an agreed position in relation to enforcement action to which the CCO has given in principle support, since the CCO will already have taken such matters into account in giving such in principle support).

If a decision is made to issue an Enforcement Notice or an Alleged Minor Infringement Notice, the relevant Notice will set out details of:

- the Operating Rule/s breached;
- the facts giving rise to the alleged contravention;
- the sanction determined by ASX in respect of the contravention;
- the principles or factors taken into account by ASX in determining the sanction; and
- the consequences of not complying with the sanction.

The CCO may delegate his or her power to make an enforcement decision to another ASX employee or to a member of the Appeal Tribunal Panel if the CCO is on leave or away on business or otherwise considers it appropriate to do so.

Timetable for compliance with Enforcement Notices and Alleged Minor Infringement Notices

A Participant has 28 Business Days to comply with an Enforcement Notice or an Alleged Minor Infringement Notice.

Failure to comply with an Enforcement Notice within 28 Business Days may lead to legal proceedings by ASX to recover any monetary penalty imposed in the Enforcement Notice. It may also lead to the suspension or termination of the Participant's participation in ASX's markets or facilities.

Failure to comply with an Alleged Minor Infringement Notice within 28 Business Days may lead to the issue of an Enforcement Notice.

Details of how to effect payment of any monetary penalties will be included in the Enforcement Notice or the Alleged Minor Infringement Notice.

Alleged Minor Infringement Notices

Where a Participant commits a Level 1 contravention, as defined in the sanction guidelines in Annexure A to the Procedures, ASX may elect to issue an Alleged Minor Infringement Notice rather than an Enforcement Notice.

If within 28 Business Days of receiving an Alleged Minor Infringement Notice, a Participant:

- pays any monetary penalty set out in the Alleged Minor Infringement Notice; and
- if there are any non-monetary sanctions set out in the Alleged Minor Infringement Notice, complies or agrees to comply with those sanctions in a manner acceptable to ASX,

then ASX is precluded from issuing an Enforcement Notice to the Participant in respect of the alleged contravention.

A Participant is not, by reason only of having complied with an Alleged Minor Infringement Notice, regarded as having breached the relevant Operating Rule or condition specified in the Alleged Minor Infringement Notice (Rule 2.4.2).

Where a Participant complies with an Alleged Minor Infringement Notice, any publication by ASX of enforcement action in relation to the Notice will not name the Participant (Procedure 4.1.1).

If, however, the Participant fails to comply with the Alleged Minor Infringement Notice within the required 28 Business Day period, then ASX may issue an Enforcement Notice in respect of the alleged contravention. If ASX decides to issue an Enforcement Notice, it may impose a greater sanction (including a larger monetary penalty) than the sanction originally imposed in the Alleged Minor Infringement Notice.

Any publication by ASX of action taken in an Enforcement Notice will also usually name the Participant.

Appeals from Enforcement Notices

If a Participant is not satisfied with the decision of ASX to issue an Enforcement Notice or the sanction imposed in the Enforcement Notice, the Participant may appeal that decision by lodging an appeal with the Appeal Tribunal no later than 20 Business Days from the date of the Enforcement Notice. Each appeal notice must identify the decision against which the appeal is made and set out the grounds of appeal.

The fee for lodging an appeal is \$5000 (plus GST). The Appeal Tribunal may order that fee to be refunded to the Participant if the Enforcement Notice or the sanction imposed in the Notice is set aside or varied by the Appeal Tribunal in the manner sought by the Participant (Rule 3.6.9).

The Participant may elect for the appeal to be conducted as a fresh hearing, to be decided on the basis of the facts and the law and the submissions made to the Appeal Tribunal as at the date of the hearing (Procedure 3.6.1). In order to make this election, the Participant must specify in its Notice of Appeal that it elects that the appeal be conducted as a re-hearing.

If an election for a re-hearing is not made, the Appeal Tribunal will review the decision of ASX as an appeal and determine whether there was any error in fact or law which had the effect of making the decision incorrect, based on the material before the ASX at the time the decision was made.

The Appeal Tribunal will comprise at least 3 members, appointed by the Chairperson, drawn from the Appeal Tribunal Panel (Procedure 3.5.4).

Following the provision of a notice of appeal to the Appeal Tribunal, the Chairperson of the Tribunal or Counsel to the Tribunal (being a person appointed to assist the Tribunal in carrying out its functions) will advise the Participant and ASX in writing of the date fixed for

the hearing. The Chairperson of the Tribunal or Counsel to the Tribunal will also advise the parties of the identity of the panel members who have been nominated to hear the matter.

Communications to the Appeal Tribunal prior to a hearing should be addressed to Counsel to the Tribunal, and should always be copied to the other party.

If any party has any objection to any member of the Appeal Tribunal hearing a particular matter or has any other objection to a particular matter being heard by the Appeal Tribunal, that party should raise that objection at the earliest possible opportunity with Counsel to the Tribunal and should not wait until the hearing date before raising the objection.

Matters to be considered by an Appeal Tribunal are assessed on the written submissions of the parties unless the Tribunal decides to conduct, or a party requests, an oral hearing. If a party wishes to request an oral hearing, it must do so by no later than the lodgement of its final written submissions with the Tribunal (Rule 3.6.2).

Rule 3.6.4 provides that proceedings of the Appeal Tribunal are to be conducted with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before the Tribunal permits. While the Appeal Tribunal does not operate as a court, some court practices or procedures may be adopted by the Tribunal in hearings, for example, setting time-tables for the submission of material to the Tribunal.

Prior to a hearing, the Tribunal may give written directions to the parties, with a view to simplifying the matter and shortening the hearing time. Pre-hearing directions given by the Tribunal may address such matters as imposing deadlines for the supply to the other party of copies of documents which it is intended will be relied on at the hearing, imposing deadlines for identifying any persons who it is proposed will give oral evidence at the hearing, directing that written outlines of arguments be prepared and directions in relation to preparing a statement of agreed facts.

The venue for a hearing is chosen by the relevant Appeal Tribunal. The Tribunal may choose to hold a hearing by video or telephone conference.

Oral hearings before the Appeal Tribunal take place in private. A party is entitled to have two representatives attend the hearing and make submissions on its behalf (Procedure 3.6.2). A representative may be an employee of the party appearing before the Tribunal, a barrister or solicitor, or any other person approved by the Tribunal. The Tribunal may also permit additional persons to be present at the hearing as observers.

The Appeal Tribunal must determine a matter on its merits, without bias, give both ASX and the Participant a fair hearing and observe the rules of procedural fairness (Rule 3.6.5).

The Appeal Tribunal may conduct proceedings as it sees fit (Rule 3.6.4). It is not obliged to observe formal rules of evidence and may give such weight to items of evidence placed before it as it considers appropriate and fair in all the circumstances.

Evidence placed before the Appeal Tribunal by ASX or a Participant is usually in written form and, if an oral hearing is ordered or requested, supported by oral submissions made by the parties. The written evidence commonly includes the Submission Notice and the Participant's response, as well as relevant trading or other business records of the Participant.

Where relevant, the Appeal Tribunal may permit oral evidence to be led at a hearing. It is a matter for the discretion of the Appeal Tribunal whether to permit a person who provides oral

evidence to be cross-examined. The Appeal Tribunal may itself choose to question a person who provides oral evidence.

The Appeal Tribunal is not obliged to make a transcript of a hearing but may elect to do so. The usual practice is that the hearing is recorded and the relevant Tribunal subsequently makes a decision on whether to prepare a transcript from the recording. A copy of any transcript or recording will be made available to the parties involved in the proceeding, if requested.

A determination of the Appeal Tribunal is made by a simple majority of votes of the members of the relevant Tribunal. Each member, including the Chairperson, has one vote. The Chairperson does not have a casting vote.

The Appeal Tribunal is generally required to provide written reasons for its determination within 90 days of making its decision (Procedure 3.6.11).

If an Appeal Tribunal considers that a party to the appeal has acted vexatiously, frivolously or unreasonably, the Appeal Tribunal may order that party to pay to another party to the proceedings, the whole or part of the costs and expenses incurred by the other party in the appeal (Rule 3.6.9).

An order for costs:

- may be for a specified or unspecified amount;
- if for an unspecified amount, must specify the basis on which the amount is to be determined; and
- may specify the terms on which costs must be paid (Rule 3.6.10).

Publication of Enforcement Action and Appeal Tribunal Determinations

Rule 4.1.1 provides that ASX will, unless it determines otherwise, publish details of enforcement action against a Participant, in the form and manner ASX considers appropriate. Likewise, the Appeal tribunal will, unless it determines otherwise, direct ASX to make public an appeal determination (except where the determination has entirely set aside the enforcement action), in the form and manner ASX considers appropriate.

The announcement relating to the enforcement action or appeal determination will usually include:

- the name of the Participant; and
- any other information which ASX or the Appeal Tribunal (as the case may be) considers relevant to those matters.

ASX will generally not make any announcement in relation to an Enforcement Notice until after the expiry of the 20 Business Day appeal period following the date of the Enforcement Notice. If an appeal is lodged by the Participant within that period, ASX will generally not make any announcement until the appeal is determined.

Where an Alleged Minor Infringement Notice is issued to a Participant, any publication of enforcement action in relation to the Notice will only occur following compliance with the Notice and will not name the Participant (Procedure 4.1.1).

Report to Australian Securities and Investments Commission

If ASX takes enforcement action against a Participant, ASX is obliged by sections 792B(2)(b) and 821B(2)(b) of the Corporations Act to lodge with ASIC written particulars of the name of the Participant and the reason for, and nature of, the action taken.

Transitional Provisions

The processes and procedures set out in this Guidance Note apply to enforcement and appeal matters in respect of conduct which occurs after 1 August 2010. For conduct which occurred prior to 1 August 2010, disciplinary action is undertaken pursuant to the former Disciplinary Processes and Appeals Rulebook (see the transitional provisions in Rule 1.13 in the new Rulebook).

Qualification

ASX has published this Guidance Note to promote commercial certainty and to assist Participants. Nothing in this note binds ASX or the Appeal Tribunal in the application of the Operating Rules in a particular case or restricts ASX or the Appeal Tribunal from adopting practices and procedures as it considers appropriate in its discretion from time to time. This Guidance Note does not constitute legal advice and Participants should obtain their own advice from a qualified professional person in respect of their obligations. ASX may replace this Guidance Note at any time. Readers may contact ASX to ensure they have the most up to date version.

Guidance Note History:	First Issued: 31 March 2008
	Amended: 20 December 2010

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