



23 December 2009

Ms Marian Kljakovic
Market Integrity Unit
Corporations and Financial Services Division
The Treasury
Langton Crescent
Parkes ACT 2600
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Dear Ms Kljakovic

Re: Reforms to the Supervision of Australia's Financial Markets

ANZ appreciates the opportunity to comment upon the proposed reforms to the supervision of Australia's financial markets following the government's decision to have the Australian Securities and Investment Commission ("ASIC") perform the supervision of real-time trading on Australia's domestic licensed markets.

The key points of our submission are:

- (a) ASIC's regulatory and supervisory functions, roles and responsibilities should be clearly delineated from other market operators and licensees;
- (b) disciplinary hearings into alleged '*Market integrity rule*' contraventions should not be conducted in public;
- (c) an appeal or review mechanism in respect of the determinations or recommendations of the ASIC Disciplinary Panel should be included (as a measure outside of having a matter taken through the formal court process);
- (d) greater detail is needed in respect of the overall application and determination of sanctions;
- (e) supports, in-principle, the introduction of an infringement notice regime but the amount of up to four-fifths (80%) of the maximum penalty is too high and instead a cap of three-fifths (60%) would provide greater incentive for participants to accept and agree to the resolution of matters through the infringement notice process;
- (f) each market participant should have the right to nominate a representative for appointment as a delegate to the Disciplinary Panel;
- (g) further consultation with industry representatives is required in order to develop a fair and transparent calculation of levies to meet the costs for supervision; and
- (h) the proposed "*Emergency rule*" provisions detailed in the Draft Bill should be subject to further consultation including its place in respect of Ministerial and parliamentary responsibilities.

Discussion of key issues:

(a) Duplication between ASIC's Supervisory Role and other Market Licensees

In order to facilitate a streamlined and effective supervisory regime in Australia, that responds in a timely and market sensitive manner, it will be important to remove duplication and overlap of supervisory roles and responsibilities between ASIC, the Australian Securities Exchange ("ASX") and other market operators and licensees.

In particular, in the transfer of market supervision from the ASX to ASIC a clear delineation needs to be established in respect of the separation of the supervisory functions, roles and responsibilities proposed for the respective organisations. Market and trading participants should be required to interface with the one market regulator or supervisor in relation to surveillance, trading or other market matters.

It will be important to ensure there is not duplication or parallel processes in respect of regulatory or supervisory queries or matters and there should be a single disciplinary process and regime over matters for which ASIC will have supervisory responsibility. Further, there should not be duplication for participants in the requirement to report supervisory or regulatory issues.

(b) Disciplinary Hearings

Currently, the ASX Disciplinary Tribunal conducts hearings in private and, where a participant is found to have breached the rules, its findings are made public. Given the potential commercial and reputational ramifications and sensitivities for both individuals and participants, it would be inappropriate for details of disciplinary matters to be the subject of public airing and media scrutiny prior to any formal finding being established.

Therefore, outside of matters which are the subject of formal legal proceedings and within the jurisdiction of a court, we oppose the proposal for disciplinary hearings into alleged market integrity rules contraventions to be conducted in public. Whilst hearing processes are not covered in detail within the Consultation Paper, if disciplinary hearings are intended to be convened by the Disciplinary Panel put in place by ASIC (being the panel comprised of members within the securities industry who have been nominated as ASIC delegates) then any such hearings should be conducted in private. In circumstances where non-legal persons constituting the ASIC Disciplinary Panel are to be responsible for the determination of disciplinary matters, or at least in making recommendations to ASIC, then such deliberations need to be conducted in private.

(c) Need to Incorporate an appropriate Appeals Framework

We note the Consultation Paper does not consider rights of appeal or an appeal or review mechanism in respect of the determinations or recommendations of the ASIC Disciplinary Panel.

However, as we understand it, if ASIC suspects that a person or participant has breached a market integrity rule, ASIC will submit the facts to the ASIC Disciplinary Panel for consideration. If the Disciplinary Panel finds a contravention has occurred it

may (as delegates of ASIC) issue an infringement notice which is likely to include details of the alleged breach and penalty, and which may include non-pecuniary sanctions. While the total financial penalty cannot exceed \$4 million per contravention for a corporation, the fine available is contingent on the level of penalty set for the particular market integrity rule.

As proposed, if the person alleged to have contravened market integrity rules decides not to comply with an infringement notice, ASIC may then pursue the matter through the Courts. However, we suggest that an appeals mechanism should be incorporated into the process, consistent with ASX current practice with its Appeal Tribunal, which comprises an external chairman and two members drawn from the Disciplinary Panel who were not part of or involved in the original decision-making process.

If the person alleged to have contravened market integrity rules decides not to comply with an infringement notice and the appeal goes against them, ASIC should then be able to pursue the matter through the Courts. The court may find that a person has breached, which would be a contravention of a civil penalty provision in the Act. If the court finds a breach has occurred it is open to the court to issue a penalty of up to \$5 million for corporations. It would then be open for a person to appeal a decision by a court via the usual processes which would see the process as being both convoluted and expensive.

In summary, we propose that the disciplinary process proposed should also incorporate an appropriate appeals or review framework and mechanism that sits between the determination or recommendations of the ASIC Disciplinary Panel and the formal commencement of Court proceedings.

(d) Sanctions

At present, ASX can impose a maximum pecuniary penalty of \$1 million dollars upon its participants. Prior to 31 March 2008, the maximum fine that ASX could impose upon its participants for a breach under its Market Rules was \$250,000.

The Consultation Paper proposes a substantial increase in the maximum level of fine. Under the proposal, and whilst contingent on the particular pecuniary penalty set for the relevant market integrity rule, potentially fines of up to \$1 million for individuals or \$5 million for corporations may be imposed by a Court (and \$800,000 for individuals or \$4 million for corporations under the proposed Infringement Notice regime) for a contravention of the market integrity rules. The substantial increase to a potential maximum fine of \$5 million seems excessive and the basis for the increase is not clear. The present penalty of \$1 million would seem to be an adequate deterrent.

In any event, it will be essential that practical guidance and a proper framework be provided as to how disciplinary fines and sanctions are to be determined. In circumstances where the composition and membership of the ASIC Disciplinary Panel may differ from case-to-case, it is imperative for the purposes of ensuring fairness, consistency and transparency, that a clear framework and set of guidelines be produced in respect of the application of fines and sanctions.

(e) *Infringement Notice Process*

It is appreciated that the precise details of the infringement notice regime are yet to be determined but are to be set out in regulations which are likely to be the subject of further consultation in early 2010.

We understand that the proposed infringement notice process is likely to operate in a similar manner to the infringement notice regime presently in place for alleged breaches of the continuous disclosure provisions. We further understand that fines issued pursuant to an infringement notice are administrative penalties (as opposed to civil penalties) and satisfying the terms of the infringement notice is not an admission of guilt by the person or participant alleged to have contravened the market integrity rule.

On the basis of our understanding of the proposed infringement notice regime, and subject to the review of the proposed regulations, we agree, in-principle, with the introduction of a 'flexible' infringement notice regime.

However, the proposed amount of up to four-fifths or 80% of the maximum fine available is too high a percentage, and in some cases, may not provide sufficient incentive or encouragement for participants to accept and agree to the resolution of matters through the infringement notice process. For the infringement notice regime to operate efficiently and effectively, and to properly recognise the co-operation and assistance of participants who accept and agree to enter and resolve matters by way of infringement notice, it is suggested that a cap of three-fifths (60%) of the maximum fine able be considered. This would provide greater incentive for participants to co-operate and agree to the resolution of matters through the infringement notice process.

Further, fines that result from infringement notices should be directed towards funding market education and research. This approach would be consistent with the ASX Disciplinary Tribunal's current practice.

(f) *Appointments of Delegates to the ASIC Disciplinary Panel*

We support the disciplinary mechanism proposed through the establishment of a committee of market experts to act, as required, as delegates on the Disciplinary Panel. We suggest that the composition of the Disciplinary Panel capture broad expertise and knowledge of the nature of our financial markets, including the types of products, platforms and participants through which the market operates. To that extent we further suggest that each market participant be given the right to nominate a representative for appointment as a delegate to the Disciplinary Panel. This approach would strengthen transparency and equity for all participants and ensure broad industry expertise and knowledge resides with the Disciplinary Panel.

(g) *Recovery of Costs for Supervision*

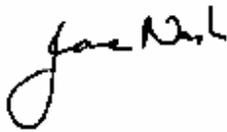
If ASIC is to adopt the cost recovery approach outlined in the Consultation paper, then further consultation with industry representatives is required in order to develop a fair and transparent calculation of levies.

(h) Proposed introduction of 'Emergency rule' provisions

The proposal for ASIC to be provided with powers to make market integrity rules in emergency situations requires more extensive consultation in relation to how this sits with parliamentary and ministerial responsibilities and decision-making. Additionally, as part of further consultation, it would be beneficial if a framework setting out the circumstances that may constitute an emergency situation requiring ASIC to invoke its powers to make market integrity rules were provided.

Should you wish to discuss this submission please contact either Mr Rob Koopman on 02 8019 3963 or myself on jane.nash@anz.com or (03) 8654 3662.

Yours sincerely

A handwritten signature in black ink, appearing to read "Jane Nash". The signature is written in a cursive, slightly slanted style.

Jane Nash

Head of Government & Regulatory Affairs