

### PRIVACY MATTERS

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>• To outline ASX's information gathering and disclosure powers under the ASX Clear Operating Rules</li> <li>• To suggest some measures ASX clearing 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 Clear Operating Rules</li> <li>• To confirm that an ASX clearing participant may not refuse to provide information to ASX under the ASX Clear Operating Rules on the basis that it would involve an unauthorised disclosure of personal information about an individual without their consent</li> </ul>
<p><b>The main points it covers</b></p>	<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 clearing participants</li> <li>• Where ASX's privacy policy can be found</li> </ul>
<p><b>Related materials you should read</b></p>	<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 Clear Operating Rules. It sets out ASX's interpretation of the ASX Clear 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 Clear 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.

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## 1. Introduction

The purpose of this Guidance Note is to outline the information gathering and disclosure powers of ASX Clear Pty Limited (ASX) under the ASX Clear Operating Rules and to suggest some measures ASX clearing 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 Clear facility, and are likely also to apply to most ASX clearing 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)

### 3. ASX's information gathering powers

Under the ASX Clear Operating Rules, an ASX clearing 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

<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.

<sup>8</sup> See for example the information disclosure requirements in ASX Clear Operating Rules 4.1.1(l), 4.3.1(c), 4.7.1 and 19.1A.1.

includes details of any changes in directors; information about significant breaches of the ASX Clear Operating Rules or Procedures; 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; and claims, potential claims and circumstances that might give rise to a claim under its professional indemnity insurance.

ASX may also at any time investigate the activities of a clearing participant.<sup>9</sup> As part of the investigation, ASX may require the participant to provide any information known to the participant in connection with the performance by it of its obligations under the ASX Clear Operating Rules or Procedures.<sup>10</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;<sup>11</sup>
- to provide specified information relating to the terms and circumstances of, and the parties to, any dealings in relevant financial products by clients and former clients 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 a clearing 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 market operator;
- an approved settlement facility; or
- any governmental agency or regulatory authority.<sup>15</sup>

ASX may also disclose information regarding a clearing participant and its activities in the following circumstances:

- pursuant to any agreement or arrangement between ASX and any governmental agency or regulatory authority (including, without limitation, a market, 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, financial products;
- if required to be disclosed by ASX under any law or any order of any court or tribunal, authority or regulatory body;

<sup>9</sup> ASX Clear Operating Rule 19.1.1.

<sup>10</sup> ASX Clear Operating Rule 19.1.1(a).

<sup>11</sup> ASX Clear Operating Rule 19.1.1(b).

<sup>12</sup> ASX Clear Operating Rule 19.1.1 concluding paragraph.

<sup>13</sup> ASX Clear Operating Rule 19.1.2. 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 Clear Operating Rule 4.14.1.

<sup>14</sup> 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 CS facility licence under Part 7.3 of the Corporations Act: see ASX Clear Operating Rule 1.15.1.

<sup>15</sup> ASX Clear Operating Rule 1.8.1.

- 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 Clear 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 market operator or approved settlement facility, for the purpose of enabling the approved market operator or approved settlement facility to assess whether the participant (or a market participant or settlement participant for whom the participant clears transactions or contracts) is complying with, will comply with or has complied with the approved market operator's or approved settlement facility's rules or procedures;
- to any governmental agency or regulatory authority including, without limitation, an exchange, market, 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 participants; or
  - the efficient, honest, fair, competitive and informed trading, clearing and settlement of derivatives or securities (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 clearing 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 clearing 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 clearing participants

Having regard to the obligations referenced in the preceding sections of this Guidance Note, an ASX clearing participant should acknowledge in its privacy policy and in its privacy information collection statements that it may be obliged to provide personal information about individuals to ASX under the ASX Clear 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 clearing 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 Clear Operating Rules.<sup>18</sup>

<sup>16</sup> ASX Clear Operating Rule 1.8.2.

<sup>17</sup> ASX Clear Operating Rule 1.9.2.

<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).

Having said this, it is no defense or excuse for a participant to refuse to provide information to ASX under the ASX Clear 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 clearing participant who refuses to provide information to ASX when required to do so under the ASX Clear Operating Rules may be subject to enforcement action for breaching those rules.<sup>20</sup>

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<sup>19</sup> The ASX Clear Operating Rules are effectively given the force of law by the Corporations Act 2001 (Cth): see sections 822B and 822C. The disclosure of personal information about an individual to ASX under the ASX Clear 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 Clear Operating Rule 19.3.1.