Stockbrokers
Association of Australia
Incorporating SDIA

31 March 2014

Mr John Lonsdale
Head of Secretariat
Financial System Inquiry
The Treasury
Langton Crescent
PARKES ACT 2600

By email: fsi@treasury.gov.au

Dear Mr Lonsdale,

Financial System Inquiry

The Stockbrokers Industry Association, as the peak industry body representing wholesale and retail stockbrokers and investment banks in Australia, would like to make the following comments in relation to the Financial System Inquiry.

Terms of reference

In making these comments, we wish to address **Terms of Reference** 1 & 2, namely:

1. The Inquiry will report on the consequences of developments in the Australian financial system since the 1997 Financial System Inquiry and the global financial crisis, including implications for:
    - a) how Australia funds its growth;
    - b) domestic competition and international **competitiveness**; and
    - c) the current **cost**, quality, safety and availability of financial services, products and capital for users.

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2. The Inquiry will refresh the **philosophy, principles and objectives** underpinning the development of a well-functioning financial system, including:
   a) balancing competition, innovation, efficiency, stability and consumer protection;
   b) how financial risk is allocated and systemic risk is managed;
   c) assessing the effectiveness and need for financial regulation, including its impact on costs, flexibility, innovation, industry and among users;
   d) the role of Government; and
   e) the role, objectives, funding and performance of financial regulators including an international comparison.

Comments

Our comments to the Inquiry will focus on the following topics:

1. Compliance Costs
2. Regulatory Structure
3. Extension of Market Integrity Rules to non-Market Participants
4. Wholesale /Retail Client definitions
5. Use of Share registers
6. Bad Apples
7. Designated Trading Representatives

1. Compliance Costs
and
2. Regulatory Structure

Our comments below address these two subject areas together as there is a considerable interrelationship between issues in each subject area.

A number of factors have combined in recent years to contribute to some undesirable outcomes from the point of view of Australia's equity markets and of investor protection. They have the potential of weakening the stockbroking industry and sowing the seeds for what may be the next major regulatory failure of investor protection in Australia.

The combination of these factors is also impacting on Australia's objectives of enhancing Australia's growth as a regional financial hub and our ability to compete with other financial centres in the Asia region.

It is no surprise to read recent media reports[1] that the ranking of each of Sydney and Melbourne as financial centres in the Global Financial Centres Index had slipped in recent times. In our view, this bears out our arguments about the impact of the factors to which we will refer. There is a pressing need for adjustments to the regulatory landscape to address the impact of these factors.

Significant rise in compliance costs

The first and most important factor has been a significant increase in the burden and cost of regulatory compliance which has been imposed on the stockbroking industry over the last 5 years.

Much of the new regulation has been introduced in response to the Global Financial Crisis. There has been a significant increase in regulatory obligations, particularly dealing with conduct, supervision, trade surveillance and monitoring, and financial stability (particularly liquid capital and margining requirements designed to address risks in clearing and settlement).

Some of the regulation has also resulted from market structure changes. During this same recent period, there have been enormous changes in market structure, including the introduction of competing exchanges, dark pools and other alternative execution venues and trading arrangements, accompanied by massive advances in trading technology. The rate of technological advances, including in high speed electronic order entry, and algorithmic trading platforms, has been dramatic. These changes have generated a significant body of extra regulation, such as best execution obligations.

The end result of these trends has been that the stockbroking industry has had to shoulder very large implementation cost, including the cost of developing new IT systems, as well as internal operational and compliance processes, to deal with the changes and the new regulatory obligations.

The industry has carried these high costs in a subdued economic environment post-GFC, during which volumes transacted in the equities market have remained low for some years, and investor confidence has remained weak. Investors have remained in less risky investments such as cash and fixed income products, rather than return to equities. Capital raising activity has also been low. In addition, the impact of advances in electronic trading technology, and high levels of competition in the stockbroking sector, have combined to drive commission down to unprecedented low levels.

[1] For example, *Sydney Morning Herald* 17 March 2014 http://www.smh.com.au/business/markets/sydney-melbourne-slip-in-financial-centre-rankings-as-asias-hubs-climb-20140317-34wvx.html

Consequently, the revenues of stockbroking firms has remained under pressure for some years now, and broking firms have had to carry these additional costs during a time when revenues have been weak.

The Australian Government has also chosen this time to implement a Cost Recovery policy in respect of the cost of ASIC's Market Supervision function. The cost recovery model that has been employed has resulted in approximately 80% of ASIC's Market Supervision costs ($28 million total cost over the first 18 months, $42 million over the following 4 year cycle) being imposed on Market Participants (essentially, stockbroking firms).

Whilst the assumption, we presume, was that Market Participants would pass the impact of the Cost Recovery levy on to clients, this has not eventuated. The stockbroking sector in Australia is so highly competitive that firms have not considered themselves in a position to be able to pass these costs on to clients. The result has been that firms have absorbed the cost themselves, and have done so by significantly reducing costs. As one of the few areas where sufficient cost savings can be made is in the area of head-count, it is no surprise that broking firms have made very substantial cuts to staff numbers in order to meet these costs.

Hence, Cost Recovery was imposed using a flawed model and has been borne by stockbroking firms at a time when they were least able to do so. The detriment to the stockbroking sector, and on employment in the sector, has been pronounced. The impact on the standing of Sydney and Melbourne as financial centres, to which we have already referred, does not, in our view, come as any surprise in view of these factors.

Much work has been done in relation to fostering Australia as a regional financial hub. The work of the Johnson Committee, and the implementation of many of its recommendations, is a noteworthy example of this. Much has also been said in recent times about the need to create jobs in new sectors to replace the rapid loss of jobs in sectors that are in decline, such as in manufacturing and in primary industries. The financial sector has been identified as one such area where Australia can create new employment, particularly in connection with competing in our region to provide financial services to the region.

Yet, rather than identify possible incentives and policies to encourage the growth of this sector, as other nations in the Asia region are actively doing, Australia has adopted policies that have loaded an ever increasing burden of cost on the financial sector, particularly on the stockbroking industry. The policies that are being implemented are serving to weaken it. For the sake of recovering the amounts of money which in fiscal terms is not great in the scheme of things, the Government in the process of harming the goose that could potentially be laying golden eggs for Australia's economic performance and regional financial significance.

Growth of Shadow Broking

Directly related to the above factors, but generated also by other factors independently, is the growth in "shadow broking". Similar to the concerns being expressed about the growth of other "shadow" areas, such as shadow banking, there is a high potential for regulatory risk stemming from the rise in activity of shadow or "white label" broking.

The Stockbrokers Association has for a number of years been highlighting the regulatory asymmetry between the stockbroking sector, which is highly regulated under a raft of legislation, Market Integrity Rules, and Exchange, Clearing and Settlement obligations, and the low level of regulation applied to the shadow broking sector.

The shadow broking sector has however continued to grow significantly. Avoiding the high level of regulation, and the high costs of compliance and technology, are major advantages for firms operating in the shadow space. Many firms will have left the stockbroking industry and become shadow brokers precisely for these reasons. Shadow brokers will also not be subject to the liquid capital requirements and cash margining requirements, and the ASIC Cost Recovery levy referred to previously, to which Market Participants are subject.

The shadow broking sector is not completely unregulated. They fall under the Australian Financial Service Licence (AFSL) regime administered by ASIC. However, this regime falls well short of the compliance regime applicable to Market Participants. In our view, ASIC's supervisory program in relation to shadow brokers, or its application of AFSL licence requirements, has not been sufficiently developed to adequately supervise this sector. ASIC may not have sufficient resourcing to properly supervise this area. We do not believe that the true number of firms operating as shadow brokers is even known.

Many of these firms act as if they are stockbrokers. A number even refer to themselves as stockbrokers, even though that term is a restricted term under the Corporations Act and use of it other than by a Market Participant is a criminal offence. Many members of the investing public who are clients of shadow brokers may be under the impression that they are dealing with a stockbroker and will not appreciate that this not actually the case, and that they do not enjoy the full level of protection that comes with transacting with a market Participant.

The Stockbrokers Association's view is that, because of this regulatory gap, the risk that the next generation of "Storm" type regulatory failure could arise in the shadow broking sector is a significant one, unless steps are taken to apply an appropriate level of regulation to that sector.

The financial services sector generally is undergoing a period of change, and the stockbroking sector is not immune from this. In particular, the impact of new technology, such as that already referred to, is playing a major role in re-shaping the delivery of financial services. It is not the Stockbrokers Association's contention that there is no place for the shadow broking business model. Whilst the Association does not accept that avoiding appropriate compliance obligations and investor protection is an appropriate reason for choosing one's business model, we do see that some firms will for valid reasons reconsider the need to be an Exchange Market Participant. As execution of transactions becomes increasingly a matter of automation and electronic, it is foreseeable that some firms will concentrate on the provision of financial advice to clients as being their core function, and outsource execution and clearing to other firms. Some firms have already made this decision, and the number of Market Participants has been decreasing over time.

Provided that an appropriate regulatory and supervisory regime, and appropriate professional standards and investor protection, are applied to the shadow broking sector, then the growth of this sector should not pose the same regulatory risk than the Association believes it does at present. However, as we have already stated, it is our view that an appropriate regulatory framework is not yet in place, and this should be addressed as a matter of high priority. Our proposals for such a regulatory framework are set out in the following point, which involves extending the market integrity rules to those whose businesses are akin to stockbroking.

3. Extension of Market Integrity Rules to non-Market Participants

As mentioned above, the Stockbrokers Association of Australia has long been concerned about the activities of shadow brokers[2]. Their activities have cast doubt over the operation and efficacy of the existing provisions of the law relating to market participants and stockbrokers[3], and they have caused confusion and uncertainty in investors.

It is time for the shadow broking sector to be brought into line with the regulated market participant sector.

[2] It is difficult to define ***shadow broker***, because (unlike stockbrokers and market participants) they do not have any particular status under the law, other than being licensed (or authorised) to deal in securities. In correspondence with ASIC in 2012 attached, we used the following definition –

> *An AFS Licensee (or Authorised Representative) that is authorised to deal in securities, and has an agreement or arrangement, directly or indirectly, with a Market Participant to facilitate the trading of financial products on a licensed market.*

[3] See in particular, sections 761A (definition of *market participant*), 791B (offence of pretending to be stockbroker), and 923B (authorisation necessary to use the term *stockbroker*)

As Stockbrokers, our members are subject to higher levels of regulation under the ***Market Integrity Rules*** (**MIRs**)[4] than other licensees who may advise and deal in securities. The MIRs contain most of the rules on trading on a licensed market that were previously contained in the ASX *Market Rules*, and including –

- management and supervision requirements (including Responsible Executive Requirements),
- prohibition of Unprofessional Conduct,
- liquid capital requirements,
- adviser accreditation,
- client relationships (including rules against excessive transactions),
- record keeping and
- trading.

The use of terms such as *Indirect Market Participant* or *non-trading participant* gives these parties status and credibility that is not deserved and is potentially damaging, since it has the potential to mislead the investing public. In any extension of the MIRs to this sector, care will need to be exercised in defining the relevant category[5].

As mentioned above, Shadow brokers pay **nothing** to ASIC in respect to supervision, and yet are taking-up an increasing amount of the time of the participant supervision team. Indeed, in its 6-monthly reports on supervision of markets and participants[6], ASIC reports separately on its activities in relation to market participants, and *securities dealers*, namely shadow brokers.

Many shadow brokers were formerly Market Participants, or employed by a Stockbroker. The 'culture' therefore may be similar. However, this should not give the regulators any comfort in dealing with this sector. Most shadow brokers who were Participants chose to give up their participant status in order to **avoid** the additional regulation which only applies to Market Participants. Key drivers for this move are usually concerns over **cost and liability**.

In the interests of **regulatory equivalence**, licensees who provide stockbroking-like services should be regulated in the same manner as stockbrokers. To paraphrase the ASIC Chairman in speech he gave in 2013[7], '*if it looks like a broker, it should be regulated like a broker*'.

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[4] In this Submission, *Market Integrity Rules* principally refers to the *ASIC Market Integrity Rules (ASX Market) 2010*. However, it is noted that there are sets of MIRs for each market, e.g. Chi-X, and that the Competition MIRs (*ASIC Market Integrity Rules (Competition in Exchange Markets) 2011*) also apply where securities are traded on more than one exchange. The Competition MIRs themselves impose additional requirements on market participants, including the duty of best execution.

[5] We suggest a definition in *Note 1* above.

[6] The latest is REPORT 386 *ASIC supervision of markets and participants: July to December 2013* dated March 2014

[7] G Medcraft, ASIC Chairman, Speech to the *2013 Annual Stockbrokers Conference*, Hilton Hotel, Sydney, 30 May 2013

4. Wholesale /Retail Client definitions

In financial services legislation since the FSR reforms of 2004 and before, there has been a crucial demarcation in the law between Wholesale Clients and Retail Clients. Over the years, many anomalies and issues have arisen with the definitions in law, and their application in practice.

As part of the *Future of Financial Advice*, in January 2011 the previous Government released an Options Paper[8] which outlined a number of options for reform of the wholesale and retail client definitions in the *Corporations Act*, including:

- Retaining and updating the current system
- Removing the distinction between wholesale and retail clients
- Introducing a 'sophisticated investor' test as the sole test, or
- Doing nothing.

Our Submission dated 28 February 2011 on the *Options Paper* made the following points:

- the rationale of the proposals is not clear, and a wider review of the wholesale and retail definitions across the Corporations Act is recommended;
- there are serious concerns about the possibly detrimental effects of the proposals on capital raising in Australia, particularly in the small- and mid-cap sectors;
- the asset value test is complicated, and the real question is what truly represents a 'sophisticated investor';
- the product value test proposal to move to $1m may not achieve the aims of the review;
- the opportunity should be taken to revisit (or preferably remove) the superannuation trustee with assets of less than $10m test and the small business test; and
- there is no support for removing the wholesale/retail tests entirely, or for using the sophisticated investor test as the sole determinant.

Before any of the options are adopted, we also sought more consultation in order that our Members could analyse the effects on their businesses, and the likely benefits to clients.

It is now over 3 years since consultation on these reform options closed. Since that time, there have been no further announcements by Government of any firm proposals arising from the review. Treasury has not been able to give any information about the likely next steps. As far as we know, **nothing has happened**. The Wholesale Client and Retail Client definitions are crucial to the operation of the financial services laws. They are difficult to

[8] The Treasury *Future of Financial Advice - Wholesale and Retail Clients Options Paper* January 2011

interpret and in need of simplification. Consistent with the Government's deregulatory focus, this should happen as soon as possible.

5. Use of Share registers *(Corporations Act 2001 s173(3A); Corporations Regulation 2C.1.03)*

There is a serious anomaly in the law regarding access to and use of share registers.

The anomaly is that **shadow brokers** (i.e. licensed dealers and/or advisers in securities who are not market participants) have the right to gain **access to share registers** of companies for solicitation of business, but **market participants** (i.e. stockbrokers) are specifically **prohibited** from doing so. The anomaly appears to be an unintended consequence which has no proper policy basis, and could be fixed very simply. Our pleas to address this issue since 2011 have fallen on deaf ears.

Accordingly, we seek to have the anomaly remedied urgently. This could be easily achieved by the **removal of one paragraph** in the *Corporations Regulations*, namely Regulation 2C.1.03(b).

The Law

Section 173 of the *Corporations Act* 2001 sets out the conditions under which a person has the right to inspect and obtain copies of share registers. Under sub-section 173(3A), in order to obtain a copy of the share register, a person must apply to the company as follows:

> (3A) An application is in accordance with this subsection if:
> (a) the application states each purpose for which the person is accessing the copy; and
> (b) **none of those purposes is a prescribed purpose**; and
> (c) the application is in the prescribed form. *(emphasis added)*

Paragraph (b) above states that the purpose of access to the share register must not be a ***prescribed purpose***. The meaning of *prescribed purpose* is set out in Regulation 2C.1.03, which states:

> Improper purposes for getting copy of register
> For paragraph 173 (3A) (b) of the Act, the following purposes are prescribed:
> (a) soliciting a donation from a member of a company;
> (b) **soliciting a member of a company by a person who is authorised to assume or use the word stockbroker or sharebroker in accordance with section 923B of the Act**;
> (c) gathering information about the personal wealth of a member of a company;
> (d) making an offer or invitation to which Division 5A of Part 7.9 of the Act applies.
> *(emphasis added)*

Under section 923B, only market participants authorised by ASIC can use the term *stockbroker*. The inclusion of paragraph 2C.1.03(b) above - i.e. prohibiting *soliciting by a stockbroker* - is the **nub of the problem.** We would submit that the appropriate **solution** is to remove that paragraph.

Background to the 2010 Amendments

The above provisions were added to the *Act* by amendments in late 2010[9]. The area of unsolicited offers and access to share registers has long been a concern to our Members and their clients. Whilst the regulation of unsolicited offers was tightened through reforms introduced in 2004[10], there remained areas for improvement in the rules for accessing share registers and making unsolicited offers for securities.

The then Minister for Superannuation and Corporate Law Senator Nick Sherry, at our Annual Conference in May 2009, announced proposed amendments to further address the issue of unsolicited share offers. The Minister released an *Options Paper* at the Conference[11] which included the following proposals:

- Introduction of a proper purpose test for access to share registers (Option A)
- Cost recovery for companies providing access to share registers (Options B&D), and
- Formatting requirements for provision of share registers (Option C).

The key driver for all the reforms relating to unsolicited share offers was and has always been the potential for shareholders to be unfairly taken advantage of by unscrupulous operators. As stated in the *Options Paper* –

> *The unethical nature of these offers, together with their significant level of profit making, continues to generate concern among shareholders and the broader community*[12].

In Option A to the Paper – the Proper Purpose Test – there was no discussion or proposal which made reference to market participants.[13] At the time, we welcomed the announcement. Indeed, we supported the proposal in our Submission to the proposals outlined in the *Options Paper*[14].

The makers of these unsolicited offers were not market participants (i.e. stockbrokers), but unlicensed and unregulated businesses. In the *Options Paper*, and all the discussion and consideration about regulation of unsolicited offers which led to the reforms in 2004 and 2009, no issue was raised as to the conduct of stockbrokers. This is because stockbrokers were and remain the most highly regulated entities in the financial services sector. As well as holding Australian Financial Services Licences, stockbrokers are also regulated as market participants by ASIC, and until 2010, ASX. As market participants, stockbrokers are subject

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[9] *Corporations Amendment (No. 1) Act* 2010 (No. 131 of 2010) (the '**2010 Amendments**')

[10] Chapter 7 Division 5A of the *Corporations Act*

[11] Australian Government *Access to share registers and the regulation of unsolicited off-market offers – Options Paper* May 2009 ('*Options Paper*')

[12] *Options Paper* page 17

[13] *Options Paper* pages 3-5

[14] Securities & Derivatives Industry Association (the former name of the Stockbrokers Association of Australia) *Submission: Options Paper on Access to share registers and the regulation of unsolicited off-market offers* 23 July 2009

to higher standards of conduct, capital requirements and investor protection, enforceable by fines of up to $1,000,000 under the ASIC *Market Integrity Rules* (previously the ASX *Market Rules*).

Stockbrokers are the only persons mentioned in the 2010 Amendments as being prohibited from making contact with shareholders via access to share registers. The practical effect of this prohibition has been that, while stockbrokers cannot contact shareholders from the register, **any other person** (including shadow brokers) **can**. Shadow brokers have used this regulatory advantage to their great benefit in soliciting business from shareholders in trading and capital raising.

The prohibition on stockbrokers using share registers was not flagged by Government ahead of the 2010 Amendments. It lacks any justification, and we believe it is a case of unintended consequences and should be **removed**, which could achieved by simply deleting *Regulation* 2C.1.03(b).

6. Bad Apples

The financial industry is lacking an effective means of reference-checking potential employees so as to keep out 'Bad Apples'[15]. Since the early 2000's, the Association has sought law reform to provide a more effective means of reference checking new employees, to stop the movement of Bad Apples around the industry. The model we have sought was along the lines of the US system which provides for compulsory reporting of certain matters of misconduct on termination, and which also protects participants in both making and relying upon such reports in good faith.

Recently, in its main submission to the *Senate Economics Committee Inquiry into the performance of the Australian Securities and Investments Commission* October 2013 (Submission 45), ASIC called for the following measures to catch Bad Apples**:**

> 581 Mandated reference checking could be achieved by introducing a legislative requirement for licensees to:
> (a) *conduct reference checks on prospective employees*
> (b) *provide honest and full feedback when asked to provide a reference, and*
> (c) *have in place appropriate policies and procedures for maintaining accurate and comprehensive employment records*.

While falling short of a full US-style reporting mechanism, the mandatory nature of the ASIC proposals should improve the standard and effectiveness of reference checking, <u>provided</u> that they also include legal protections for participants acting in good faith.

[15] The term 'Bad Apples' is used to refer to persons who have committed acts of misconduct while employed by a financial services provider, which, though serious, have not given rise to regulatory action by ASIC.

Nevertheless, we continue to argue that a fully accessible centralised register of misconduct by advisers, supported by legal protections in its use along the lines of the US model is the appropriate solution.

7. Designated Trading Representatives (DTRs)

Designated Trading Representatives (DTRs) are the people inside stockbroking firms who are authorised to enter orders into the stockmarket. In many ways it can be said that DTRs are the gatekeepers of market integrity in Australia. There is a problem in the industry that since the removal of DTR accreditation in 2010, the standards of DTRs are slipping. Accordingly, a tightening of the accreditation requirements for DTRs is called for.
In the lead-up to the hand-over to ASIC of Market Supervision from ASX in 2010, the Stockbrokers Association was strongly of the opinion that, despite proposals to the contrary, DTRs ought to be retained. As we noted at the time, Members were concerned that the removal of appropriately qualified and independently accredited specialist operators may impact negatively on the integrity of the market.

In the event, the requirement for Trading Participants (i.e. stockbroking firms) to have a DTR was retained in the Market Integrity Rules[16]. However, the compulsory accreditation and registration requirements for DTRs previously administered by ASX were removed. The onus is now on the individual firm to ensure that the relevant person is appropriately qualified before authorising the person to be a DTR.

In 2010, in order to assist firms to demonstrate that DTRs have the required knowledge and dealing skills, the Stockbrokers Association launched the Stockbrokers Association National DTR Accreditation. The Accreditation was based on the previous ASX model, with a written examination and a practical test, conducted by senior market operators, called DTR Governors.

The National DTR Accreditation has been running for over 3 years now, so some observations about the program and the candidates can be made. The DTR Governors, who conduct the oral assessment component of the National DTR Accreditation, are very concerned at the caliber of candidates being put forward for accreditation. While most are passing the written exam component, a significant number are not performing to the required standard in the practical DTR Governors Exam.

Accordingly, we have proposed to ASIC that the *Market Integrity Rules* be amended to restore a compulsory accreditation and registration requirement for DTRs. Unfortunately, ASIC has not accepted our proposal. In the meantime, standards are slipping and there is real concern that a **serious market disruption** may be caused by a DTR that is not properly experience and qualified.

[16] *ASIC (ASX Market) Market Integrity Rule* 2.5

Traditionally, DTRs have played an important role. They are the first line of protection for the firm from improper trading. They play a 'gate keeper' quality-control role. Even if trading is conducted with an automated system, DTRs often play an important role in determining appropriate action when a trading message is blocked by filters or other safeguard mechanisms.
In recent cases where a market participant has been charged with failure to ensure that the market was fair and orderly, the *ASIC Markets Disciplinary Panel* (**MDP**) has emphasised the critical role of DTRs:

> *…the MDP reiterated that an important aspect of the role of the DTR is to pay proper attention and diligence to prevent the entry of Orders into the Trading Platform that could result in a market that is not both fair and orderly.* ***This is a critical measure in maintaining the integrity of a market*** [17] (emphasis added)

Accordingly, it would appear that while ASIC's own disciplinary panel is emphasising the critical nature of DTR standards in maintaining market integrity, the agency itself won't mandate accreditation.

In seeking mandatory requirements for accreditation and registration of DTRs, **we are not seeking new regulation**: we are merely asking for the restoration of *previous regulation* in order to protect the integrity of the market.

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The Association is grateful for the opportunity to make this contribution to the Inquiry. We would be happy to appear and make further submissions or provide further information for the assistance of Members of the Inquiry at your convenience.

Should you require any further information, please contact Doug Clark, Policy Executive, on (02) 8080 3200 or email dclark@stockbrokers.org.au .

Yours sincerely,

David W Horsfield
Managing Director/CEO

[17] ASIC Gazette *Markets Disciplinary Panel Infringement Notices* MDP03/14 17 March 2014 p.4 (CommSec); MDP04/14 17 March 2014, page 4 (Instinet); MDP05/14 19 March 2014 page 4 (Hartleys)