8 September 2023

Chair
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email to: Corporations.Joint@aph.gov.au

STATUTORY INQUIRY INTO ASIC, THE TAKEOVERS PANEL, AND THE CORPORATIONS LEGISLATION – CBOE SUBMISSION

Dear Chair

ASX thanks the Parliamentary Joint Committee on Corporations and Financial Services (the **Committee**) for the invitation to respond to Cboe's submission 12 and answer to question on notice 7 to the inquiry.

ASX considers that Schedule 3 of Treasury Laws Amendment (2023 Measures No. 3) Bill 2023 (**CICS bill**) addresses industry stakeholders' key concerns regarding clearing and settlement competition in Australia. The CICS bill represents the outcome of extensive work and public consultation by Government and the Council of Financial Regulators (**CFR**) across several years, which was supported by detailed feedback from a wide range of industry stakeholders. For the purposes of this response, ASX considers it more constructive to focus its comments primarily on the successful implementation of the reforms, rather than responding to every detail in Cboe's submission and answer to question on notice. Notwithstanding this, ASX does wish to provide additional information to clarify a specific point in Cboe's submission concerning the legislative background to the National Guarantee Fund changes.

Competition in clearing and settlement reforms

ASX notes the significant policy work and consultations that led to the CICS bill, including Treasury's consultation on the CICS exposure draft earlier this year and the CFR' numerous consultations on competition in clearing and settlement dating back to 2012. Since 2017, the CFR, in cooperation with the ACCC, has provided the policy framework for competition in clearing and settlement through the Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia (the **Regulatory Expectations**), the Minimum Conditions for Safe and Effective Competition in Cash Equity Settlement in Australia and the Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia (together the **Minimum Conditions**). ASX considers the CICS bill as the logical next step in ensuring that the regulatory framework supports competition in clearing and settlement in the best long-term interests of the Australian market.

ASX supports the policy intent of the CICS bill and ASX will continue to work with the Government to ensure it achieves its objectives. ASX worked constructively with the Government and Treasury in the development of the draft legislation, including making a submission to Treasury's consultation on the exposure draft outlining suggestions for targeted improvements to the draft legislation to ensure that the regulatory regime operates as envisaged, includes appropriate checks and balances for all stakeholders, and reflects best regulatory practice.

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The CICS bill passed both Houses of Parliament on 6 September 2023. ASX intends to engage constructively with the Government in further consultations on the scope of clearing and settlement services to be covered by the new legislation, and with ASIC in making rules relating to clearing and settlement.

Structural matters

Cboe's submission discusses the structure of ASX Clear and ASX Settlement in the context of matters relating to competition.

ASX considers that the CICS bill promotes competitive like outcomes in the absence of competition without imposing additional costs on industry. It is important that the Government is able to implement these reforms and assess their impact before considering any further changes. Further significant changes are likely to result in increased costs to the industry. For example, in a structurally separated environment, the clearing house would not have the backing of the ASX Group to raise new capital in a situation of extreme financial stress. Further, there are likely to be higher ongoing costs for clearing and settlement services because of the increased cost of capital for the standalone clearing and settlement facilities, as well as not being able to access the efficiencies of shared corporate group functions (e.g. finance, risk management, legal, IT and cybersecurity). It is also worth noting that all ownership models for clearing and settlement facilities will involve differing interests and commercial considerations. The key to managing potential conflicts is to have appropriate arrangements to manage those different interests and ensure that licence obligations are met.

ASX has a robust framework in place for the identification and management of conflicts of interest. As requested by the RBA, ASX engaged law firm Herbert Smith Freehills (**HSF**) as an external expert to review ASX's arrangements to identify and manage potential conflicts between the commercial interests of ASX Group and the licence obligations of ASX Clear and ASX Settlement, focusing on current CHESS and CHESS replacement. Chair and Senior Partner of HSF Rebecca Maslen-Stannage led the review. ASX publicly released the findings of the HSF review on 28 July 2023 (**HSF report**). Overall and having regard to recent governance enhancements by ASX, the HSF review found that "the existing framework for conflict identification and management within the ASX Group… is sophisticated and consistent with the framework [HSF] would expect from a listed group of the complexity and scope of potential conflicting operations of the ASX Group." ASX is well progressed on implementing the recommendations outlined in the HSF report.

ASX is committed to fulfilling its licence and other regulatory obligations, including that the services of each of its licensed clearing and settlement facilities are provided in a fair and effective way, and in compliance with the Regulatory Expectations. In particular, as set out in the Regulatory Expectations, ASX is committed to providing commercial, transparent and non-discriminatory access to clearing and settlement services, including in relation to service levels, information handling and confidentiality. ASX Clear and ASX Settlement have provided access to clearing and settlement services to non-affiliated market operators on non-discriminatory terms for over a decade via the Trade Acceptance Service and Settlement Facilitation Service.

National Guarantee Fund

Cboe's submission discusses a payment from the National Guarantee Fund (**NGF**) to ASX Clear in 2005, when ASX Clear took over the role of clearing support from the NGF. Cboe proposes the funds should be returned to Securities Exchanges Guarantee Corporation Ltd (**SEGC**, which administers the NGF), as an administrator and manager for the benefit of all clearing and settlement facility licensees, to provide access to the funds in the event of a default. ASX would like to provide additional information to the Committee regarding the legislative background to this matter.

Prior to 2005, the NGF performed a dual role of investor protection and clearing support. However, the Government recognised that "this dual function arrangement is inconsistent with international practice and the Reserve Bank of Australia's Financial Stability Standards (which address, among other things, responsibility for clearing support)."[1] In March 2005, the Corporations Regulations were amended to remove the clearing support role of the NGF so that it was no longer liable for clearing support claims. At the same time, a ministerial

[1] Explanatory Statement, Select Legislative Instrument 2005 No.38.

declaration was made under section 891A of the Corporations Act, providing that a payment of $71.5 million be made to ASX Clear, being a body that had made adequate arrangements for clearing and settlement support. This payment was to cover claims in relation to clearing support, which could previously be made on the NGF. Sufficient funds were retained in the NGF to continue to cover claims for investor compensation (being $93.9 million as at 30 June 2005). In 2020, Cboe became a member of the SEGC. ASX acknowledges the importance of the NGF providing a streamlined investor protection regime that covers securities listed on the respective markets of ASX and Cboe.

Cboe's proposal that $71.5 million be repaid to SEGC fails to recognise that the payment was made to ASX Clear because it took over the liability for clearing support from the NGF. The Corporations Regulations that set out the NGF's clearing support role no longer exist. The SEGC's ability to make rules relates to the performance or exercise of its duties under Part 7.5 of the Corporations Act, which does not extend to clearing support. Further, it was recognised in 2005, and remains the case, that investor compensation and clearing support are very different roles, requiring different skills and operational arrangements, and should not be combined in the same entity.

As a central clearing counterparty for cash markets, ASX Clear maintains sufficient financial resources to cover the default of the two participants and their affiliates that would potentially cause the largest aggregate credit exposure for ASX Clear in extreme but plausible market conditions. The $71.5 million is a restricted capital reserve that forms part of the financial resources held by ASX Clear to meet this regulatory requirement. As at 30 June 2023, ASX Clear held $250 million total in paid-in resources in respect of this regulatory requirement, comprised of $178.5 million in addition to the $71.5 million in restricted capital reserve.

ASX welcomes the opportunity to discuss the issues raised in this letter further with the Committee.

Kind regards

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