

<b>Committee</b>	Parliamentary Joint Committee on Corporations and Financial Services
<b>Inquiry</b>	Oversight of ASIC, the Takeovers Panel and the Corporations Legislation
<b>Question No.</b>	037
<b>Date</b>	27 October 2023
<b>Topic</b>	CHESS replacement program
<b>Reference</b>	Written, 27 October 2023
<b>Committee member</b>	Senator Deborah O'Neill

### Question 1

How does ASIC intend to use the powers created under the passage of the *Treasury Laws Amendment (2023 Measures No. 3) Act 2023*?

- a. Has ASIC identified any areas or issues for which it intends to make rules for competition in clearing and settlement in the near future?

### Answer

ASIC's new powers are intended to facilitate outcomes associated with competition both in the absence and presence of competition while ensuring that if competition does emerge it occurs in a safe and effective manner. ASIC's rulemaking power must be enlivened by a Ministerial Determination.

Subject to this determination, we intend to make rules to address the current monopoly market structure for the provision of clearing and settlement in Australian cash equities by ASX Clear and ASX Settlement by implementing the Council of Financial Regulators' [Regulatory Expectations](#).

The Council of Financial Regulator's Minimum Conditions policy statements (for competition in [Clearing](#) and in [Settlement](#) respectively) also make clear that the technological design of ASX's clearing and settlement (CS) infrastructure should not raise barriers to entry or otherwise seek to frustrate access to data or services that are necessary for the provision of services by a competing service provider. We intend to seek feedback from industry on potential measures to implement this as an obligation under the rules, ahead of the emergence of competition.

Should a committed competitor emerge, ASIC will work with our regulatory colleagues at the RBA and the ACCC to develop further rules as appropriate to ensure that competition can occur in a safe and effective manner.

### Question 2

In [Submission 6](#), Computershare argued that the ASX should face greater scrutiny over use of its rule-making authority, because during the CHESS Replacement Project, ASX issued hundreds of pages of draft rule amendments that would have the effect of embedding processes and structures that disadvantage various stakeholders' established market positions. Hence, Computershare recommended that the government and regulators consider whether ASIC should have responsibility for some rules for clearing, settlement, and securities administration.

- a. To what extent do the recent reforms to competition in clearing and settlement provide ASIC the power to address the issues raised by Computershare?
- b. What are the advantages and disadvantages of the approach proposed by Computershare?

### Answer

#### Question 2 and 2(a)

It is the responsibility of all licensed CS facilities to have rules that govern the operations of the facility. It is important that the rules provide certainty and clarity for users of CS facilities in terms of their rights and obligations and the risks in participating in the facility.

Licensed CS facilities that are primarily regulated in Australia must have operating rules that deal with the matters prescribed by the Corporations Regulations and any additional matters required to be dealt with in relation to CS services under the CS services rules, once made. Changes to the operating rules must be notified to ASIC within 21 days and are subject to disallowance for a period of 28 days after ASIC receives the notice. In deciding whether to disallow all or a specified part of the change, the Minister or an ASIC delegate must have regard to the consistency of the change with the licensee's obligations, any matters specified in the CS services rules (once made), and other matters specified by the Corporations Act. Following the passage of the *Treasury Laws Amendment (2023 Measures No. 3) Act 2023*, this now includes any relevant advice received from the ACCC. Consequently, in addition to ASIC's own consideration of the impact of any proposed rule changes on competition, ASIC will also seek the advice of the ACCC on the potential impacts on competition of the proposed rules.

In addition, where a senior staff member of ASIC exercises the power to decide whether to disallow all or part of a change to the operating rules of a licensed CS facility as a delegate of the Minister, they must do so in accordance with the [Guidelines for the Exercise of Powers Delegated to ASIC under Chapter 7 of the Corporations Act](#). Notably, this includes a requirement to ensure, to the degree practicable, that the exercise of any delegated power promotes competition.

ASIC and the RBA review and provide advice to the Minister or the delegate of the Minister on all operating rule changes, which includes a recommendation on whether to disallow all or part of a change. We assess and consider the proposed rule changes before they are made, and in many instances such as the proposed CHESS Replacement Rules referred to by Computershare involves extensive discussion with the regulators. A particular consideration for us in such a technical set of rules was ASX's stakeholder engagement and consultation and its response to feedback received from consultation.

### **Question 2(b)**

Computershare's suggestion to consider whether ASIC should have responsibility for some operating rules is a matter for Government. However, we consider the disallowance powers provided to the Minister (or an ASIC delegate) are broadly sufficient. Implementing Computershare's proposal for ASIC to directly write operating rules for clearing houses and settlement facilities would be out of step with other international regulatory regimes and international regulatory standards for financial market infrastructure.

### **Question 3**

In [Submission 6](#), Computershare also drew attention to corporations regulations for title and transfer that are not entity agnostic and therefore may act as a barrier to competition in clearing and settlement services. Computershare recommend the Government and Regulators consider and communicate their intended approach to remove this current barrier to competing CS facilities.

- a. What are the advantages and disadvantages of the approach proposed by Computershare?
- b. Would legislation or regulations need to be changed to address the issue raised by Computershare?

### **Answer**

Currently ASX Settlement is the only prescribed CS facility for the purposes of Division 4 of Part 7.11 of the Corporations Act. Transfers of relevant securities effected otherwise than through a prescribed CS facility may be effected in accordance with the provisions of Division 3 (including the detailed requirements prescribed by the Regulations for the purposes of that Division).

As set out in paragraph 16 of the [Revised Explanatory Memorandum to the Financial Services Reform Bill 2001](#) (the Revised EM to the FSR Bill), Part 7.11 was designed to facilitate competition between clearing and settlement facilities in the settlement of securities transactions and to provide greater flexibility in procedure to accommodate future developments, by:

- omitting the special position of ASX's Securities Clearing House; and
- providing for the detailed procedural provisions to be made in the regulations.

In line with these policy objectives, the primary law refers generally to a “prescribed CS facility” and does not require transfers to be effected in a particular way, with the supporting architecture for the mechanism employed by a particular prescribed CS facility to be included in the regulations. The provisions in Division 4 of Part 7.11 of the Regulations are, therefore, specifically tailored to the licensed CS facility operated by ASX Settlement.

In order to benefit from the Division 4 mechanism, a licensed CS facility would need to be prescribed by the Regulations. ASIC is not the relevant decision-maker for this purpose. As set out in paragraphs 16.12-16.35 of the Revised EM to the FSR Bill, the Minister is expected to have regard to the adequacy of the arrangements for the transfer of title pursuant to the provisions of Division 4 of Part 7.11 (including associated regulations), and any stamp duty issues arising, before recommending that a CS facility be prescribed for the purposes of this Division. This will involve detailed consideration of the facility’s operating rules. It is likely that bespoke Regulations would need to be made if a competing settlement facility were to emerge.

#### **Question 4**

Could you provide an update on the status of the Financial Market Infrastructure (FMI) reforms?

#### **Answer**

ASIC (and the RBA) continues to support Treasury on the development of an exposure draft implementing the FMI Reforms. The timing of the exposure draft is a matter for Government.

#### **Question 5**

In response to recommendations 2-6 in Cboe’s [Supplementary Submission 8.1](#), ASIC indicated that some of those recommendations could be addressed by rules ASIC could make under the new powers it has from the recently passed competition in clearing and settlement legislation. While noting that ASIC could not foreshadow precisely what rules it may make, could you explain the process and how it would work from the perspective of industry participants? For example, Cboe and others have raised some concerns and made some recommendations:

- a. What is the trigger for a potential rule change to be formally considered?
- b. What is the process through ASIC, Treasury and other regulators to assess a potential rule change?
- c. How is the decision made on whether to implement rules?
- d. How is the implementation of a new rule monitored and reviewed?

#### **Answer**

a. We refer to our response to Question 1. We propose initially to make rules to address the current monopoly market structure for the provision of clearing and settlement in Australian cash equities by ASX Clear and ASX Settlement. Should a competitor submit an application for a CS facility licence ASIC and the RBA we would engage with the applicant to understand its proposed offering and to understand the impacts on the market including market structure. We may also make emergency rules if it is necessary, or in the public interest, to do so in order to protect:

- the Australian economy
- the efficiency, integrity and stability of the Australian financial system; or

- safety, fairness and effective competition in the provision of CS services.
- b. and c. Our process for the development of CS Service Rules would involve consultation with the public on the proposed rule and consultation with the ACCC and the RBA (see s 828J of the Corporations Act). ASIC would also engage with the Office of Impact Analysis (OIA) to determine whether an Impact Analysis is required and if so, engage with OIA on this process.

We would follow ASIC's internal governance processes for the exercise of ASIC rule making powers, including obtaining of Commission approval and internal legal review of the proposed rules. ASIC would then seek Ministerial consent to make the proposed CS Service Rules, and if consent was granted, ASIC would formally make the rules as a legislative instrument. The rules would also be subject to Parliamentary disallowance.

- d. ASIC will monitor compliance with the CS Services rules on an ongoing basis, including in its consideration of any proposed changes to the operating rules of the licensed CS facilities operated by ASX Clear and ASX Settlement. Breaches and anticipated breaches of the rules must also be notified to ASIC. We will also review the CS Service Rules as needed to ensure that the rules remain fit-for-purpose, necessary and relevant.

#### **Question 6**

The committee has received [Submission 12](#) from Helen Bird and William Klein. Would you please provide a response on notice to the submission on:

- a. each of the dot points in sections A, B, C, and D of the key findings and whether those issues have been addressed, or are still to be addressed, or if there is a reason why they should not be addressed; and
- b. any other issues in the submission you wish to respond to.

#### **Answer**

ASIC's investigation into ASX Limited, ASX Clear and ASX Settlement and their directors/officers in relation to the oversight of the CHESS Replacement Program and statements and disclosures on the status of the program between October 2020 and March 2022, is ongoing.

In taking regulatory action with respect to ASX we insist on transparency, including the publication of assurance reports, reviews and special audits. We have worked closely with the RBA on its oversight of ASX including on current CHESS and the CHESS Replacement. The regulators' requirement for transparency has informed Ms Bird's and Mr Klein's detailed submission.

ASIC is closely monitoring the CHESS Replacement Program and using the full range of our tools to require ASX to meet regulatory expectations (e.g., on governance, stakeholder engagement and program delivery) and to comply with its obligations under the Corporations Act. We are also monitoring ASX's continued investment in current CHESS so that it serves the market well until it can be replaced.

ASIC has used its current powers (including delegated powers) in respect of markets and clearing and settlement facilities to set regulatory expectations, impose additional licence conditions, appoint independent experts and require audited special reports. Collectively these audited special reports and ASIC action will help build confidence in ASX's ability to deliver the CHESS Replacement and any other programs ASX undertakes. We are collectively and holistically considering the special reports and meetings with EY to ensure we understand its findings and will determine if further regulatory action is required.

In addition to this formal regulatory action, ASX recently established a Clearing and Settlement Advisory Group (CS Advisory Group) at ASIC's request. The CS Advisory Group will be a key mechanism for stakeholders to input into the governance of ASX Clear and ASX Settlement on key strategic issues and the CHESS Replacement. We have set clear public expectations of ASX on the CS Advisory Group. Any final decisions on key strategic issues on the CHESS Replacement are not to

be made until the Group has had sufficient information and time to consider and provide any recommendations, and for ASX Clear and ASX Settlement to respond. The regulators must also be briefed. The effectiveness of ASX's stakeholder engagement is critical to the restoration of trust and confidence to ASX's CHESS Replacement program. We will use our powers, including our new CS Service rule making powers, if required to underpin the effectiveness of the CS Advisory Group.