National Stock Exchange of Australia

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28 August, 2023

PARLIAMENTARY JOINT COMMITTEE
ON CORPORATIONS AND FINANCIAL SERVICES

Sent by email to: Corporations.Joint@aph.gov.au

Dear Dear Committee Secretary,

RE Statutory Inquiry into ASIC, the Takeovers Panel, and the corporations legislation - Cboe submission

NSXA thanks The Committee for the opportunity to respond to this submission.

Comments on proposed legislation

The Committee has also asked NSXA to make any comments on the proposed Financial Sector Reform (Competition in Clearing and Settlement) Bill 2023 (CICS). We have included our submission to Treasury in Appendix 1 below where we have highlighted our concern for an arbitration model to resolve disputes with the incumbent provider.

Comments on Cboe's Submission

NSXA broadly supports each aspect of Cboe's submission and the recommendations presented. A number of the areas raised by Cboe are consistent NSXA's original submission to the Committee on 4 May 2023.

The table below includes NSXA's feedback cross-referenced to the topics and recommendations in Cboe's submission.

1.1 Default Funds	
NSXA Observations	**Feedback on Cboe Recommendation**
NSXA appreciates the rationale for the separation of the NGF following the formation of ASX Clear as a CCP to take responsibility for centrally managing its risk. This may have been fit-for-purpose at the time when competition for CCP services were not contemplated. What has eventuated is that this "ASX Restricted Capital Reserve" now acts as a barrier to CCP competition in the current environment. NSXA agrees with Cboe that as mutualised funds there may be a compelling case to return the funds to SEGC as described.	NSXA supports Cboe's recommendation for the return of clearing default capital to SEGC for its holistic application as a general Industry Capital Reserve.

With regards to the fidelity fund component already managed by SEGC, NSXA maintains its own fund for this purpose whereas ASX and Cboe rely on the NGF for this purpose. In the broad interests of competition, NSXA is investigating the need to maintain a separate fidelity fund and why it may not be able to join as a Member Market Operator of SEGC and rely on the NGF for the protection of all shareholder interests. NSXA's understanding is that the SEGC now operates independent of the ASX which we anticipate will provide greater access than the past.	
1.2 ASX Clear's support of non-ASX AMOs	
NSXA Observations	**Feedback on Cboe Recommendation**
NSXA agrees with Cboe's concerns about the lack of transparency and perceived bias applied by ASX Clear to the evaluation of clearability of non-ASX products. This also leads to concerns of information sharing with ASX Clear by non-ASX market operators looking at the potential admission of novel or unique products which are yet to be identified by ASX (as market operator) where it can apply its market power to the acquisition of these issuers as a "second mover". NSXA has experienced reticence for the admission of non-novel products (for example stapled securities) just because they are not traded by ASX.	NSXA supports Cboe's recommendation for the adoption of transparent risk management assessment. Regulators should take an active position now – in the current environment with the absence of competition to ensure that ASX Clear acts independently to protect the interests of each market operator equally.
1.2.2 Non-ASX AMO access to ASX Clear for clearing	
NSXA Observations	**Feedback on Cboe Recommendation**
NSXA refers to its comments in 1.2.1 and agrees with Cboe that ASX Clear should be compelled by the regulators to transparently review and act on its structure. NSXA is of the opinion that this equally applies to ASX Settlement – especially given its monopoly position and forced commercial relationship with non-ASX issuers. NSXA also refers to its 4 May 2023 Submission to the Committee for detailed commentary on this matter.	NSXA supports Cboe's recommendation.
1.3 ASX Settlement's critical functions, operations support and further ASX's overall market power	
NSXA Observations	**Feedback on Cboe Recommendation**
The sentiment presented by Cboe is in line with the points and case studies presented by NSXA in its 4 May 2023 Submission to the Committee. We refer to *Diagram 1: The ASX Group Structure* in our submission and the lack of separation of resources across monopoly services to competitors and itself which creates the environment for bias and conflicts of interest.	NSXA broadly agrees with Cboe's collective recommendations for 1.3. NSXA would however, not support an arbitrary move towards an omnibus structure. This is largely achieved through custodians who hold institutional investment in nominee form. NSXA does support competition and refers to page 7 – "Holistic Approach to Competition" where we have argued for open access to HIN records to support possible direct settlement solutions.
1.3.1 ASX Settlement as a Central Securities Depository	
NSXA Observations	**Feedback on Cboe Recommendation**

NSXA agrees with Cboe's sentiments and the use of market power. We refer to *Diagram 3: Market Operator Access to CHESS through Trade Acceptance Service (TAS), "Its about Post-Trade – Not simply Clearing & Settlement"* of our May 5 2023 Submission which amplifies these points.	
1.3.2 Issuer Services	
NSXA Observations	**Feedback on Cboe Recommendation**
NSXA agrees with Cboe's sentiments on the costs to all issuers and the marketing opportunities presented by ASX Settlement to ASX to promote to all issuers and investors. We refer to page 6 of our May 5 2023 Submission – *"Fees for clearing, settlement and subregister access under the guise of Issuer Services", Diagrams 5 and 6* which amplifies these points.	
1.3.3 ISIN Creation	
NSXA Observations	**Feedback on Cboe Recommendation**
NSXA agrees with Cboe's sentiments on the further monopoly afforded to ASX for ISIN creation and market advantage it provided ASX. We refer to Diagram 4: ASX Footprint is far more than Clearing and Settlement which amplifies these points.	
1.3.4 Reference Data	
NSXA Observations	**Feedback on Cboe Recommendation**
NSXA agrees with Cboe's sentiments on the consolidated power generated by ASX Group through its role as ISIN administrator, CSD and HIN operator. We refer to page 5 of our May 6 Submission – *"Issuer Reference Data and Issuer Subregister Services" and Diagram 4: ASX Footprint is far more than Clearing and Settlement* which amplifies these points.	
1.4 Current CHESS capability	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA broadly agrees with Cboe's collective recommendations for 1.4. In particular, the stated potential completion line of 2023 should not be used to harbour the continuation of current monopoly services and related commercial practices. As such Government and regulators may consider to mandate ASX to do an immediate review of its current ASX Clear and ASX Settlement Rule Books to identify and remove the protections in place. One example is the ASX Settlement which mandates the issuer of CHESS Holding Statements by ASX Settlement which generates significant revenue for ASX Group.

	This may pave the way for certainty by removing protections and lead to a more defined outcome for the Financial Sector Reform (Competition in Clearing and Settlement) Bill 2023 (CICS). ASX could be compelled to adopt these findings as *Principles of Competition* ahead of regulation as NSXA has stated under Holistic Approach to Competition on page 8 of our 5 May 2023 submission.
1.4.1 CHESS Replacement Project (CRP) Status	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA supports Cboe's position.
1.4.2 Current CHESS lacks global standard messaging	
NSXA Observations	**Feedback on Cboe Recommendation**
NSXA agrees with Cboe's position on global messaging standards. The CHESS External Interface Specification (EIS) protects ASX's status quo.	
2. Development of ASIC Rules to support competition	
NSXA Observations	**Feedback on Cboe Recommendation**
NSXA is of the opinion that rules to support should be specific to provide certainty to potential entrants and avoid grounds for arbitration with incumbents who hold market power.	
2.1 Interoperability is more than open access	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA supports interoperability, separately across both the CCP (ASX Clear) and CSD/HIN (ASX Settlement) functions.
2.2 Rules for expected CCP linkage model	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA does not have a view on Cboe's stated position but supports interoperability separately across both the CCP (ASX Clear) and CSD/HIN (ASX Settlement) functions.
2.3 Equal Access to CSD (HIN)	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA broadly supports Cboe's position on the batch settlement. In addition, NSXA refers to its above comments in 1.3.1 ASX Settlement as a Central Securities Depository on open access to CHESS HINs.
2.4 Comparable vs equal access	
NSXA Observations	**Feedback on Cboe Recommendation**

	NSXA broadly supports Cboe's position on equal access. ASX could be compelled to adopt these access measures as *Principles of Competition* ahead of regulation as NSXA has stated under Holistic Approach to Competition on page 8 of our 5 May 2023 submission.
3. Council of Financial Regulators	
NSXA Observations	**Feedback on Cboe Recommendation**
3.1 Requirement to build-in support for competition	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA broadly supports Cboe's position. NSXA also refers to its comments in *1.4 Current CHESS capability* above as it also applies to this recommendation.
4. Commercial levers to limit competition	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA broadly supports Cboe's position. NSXA also refers to its comments in *1.4 Current CHESS capability* above as it also applies to this recommendation.
4.1 Pricing	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA does not have a view on Cboe's stated position with regards to the CCP related fee points. NSXA supports Cboe's position on dominant market power in terms of access and pricing and refers to ASXL's Market Power Case Studies in page 3 of the 5 May 2023 Submission.
4.2 Memorandum of Understanding	
NSXA Observations	**Feedback on Cboe Recommendation**
	NSXA supports Cboe's position.

Yours faithfully,

Management,
National Stock Exchange of Australia

Appendix 1: NSXA's submission to Treasury on CICS reform

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The Treasury
Level 29, 201 Kent Street,
SYDNEY NSW 2000
AUSTRALIA

21 April 2023

Dear Treasury,

RE Competition in the provision of clearing and settlement services

Introduction

National Stock Exchange of Australia ('NSXA') is pleased to provide this response to The Treasury's Consultation on Competition in the provision of Clearing and Settlement Services (released 23 March 2023).

NSXA is supportive of Government and regulators encouraging true competition in the provision of settlement and clearing services in Australia. The consultation paper on the Bill provides a partial response to the needs of industry in this area by introducing an arbitration process for access to Clearing and Settlement Facility services. NSXA submits that more should be done in this area.

NSXA has provided input to the consultation from the unique position as a competitor of the Australian Securities Exchange (ASX) for corporate listings and as a customer of ASX Clear and ASX Settlement to receive clearing, settlement and subregister services. To be clear, NSXA seeks to expand the market for all companies wishing to list and not just be an alternative to ASX as many companies would not be eligible to list on ASX. Companies list on NSXA not just for liquidity reasons, but also for corporate governance and transparency reasons.

As part of NSXA's third party arrangements, ASX Settlement provides direct commercial services to NSXA's issuers as ASX Issuer Services. Systemically, all these services are collectively provided through CHESS (Clearing House Subregister System[1]).

Furthermore, given the size and scale of the NSXA market relative to the ASX Group (ASXG), NSXA provides a diverse view on competition, which challenges the general nature of certain aspects of the proposed legislation which is more suited to 'the big end of town'. That is, NSXA's rules and activities do not create systemic risk to the financial system.

NSXA has drawn on practical experiences from its dealings with ASXG to demonstrate how monopolistic market power can be manipulated to restrict the development of competition and deny access in the provision of clearing, settlement, subregister and associated services. These case studies are presented to assist Treasury in forming a view for the practical implementation of any resulting legislative change to facilitate its efficient and orderly use to deliver positive outcomes for the whole market and all market operators. This is undoubtedly a key challenge, as given ASXG's dominant position in the capital markets, it will always aim up to challenges and change from a position of highest market power.

[1] Note that not all NSXA listed companies utilise the CHESS system for settlement as NSXA rules and its market licence provides for alternative arrangements.

The proposed legislation does pose some limitations in practically achieving competition in the provision of holistic clearing, settlement, subregister and issuer services. This response will provide further information on where NSXA believes these limitations arise and will also provide some more general feedback on the proposed legislation.

Timing

NSXA welcomes the Government's interest and action in facilitating and enhancing competition in clearing and settlement and believes this is a positive move for the Australian economy. These changes were long overdue, especially with certain recommendations made by the Council of Financial Regulators (CFR) in 2015.

While understanding that there is a process to follow to the introduction of this proposed legislation, NSXA is concerned that there could be a long delay which would negate the progress made to date. By no means is NSXA suggesting that the correct process is not followed but NSXA encourages the Government to keep these changes a high priority. With all the publicity around the CHESS replacement and its failure, it is clear that competition in clearing and settlement is needed in Australia and should be fostered.

Furthermore, in discussions with The Treasury on the proposed changes on 13 April 2023, it was clarified that introduction of these changes does not necessarily mean that ASIC will actually propose or consult on any rules at the same time as The Treasury's changes and this may not necessarily occur in a very timely manner. No action from ASIC would be reinforcing the status quo. So, although the intent may be there from Government, it has to be followed up with appropriate instructions to regulators to implement appropriate rules that meet the intent.

Purpose of the legislation

The Exposure Draft Explanatory Materials identify that the Corporations, the Competition and Consumer and ASIC Acts are amended 'to facilitate competitive outcomes in the provision of the CS services for Australia's financial markets'. As noted in the Explanatory Materials, the Corporations Act currently permits more than one CS facility. In the meeting on 13 April 2023, The Treasury confirmed that the proposed legislation related to 'enabling' powers.

NSXA submits that there are more aspects to competition than just the C&S licence. NSXA contends that the components that make up the licence are all subject to the past view of what ASX had in place when the licence regime came into being. That means other operators have been locked out or dissuaded from competing in these areas. Regulators (as The Agencies in the 2015 CFR report) have expressed doubt that committed competitors would emerge due to a notion of weak contestability.[2] NSXA submits that Clearing and Settlement is contestable and there are overseas jurisdictions that operate with multiple facilities that interoperate, for example Target2-Securities in Europe.

NSXA is of the view that the proposed changes do not actually and practically make changes to the current regime in promoting competition as it has not addressed the issue raised in the CFR report. Further, the proposed changes predominantly focus on arbitration if a provider cannot come to commercial arrangement with the applicant. Arbitration, although a welcome and necessary concept, does not of itself eliminate market power and create an environment of equals in the negotiation. Market power can manifest in delays in negotiation and introduction of new requirements or problems on the fly before arbitration is triggered.

Definitions

NSXA would like to note the definition for *CS service*, which refers to 'data used in the operation of a clearing and settlement facility' and having access to such data qualifying the service as a CS service. In the meeting with The Treasury noted earlier, it was confirmed that 'data' in this context refers to examples like HINs and ISINs. It may be helpful to have more explanation on this aspect as to what is envisaged as being captured under 'data', noting that an exhaustive list cannot be provided. NSXA submits that data is not just a service. Service is the provision of the infrastructure that allows access to the services but also access to the components that allow a clearing and settlement transaction to complete.

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[2] https://cdn.treasury.gov.au/uploads/sites/1/2017/06/C2015-007_CFR-ConclusionsPaper.pdf (page 4 – bullet point 2 and page 49)

On 'data', NSXA points out the value in obtaining information, such as HINs and ISINs, through the following example. ASX is currently able to co-opt or gather NSX's customer base through the use of the CS service as NSX must seek ticker codes and ISINs from ASX in order to register a new issuer. The issue of this type of 'data' is not essential to the provision of CS services and should be decentralised or administered outside of ASX Group.

Once an NSXA issuer is listed, ASX is involved with the sub-register access, charges a CHESS Monthly Rental fee to NSX issuers directly and separately charges issuers for the issuance of CHESS Holding Statements to shareholders. CHESS Holding Statements are prominently ASX branded often leading to confusion by shareholders of NSX issuers. Monthly ASX branded invoices prominently positions ASX to extend its commercial relationship with NSX issuers.

In relation to the fee, should an issuer not pay, ASX has the power to suspend services, which impedes on NSXA's power and obligation to administer its Listing Rules. Again, there should be some form of separation here to ensure competition is allowed and achieved.

Furthermore, there are questions from the whole industry as to the need for the duplication of CHESS Holding Statements which is a function that the share registry currently fulfils. This could have been solved by making the issuance of CHESS Holding Statements optional based on the consent of shareholder. What this demonstrates is ASXG's inability to place the betterment of the market ahead of its commercial interests due to the revenue derived from CHESS Holding Statements and related transactions (CHESS messages).

Therefore, NSX suggests that it may be more useful to introduce provisions to separate 'data' from the CS service as opposed to the current proposal to ensure that the legislation encapsulates this function. This data should encapsulate:

- ISIN and ticker codes – decentralisation of this ancillary reference data function that feeds CSFs and the subregister, and;
- Holder Identification Numbers (HINs) – decentralisation of data ownership and access driven by HIN owners' consent (consumer data rights).

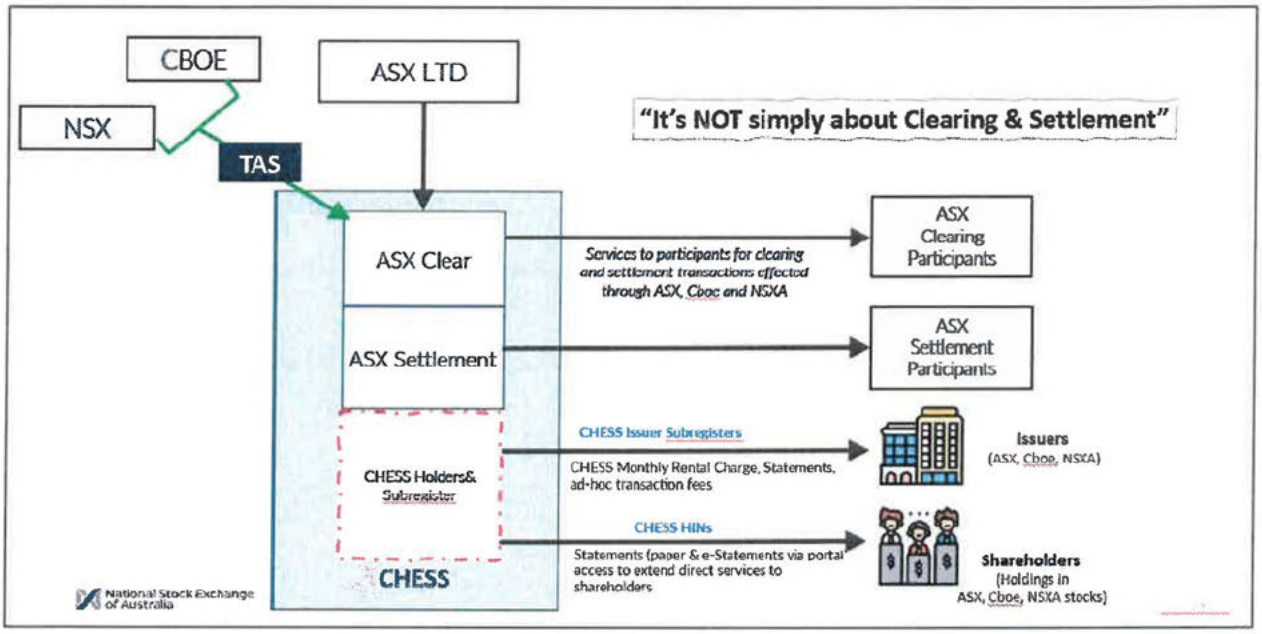

Diagram 1: ASX Monopoly Footprint

NSXA does not have any further comment on the other definitions provided in the Exposure Draft.

Changes to the Corporations Act

The changes to the Corporations Act focus on assigning ASIC the power to make rules relating to CS services and enabling enforcement powers where those rules are not complied with. As noted above, The Treasury, confirmed that this legislation is designed to enable powers. NSXA considers that this is important and relevant, however the changes, as they are currently proposed, do not actually promote competition. It seems that the rules that ASIC introduces, as a consequence of this legislation, will be the determining factor as to whether competition is actually promoted and enhanced. It is too early to make assumptions at this stage.

The draft legislation also does not assume that other entrants will emerge. Once that happens the arbitration legislation will disappear, creating an oligopoly situation. The drafting seems to be geared towards the current incumbent and does not seem to consider smaller players, like NSXA, who may not have a desire to compete at the full scale of ASX. For example, NSXA may wish to pursue a CS solution to service its own issuers and have no desire to offer services to ASX or CBOE issuers. This offering may even bypass a CCP clearing function but rely on access to HIN data to facilitate a streamlined settlement and subregister service for its issuers and their shareholders. Therefore, NSXA proposes that The Treasury considers taking a holistic view of competition to promote and enable innovation to prosper. A possible solution is to consider the issuance of tiered C&S licences and or the inclusion of licence conditions. This may include certain thresholds incorporating aspects such as scale, complexity, transaction volumes and values.

In addition, giving ASIC the ability to employ emergency rules is subject to and can have unintended consequences and introduces de facto legislation without debate. NSXA would prefer a third party that was able to instigate such rules.

Changes to the Competition and Consumer Act 2010

NSXA welcomes these changes as a positive step towards dealing with access to CS services. It is important to note that the reasonable test is very subjective as the provider can always say they are negotiating in good faith and are awaiting analysis either from the applicant or another regulator to progressively delay the outcome.

NSXA has previously experienced this type of delay when seeking access to the ASX provided Trade Acceptance Service (TAS) which took a total of *three and a half years* to obtain access to a service that was put in place for orderly access to other market operators following its deployment for Chi-X (now CBOE). Throughout the process, ASX delayed NSXA through the guise of:

- reviewing annual fees;
- the introduction of a 'clearability assessment' and an 'operations assessment' to ensure that NSX stock could be cleared, although the same types of stock were already being cleared for CBOE and ASX;
- requesting a supplementary application from NSXA because NSXA stocks were assumed to be not very liquid (even though a number of ASX listed securities are illiquid); and
- the proposed introduction of bifurcation, which required ASIC's involvement and led to *ASIC's Open Access Principles*.

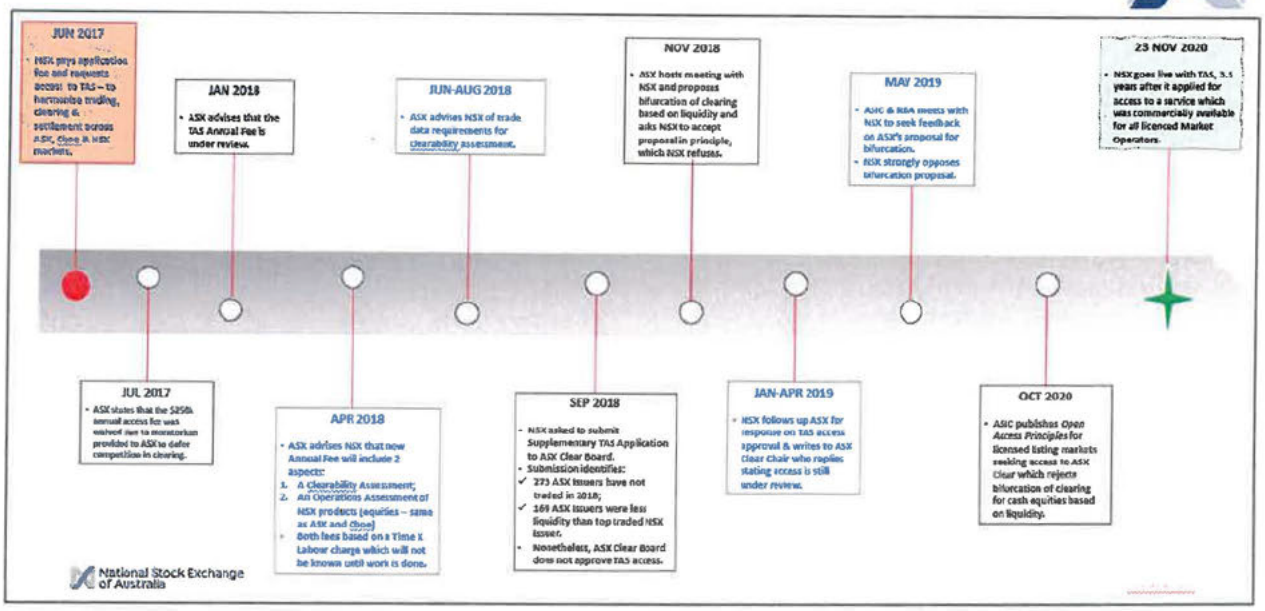

Diagram 2: Timeline of access to TAS to harmonise clearing and settlement across ASX, CBOE and NSX markets

Legislation like the arbitration legislation would have been helpful in the above example. The process which is outlined in the proposed legislation, albeit clear and helpful, may still cause delays to access due to the prescriptive nature of the process. NSXA also questions whether the arbitration legislation will disappear once, and if, a competitor emerges. It is important that disputes which are referred to the ACCC are dealt with in a timely manner so as to not hinder the offerings of entities that are seeking access.

Pricing

A point which has not been considered in the proposed legislation is the pricing aspect when considering access to CS services. Arguably, this may be an issue which may be dealt with by ACCC or ASIC in the rules it may introduce, however as noted above, it has been made clear that ASIC may not introduce rules for some time. NSXA is of the view that it is pertinent that the current monopoly-based pricing for clearing, settlement and subregister access is considered and reviewed sooner rather than later as there is a need for the legislation to encompass fair pricing.

For example, there is no concept of a wholesale versus retail service or white label of the service by ASX. ASX charges issuers full retail price on a monthly subscription basis. To improve this aspect, the NBN Co pricing structure could be used, where NBN Co has no competitors but it offers a monopolistic wholesale service to telecoms providers at a wholesale price and market operators can then compete amongst themselves on an efficiency basis as to what price is charged to the end user. Further ASX also charges the market operator for access to the services. This means that the market operator has to charge its companies an extra fee meaning that it is more expensive for NSXA companies to access the same services that ASX companies do. Pricing should always be on a fair and equitable basis.

By the time a complaint is lodged with ACCC, the applicant will usually have exhausted itself in the process. There are many delaying techniques that ASX have used over the years to either slow or prevent access and/or entry.

There should be regulatory oversight of the current incumbent and the current structure of pricing for clearing, settlement and subregister access. If a competitor is to emerge, pricing should be considered again in the context of the wholistic requirements from an incumbent and the services which are provided, that is, regulation should not be softened if what is presented are not alike.

Principles as a precursor to Legislation

Given the likely timeframe for the introduction of legislation, NSXA proposes that Treasury considers introducing Principles *of Competition* which holds ASX Clear and ASX Settlement accountable to the spirit of open access and the intent of the legislation to follow. This may build upon ASIC's Open Access Principles for licensed listing markets seeking access to ASX Clear. Although such principles may not have regulatory powers of enforcement they can act as a severe deterrent and promote adherence through visibility of any breaches.

Taking into account, ASX's ongoing quest to replace CHESS, it is important that ASXG is not given a free rein to technically design a replacement system that protects or even enhances these current monopoly 'functions and features' ahead of legislative change.

Conclusion

NSXA is in a unique position as a competitor and customer of ASX and has been able to draw on practical experiences in providing feedback on the proposed legislation. The proposed legislation is greatly welcomed however it is not sufficient to actually deal with the issues which exist in terms of clearing & settlement in the current monopoly structure. The Government should broaden the scope to do more and do it more quickly to achieve the desired outcome of enhancing and achieving competition and to create an environment for wide scale innovation to thrive.

Government needs to look at the actual structure and processes which are currently part of the CS function and introduce separation of 'data' aspects from the clearing & settlement where they are not actually related to clearing & settlement.

The Government should also broaden the scope of their proposed legislation and look into more specific issues as opposed to just allowing rules to be made by ASIC at an uncertain point in the future. For example, making changes in the way clearing and settlement and subregister services are priced could improve competition significantly and could remove unfair pricing or relationships that go beyond the need for clearing and settlement.

Introducing principles of competition as a first step will lead to a faster mechanism to hold ASX Clearing and ASX Settlement accountable and incorporate a more fair and open replacement system for CHESS.

Allowing competition is merely one step to improving competition.

Yours faithfully,

Chan Arambewela
Chief Operating Officer
National Stock Exchange of Australia