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23 May 2023

Ms Maggie Rider
Administrative Officer
Parliamentary Joint Committee on Corporations and Financial Services

By email: corporations.joint@aph.gov.au

Dear Ms Rider

Supplementary submission: *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation CHESS Replacement Project Response to Invitation to Submit*

On 4 May 2023, Computershare lodged a submission following our participation at the public hearing on the ASX CHESS Replacement Project (**CRP**). At the PJC on 23 February 2023, and in our submission, we called for the establishment of a new committee to provide enhanced governance of clearing and settlement. Referred to as the Clearing and Settlement Governance Committee (**CSG Committee**), this group would comprise industry and regulatory representatives to establish and implement an effective governance model.

As noted in our 4 May submission, Computershare engaged Ashurst and Dr Robert Austin AM to help us scope recommendations for a governance framework. This supplementary submission provides details of a proposed governance model for CRP, including the committee's framework and governance structure.

In making this submission Computershare's prime objective is the successful delivery of CRP for the broad Australian market. Our recommendation complements and supports the role of the regulators, fosters broad and purposeful industry participation, and addresses many of the identified failings of the project to date. As previously noted, Computershare continues to seek to be partners and collaborators with ASX, other stakeholders, Regulators, and government.

Yours sincerely

Proposed Governance Model for CHES and the CHES Replacement Project

1. Introduction

On 17 November 2022, ASX Limited (**ASX**) announced that it would reassess all aspects of the CHES Replacement Project (**CRP**) and pause all activities on the project while the ASX revisits the solution design.

Following that announcement, the Australian Securities and Investments Commission (**ASIC**) and the Reserve Bank of Australia (**RBA**) (together, the **Regulators**) issued a joint letter of regulatory expectations dated 17 November 2022¹ to highlight what is required of ASX Clear Pty Ltd (**ASX Clear**) and ASX Settlement Pty Ltd (**ASX Settlement**) with respect to maintaining existing CHES and the CRP. In particular, the Regulators expect that:

- (a) ASX Clear and ASX Settlement will adhere to their core obligations as clearing and settlement (**CS**) facility licensees, including, to the extent it is practicable to do so, doing all things necessary to reduce systemic risk and ensure that the facilities' services are provided in a fair and effective way; and
- (b) ASX will effectively manage the risks involved with a program of such size and complexity, including system build, development, supportability, testing, participant readiness, pricing, data access and governance frameworks; and
- (c) ASX will improve its program delivery capabilities; and
- (d) the CRP will be brought back on track after the solution design has been completed, so ASX's commitment to deliver safe and reliable clearing and settlement infrastructure will be fulfilled.

The letter also noted that, "It is important that ASX considers the impact on all CHES stakeholders in its assessment of potential solutions".

In addition to that joint letter, the RBA separately set out its expectations in a letter dated 15 December 2022², including its expectation that "ASX is to actively consult stakeholders on the solution redesign, project and implementation". Accompanying the letter was a statement from Governor Philip Lowe that, "The RBA also expects to see further uplift by ASX with respect to its governance arrangements". The RBA requires ASX to publish its governance arrangements, including oversight from its Boards, management structure and the roles of relevant Board committees (particularly its Technology and Audit and Risk Committees), and the roles of its risk management and audit functions in relation to current CHES and the CRP, particularly that "governance arrangements should also include clear responsibilities and accountabilities with respect to the delivery" of CHES replacement.

There is clearly recognition from the Regulators that there were significant shortcomings in the governance processes with respect to the CRP which had contributed to the failure of the project. It is a strong area of focus in regulatory expectations as set out in the two letters.

Computershare, in its appearance before the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**) on 23 February 2023, called for ASIC and the RBA to

¹ <https://www.rba.gov.au/payments-and-infrastructure/financial-market-infrastructure/clearing-and-settlement-facilities/pdf/letter-of-expectations-to-asx-regarding-ches.pdf>

² <https://www.rba.gov.au/media-releases/2022/pdf/mr-22-43-letter-of-expectations-15-december-2022.pdf>

commission a new high-level industry steering group to confirm the core guiding principles for the next phase of the CRP.

The purpose of this paper is to recommend ways in which this new steering group should be constituted so as to ensure that the Regulators' expectations are delivered, and concurrently to achieve material and significant input from stakeholders into the process going forward in this next phase of the CRP.

2. Current ASX governance arrangements

2.1 Boards

ASX is a listed public company. It has a Board of 10 directors, the majority of which are independent non-executive directors.

ASX Settlement is a proprietary company and a wholly owned subsidiary of ASX. ASX Settlement has its own Board, which is accountable to the ultimate shareholder of the ASX Group, ASX. The Board of ASX Settlement is made up of 5 directors the majority of whom are independent non-executive directors, and some of them also sit on the ASX Board. The Chair is an independent non-executive director.

2.2 Executive Management

The ASX Executive Team comprises its c-suite, including CEO, CFO, COO, CRO, CCO, general counsel, and other executives in listings, technology and data, people and culture, securities and payments, and markets.

2.3 Business Committee

ASX has established a Business Committee to provide input and advice with respect to the clearing and settlement of cash equities, which is intended to address its commitment to comply with its Code of Practice and the Regulatory Expectations for the Conduct of Cash Equity Clearing and Settlement Services in Australia as set out by the Council of Financial Regulators. The Business Committee's role is intended to be a mechanism for input into ASX's governance framework.

The Business Committee comprises, presently, of 33 representatives of clearing participants, settlement participants, market operators, other relevant stakeholders and their associated industry organisations. Members are appointed by ASX Clear and ASX Settlement and it is intended that the members should include executives with a deep understanding of clearing and settlement, for example, chief operating officers. The Chair is appointed by ASX, and the current Chair is the Chief Customer and Operating Officer of ASX. A full list of committee members is published on the ASX website³.

The Business Committee's charter sets out that the role of the Business Committee is to provide:⁴

- a) input for consideration by ASX Management and the Boards of ASX Clear and ASX Settlement (**Clearing and Settlement Boards**) on the ongoing operation of cash equities clearing and settlement infrastructure and services provided by ASX;
- b) input for consideration by ASX Management and the Clearing and Settlement Boards on setting the ASX investment strategy for cash equities clearing and settlement infrastructure and services development, and the system design, operational

³ <https://www2.asx.com.au/about/regulation/clearing-and-settlement-of-cash-equities-in-australia/stakeholder-engagement/business-committee>

⁴ <https://www2.asx.com.au/content/dam/asx/about/charter-of-the-business-committee.pdf>

arrangements and implementation plan for new cash equities clearing and settlement infrastructure and services provided by ASX;

- c) advice to ASX Management to assist in progressing cash equities clearing and settlement initiatives of interest to the industry, with the aim of facilitating service innovation and improving overall market efficiency; and
- d) a mechanism for ASX Management and the Clearing and Settlement Boards to consult clearing participants, settlement participants and other market operators regarding their strategic plans and investment decisions in relation to the design, operation and development of the core clearing and settlement infrastructure and services for the Australian cash equities market.

In other words, the role of the Business Committee is to provide input and advice to the relevant ASX Group boards and executive management with respect to clearing and settlement matters. It does not have any substantive decision-making power, nor are the Boards of ASX or ASX Settlement, or executive management, compelled to act in accordance with its advice or input, or compelled to provide reasons should they choose not to do so.

2.4 CHES Replacement Technical Committee

ASX has also established the CHES Replacement Technical Committee (**Technical Committee**) as a sub-committee of ASX's Business Committee. As the name suggests, this committee is focused specifically on the CRP.

According to its charter⁵, the purpose of the Technical Committee is to function as an industry forum for:

- a) ASX to obtain input from impacted stakeholders to inform ASX Management and the Clearing and Settlement Boards in relation to its decision making and help solve issues in the replacement of CHES;
- b) ASX to communicate and provide visibility to, and seek expert views and input from, impacted stakeholders on the safe and successful delivery of CHES replacement;
- c) impacted stakeholders to obtain input that informs their own decision making.

The charter then sets out the role of the Technical Committee which is to provide a forum for industry engagement to review, debate and provide input in relation to project planning, design assumptions and scope, and industry benefits. Membership of the Technical Committee comprises the chairs of the Business Committee and Technical Committee, one nominated representative per Business Committee member, and third party software vendors.

The charter of the Technical Committee contains relatively light obligations on ASX and the Business Committee with respect to the input of the Technical Committee. In particular, it is obliged to "consider in good faith the views of the Technical Committee and its members".

2.5 Other working groups

There are a number of internal working groups that have been convened by ASX. It is unclear what the remit or functions of those working groups are with respect to the CRP as the details have not been made available outside of ASX. They all ultimately report up to the ASX Executive Team, with some interface with the Technical Committee.

⁵ <https://www2.asx.com.au/content/dam/asx/markets/clearing-and-settlement-services/ches-replacement-technical-committee/ches-replacement-technical-committee-charter.pdf>

2.6 Current governance structure diagram

All of the above are reflected in the ASX CHESS Replacement Project Governance structure diagram⁶, which is enclosed as **Appendix 3 (Current Structure)**.

2.7 Issues with current governance arrangements

There are a number of issues with the current governance arrangements.

a) Level of stakeholder involvement

The relevant involvement of stakeholders needs to be addressed at a "higher level" of governance at the parent Board level, to address fundamental concerns with respect to competition in the provision of clearing and settlement services. At present, the Business Committee is a committee of the Clearing and Settlement Boards. The Technical Committee is a sub-committee of the Business Committee.

b) Limited powers of the committees

The powers of the Business Committee and the Technical Committee are limited to providing input and advice to the Clearing and ASX Settlement Boards and executive management. There needs to be greater emphasis placed on ensuring that the advice and input is acted upon or, if not, there is a clear basis for not doing so.

c) Representation on the committees

There should be greater clarity in relation to which stakeholder groups are represented on the committees.

d) Chair of the committees

The chair of the relevant committees should be independent, to ensure that the interests of stakeholders are properly represented.

e) Procedures with respect to the operation of the committees

Our understanding from stakeholders represented on the Technical Committee is that the committees operate in a way which is not conducive to substantive input and debate. Often materials relevant to the matters on the agenda for the committee are provided only shortly before the meeting, leaving little opportunity for proper consideration prior to the meeting, which then impacts the level of debate and input which can be provided by the committee in the relevant meeting.

In our view, a more substantive and independent process is required for an effective decision-making process free of conflicts of interest and fair to all stakeholders. This cannot be achieved through the present governance construct of the Business Committee and Technical Committee. We therefore propose an alternative approach in section 3 below.

⁶ <https://www2.asx.com.au/content/dam/asx/markets/clearing-and-settlement-services/chess-replacement-technical-committee/presentation-chess-replacement-technical-committee-20230308.pdf>, page 9

3. Proposed solution - a new governance committee

3.1 Overview

We recommend that ASX should be required to establish a new committee, the Clearing and Settlement Governance Committee (**CSG Committee**), which is focused on matters relating to the provision of clearing and settlement, including but not limited to all matters relating to the CRP. Our recommendation envisages that:

- a) the Business Committee will continue to exist to provide input and advice to the CSG Committee, to reflect the interests of the broader stakeholder group, and to function as a forum for market and industry liaison;
- b) the Technical Committee will continue to exist to provide input to the CRP from a technology and operational perspective to the CSG Committee;
- c) to the extent that they continue at all, the internal ASX working groups should also report up to the CSG Committee so that the CSG Committee can keep abreast of the relevant issues that are being considered and worked through for the CRP. They will also continue to report up to ASX Executive Team.

The CSG Committee would be appointed by, and report directly to, the ASX Board. It is necessary to give the new committee a direct link to the Board of the ASX holding company so as to make sure serious concerns that have emerged about governance, and in particular conflicts of interest, are properly addressed. Given the structure of the ASX Group where ASX Limited is the ultimate shareholder of ASX Clear and ASX Settlement, it should not be required for the CSG Committee to also be appointed by and report to the Clearing and Settlement Boards. The direct line of the CSG Committee to the ASX Board would be sufficient to demonstrate the importance of its role, and the ASX Board would have the ability to direct the Clearing and Settlement Boards to act in accordance with its arrangement with the CSG Committee.

We recognise that the Directors of ASX have a duty to act in good faith in the best interests of that corporation and its shareholders. Note, however, that the best interests duty includes an obligation for the Directors of ASX to take reasonable steps to ensure that its subsidiaries comply with their individual statutory obligations. In particular, ASX Clear and ASX Settlement, as licensed entities, are required to have in place adequate arrangements for handling conflicts between the commercial interests of the ASX Group and their duty to ensure that their services as CS licensees are provided in a fair and effective way (Corporations Act, s 821A(1)(c)).

In light of these obligations, and the concerns about ASX conflicts of interest that have arisen in the course of development of the CRP, we consider it would be unsatisfactory if the role of the CSG Committee were to be limited to providing input and advice to the ASX Board.

In response to these serious concerns, we put forward two alternative proposals, which we call Option 1 and Option 2. Option 1 would be sufficient to address these concerns, but Option 2 would be a cleaner solution, in our opinion. Whether Option 1 or Option 2 is adopted, it will be necessary for the ASX resolution that creates the CSG Committee to define carefully the role of the CSG Committee and to limit any potential liability of, and provide appropriate indemnities to, the members of the CSG Committee (and the organisations they represent).

Option 1

Option 1 puts forward a structure in which the Directors would retain a significant capacity to influence the decision-making process, but throughout the ASX Group (including at board and

management levels of all relevant ASX entities) effective arrangements would be put in place to avoid conflicts of interest and unfair practices.

Our Option 1 proposal is that the ASX Board of Directors would appoint the CSG Committee, but the decision-making power of the CSG Committee would be a qualified power:

- a) the CSG Committee's primary function would be to guide and review the progress of the CRP and prepare reports and recommendations for consideration by ASX Clear and ASX Settlement in relation to issues that require determination. Decisions of the CSG Committee are to be made by the majority of members;
- b) the CSG Committee would also have a secondary function to consider and prepare reports and recommendations to ASX, ASX Clear or ASX Settlement on other issues arising in respect of ASX's clearing and settlement facilities;
- c) the CSG Committee's reports and recommendations would not be immediately operative and binding on ASX, ASX Clear or ASX Settlement, but obligations would be imposed on those entities under their operating rules, before final decisions are made in respect of the recommendations, to prepare within a prescribed timeframe a written response (the **Response**) to the CSG Committee expressing the provisional views of the ASX entities with respect to each recommendation, and the reasons for those views;
- d) any member or members of the CSG Committee would be authorised to prepare and place before the CSG Committee a proposed answer (the **Answer**) to the Response;
- e) if the CSG Committee accepts the proposed Answer, the Answer is then referred to the ASX Board;
- f) if the ASX Board is not persuaded by the Answer, the issue or issues in dispute between the ASX Board the CSG Committee must be referred promptly to an independent expert selected by the ASX Board with the consent of the CSG Committee;
- g) the expert would be required to take into account, in addition to the arguments presented in the Response and the Answer, whether ASX or ASX Settlement is in a position of conflict concerning the matter in dispute;
- h) the expert's resolution of the dispute, to be recorded in a written report, would be binding on all parties;
- i) given their memberships or rights of observation in the CSG Committee, the Regulators would have vision of the emerging dispute. Arrangements to ensure that the Regulators are kept informed of an emerging dispute between the ASX Board and the CSG Committee are set out in paragraph 3.6 below. Additionally, ASX would be required at the end of the process to prepare an objective and balanced report giving an account of the conflicting views and the procedures adopted to resolve the dispute.

We set out in **Appendix 1** a summary of the key elements of the proposed the CSG Committee under Option 1.

Option 2

Under Option 2, the CSG Committee would have decision-making powers, delegated to it by resolution of the Board.

Article 15.5 of the ASX Constitution allows the Directors of ASX to delegate any of their powers (other than powers required by law to be dealt with by directors) to a committee consisting of such persons as they think fit. That power of delegation is confirmed by s 198D(1) of the Corporations Act, and the exercise of a power by a delegate is as effective as if the directors have exercised it (s 198D(3)).

Under Option 2, the Directors of ASX would resolve to exercise their power of delegation by delegating decision-making powers in respect of all matters dealing with ASX clearing and settlement to the CSG Committee. The Directors would adopt rules setting out the CSG Committee's composition and procedures. The rules would also identify the circumstances (necessarily limited and not affecting any decisions already made by the CSG Committee) under which the Directors could withdraw the delegation.

Under Option 2, the CSG Committee would become the decision-making body with respect to ASX clearing and settlement issues including supervision and implementation of the CRP. Any potential liability of members of the CSG Committee to ASX and stakeholders would be carefully defined and limited, as noted above. The rules adopted by ASX would require the CSG Committee to keep the ASX Board of Directors, and also the Regulators, fully informed about the CSG Committee's meetings, deliberations and decisions. As noted below, the Regulators would be offered membership of or the ability to observe the proceedings of the CSG Committee.

Having in place an effective and substantive CSG Committee should convey the message to all interested stakeholders that decisions in respect of clearing and settlement matters, including the CRP, will be efficiently and carefully made by a manageable-sized committee, working in communication with the Regulators and meeting frequently enough to keep all relevant concerns, including governance concerns, in the minds of all members of the CSG Committee and other affected parties.

3.2 Purpose and role of the CSG Committee

The purpose of the CSG Committee under either Option 1 or Option 2 would be to function as an industry forum which represents the interests of all impacted stakeholders in relation to the provision of clearing and settlement services, including the CRP.

The overarching objective would be for the CSG Committee to contribute to the safe and successful delivery of clearing and settlement services, including the CRP, taking into account stakeholder interests.

The CSG Committee would also have the role of keeping ASX and ASX Settlement in check on decisions that could be impacted by its self-interest or a conflict of its interests vis-a-vis the interests of relevant stakeholders in the provision of clearing and settlement services. In this regard, as it relates to the CRP, the CSG Committee would:

- a) review, consider, and make decisions/recommendations in relation to project planning and design assumptions of the CRP solutions;
- b) make decisions/recommendations having regard to the practical effects on impacted stakeholders, in respect of any changes to industry process, options and sequencing of readiness activities, taking into account all relevant matters including the level of costs likely to be incurred by stakeholders as a result of CSG Committee decisions;
- c) consider key project risks, issues, constraints and diverse industry needs;

- d) receive timely communication and reporting of project status including tracking to project milestones, stakeholder participation in readiness activities, progress statistics and assurance activities; and
- e) make recommendations (under Option 1) or approve (under Option 2) with respect to the implementation approach of the CRP solution, taking into account the risks and benefits of various transition options to appropriately manage industry risks.

The role of the CSG Committee would not be limited to the CRP, but rather have a broader remit to consider other matters associated with the provision of clearing and settlement services. In other words, the CSG Committee would have a role to play even after the implementation of the CRP including reviewing, troubleshooting and sorting out all clearing and settlement issues arising in the ASX system.

3.3 Membership

The CSG Committee should have a manageable number of members representing relevant stakeholders, such as:

- a) ASX
- b) Other exchanges using ASX clearing and settlement services (eg Cboe Australia) (the exchanges would together not have a majority of committee members)
- c) Market participants
- d) Custodians
- e) Registries
- f) Issuers (likely through representation by relevant industry associations)
- g) Investors (likely through representation by relevant industry associations)

The Regulators, ASIC and the RBA, would participate as observers. The ACCC could also be invited to be an observer.

Members should be actively involved in the industry, and have the appropriate skills and business responsibilities to actively contribute to achieving the purposes of the CSG Committee. Members would be expected to provide meaningful contribution to and discussion on the project planning, scope, risks and issues, with deep operational and technical understanding of cash equities clearing and settlement to actively contribute to achieving the purposes of the CSG Committee.

3.4 Chair

An independent person with deep knowledge of the industry should be appointed as chair of the CSG Committee.

3.5 Operating protocols

Clear protocols should be developed to ensure that there is sufficient notice of meetings of the committee, together with a clear agenda and sufficient materials to ensure effective consideration of the matters on the agenda.

3.6 Engagement with ASIC and the RBA

As noted above, if Option 1 has been adopted and the ASX Board decides not to follow the advice or input of the CSG Committee with respect to a particular matter, the ASX Board

must prepare a Response and provide it to the CSG Committee. If the CSG Committee provides an Answer to the ASX Board's Response, and disagreement remains, the dispute must be referred to an independent expert for determination.

During this process, the CSG Committee and the ASX Board would be required to provide copies of their respective documents to the Regulators and otherwise ensure that the Regulators are kept informed about all developments concerning the matter under consideration. Depending on the circumstances, the statutory powers of the Regulators may enable them to intervene if they consider it to be appropriate. In forming their views, the Regulators (ASIC and the RBA) may choose to consult the ACCC. The ASX Board and the CSG Committee would be required to inform the independent expert of any interventions or comments by the Regulators, and the independent expert would be required to take the Regulators' inputs into account before making a final determination.

If Option 2 has been adopted, and the ASX Board disagrees with the CSG Committee's decision, the ASX Board must prepare a report to the Regulators explaining its point of view. The Regulators would be authorised to overrule the CSG Committee's decision on public interest grounds, but only after giving the CSG Committee the opportunity to respond to the ASX Board's objection. The expectation would be that the Regulators would consider whether the objection made by the ASX Board was consistent with the discharge by ASX and its subsidiaries of their respective obligations, and with relevant public policies.

ASIC and the RBA could also be invited to attend meetings of the CSG Committee as observers.

3.7 Proposed structure

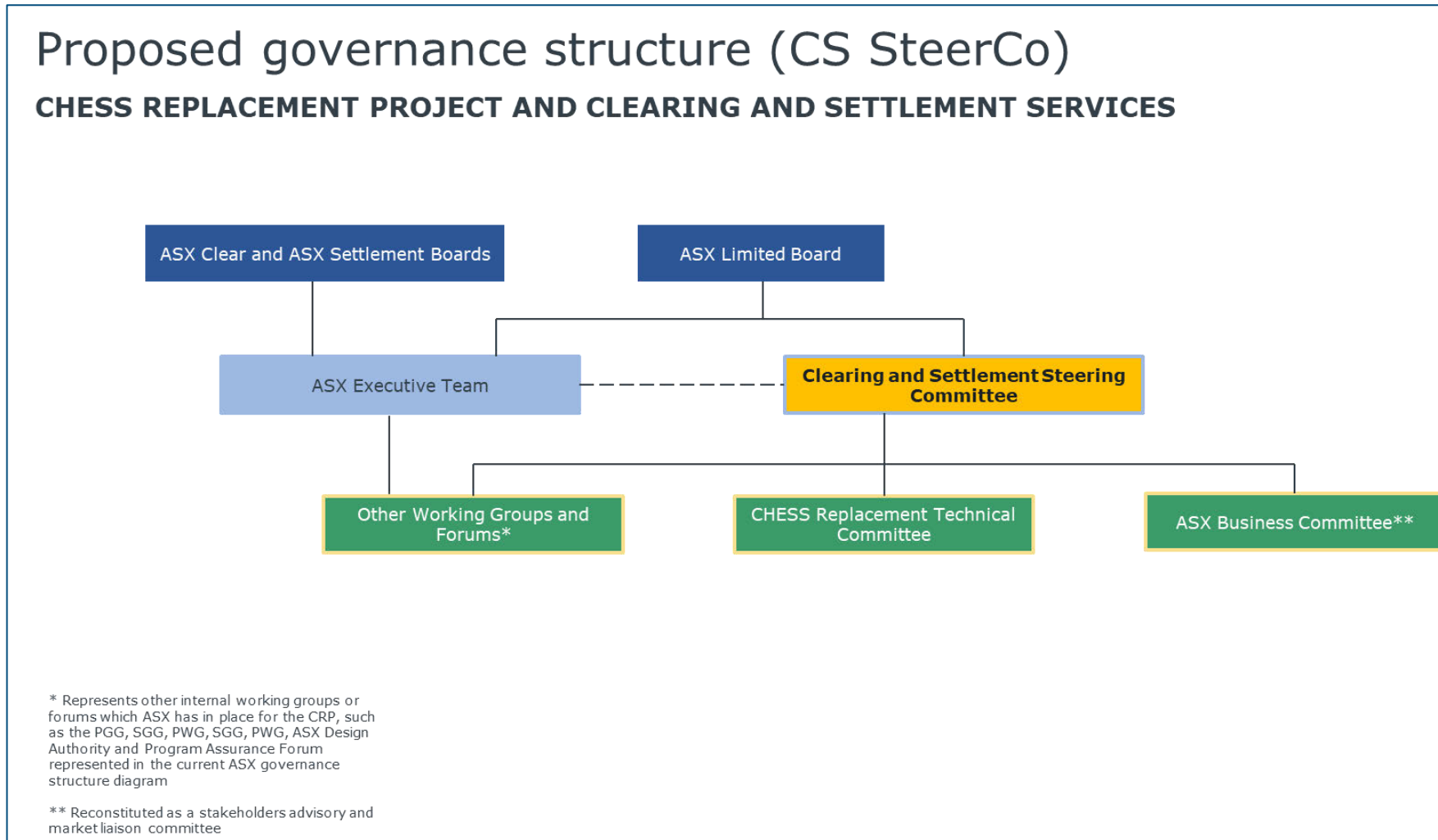
We enclosed as **Appendix 2** a structure diagram which reflect our proposal for the CSG Committee, which is much simpler when compared against the Current Structure which is presented in **Appendix 3**.

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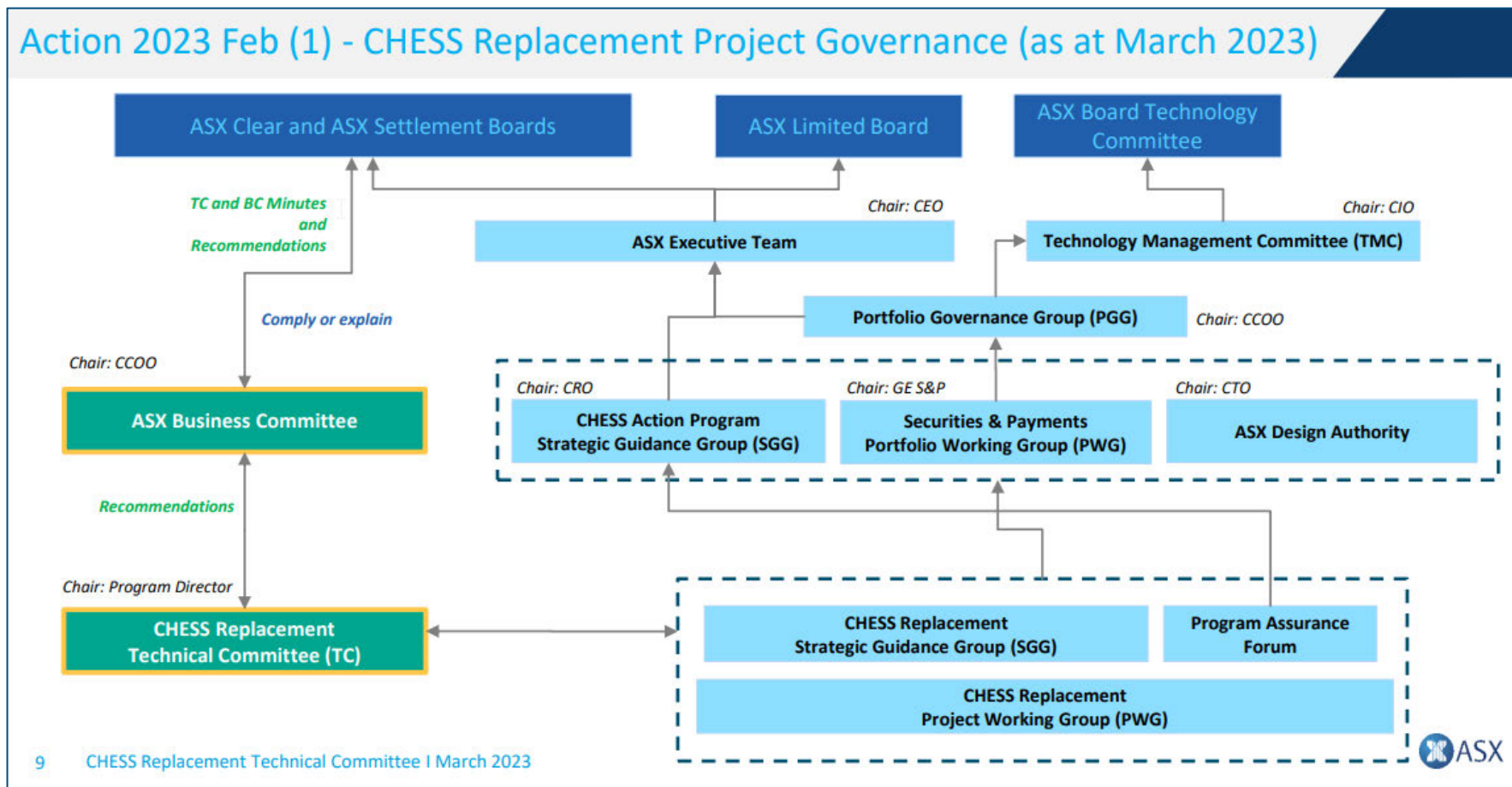
Appendix 1 - Summary of the CSG Committee framework (Option 1)

Topic	Summary
Purpose	To represent stakeholder interests in a manner that directly and substantively influences strategic direction and project management, with direct and substantive involvement in clearing and settlement matters (including the CRP). When it comes to matters relating to clearing and settlement, these would be subject to oversight and direction by the CSG Committee.
Role	<p>The CSG Committee’s primary function would be to guide and review the progress of the CRP and prepare reports and recommendations for consideration by the ASX Board in relation to issues that require determination.</p> <p>The CSG Committee would also have a secondary function to consider and prepare reports and recommendations on other issues arising in respect of ASX’s clearing and settlement facilities.</p> <p>Decisions of the CSG Committee are to be made by the majority of members</p>
Substantive recommendations	The CSG Committee’s reports and recommendations would not be immediately operative and binding on ASX, ASX Clear or ASX Settlement, but obligations would be imposed on those entities, to prepare within a prescribed timeframe a written response to the CSG Committee expressing the provisional views of the ASX entities with respect to each recommendation, and the reasons for those views. The CSG Committee can then further provide an answer which is referred to the ASX Board to be implemented and adopted.
Dispute mechanism	<p>If the ASX Board does not implement or adopt the recommendation of the CSG Committee, or object or takes any issue with any part of any recommendation, the issue or issues in dispute between the ASX Board and the CSG Committee must be referred promptly to an independent expert selected by the ASX Board with the consent of the CSG Committee, and the ASX Board must also provide a report on the dispute to the Regulators.</p> <p>The expert’s resolution of the dispute, to be recorded in a written report, would be binding on all parties</p>
Membership	See paragraph 3.3.
Chairperson	An independent person with deep knowledge of the industry.
Engagement with Regulators	<p>ASIC and the RBA would be invited to attend meetings of the Steering Committee as observers. The ACCC could also be invited to attend as an observer.</p> <p>Any dispute would be subject to an objective and balanced report giving an account of the conflicting views and the procedures adopted to resolve the dispute.</p>

Appendix 2 - Proposed Structure



Appendix 3 - Current Structure



Source: <https://www2.asx.com.au/content/dam/asx/markets/clearing-and-settlement-services/ches-replacement-technical-committee/presentation-ches-replacement-technical-committee-20230308.pdf>, page 9