



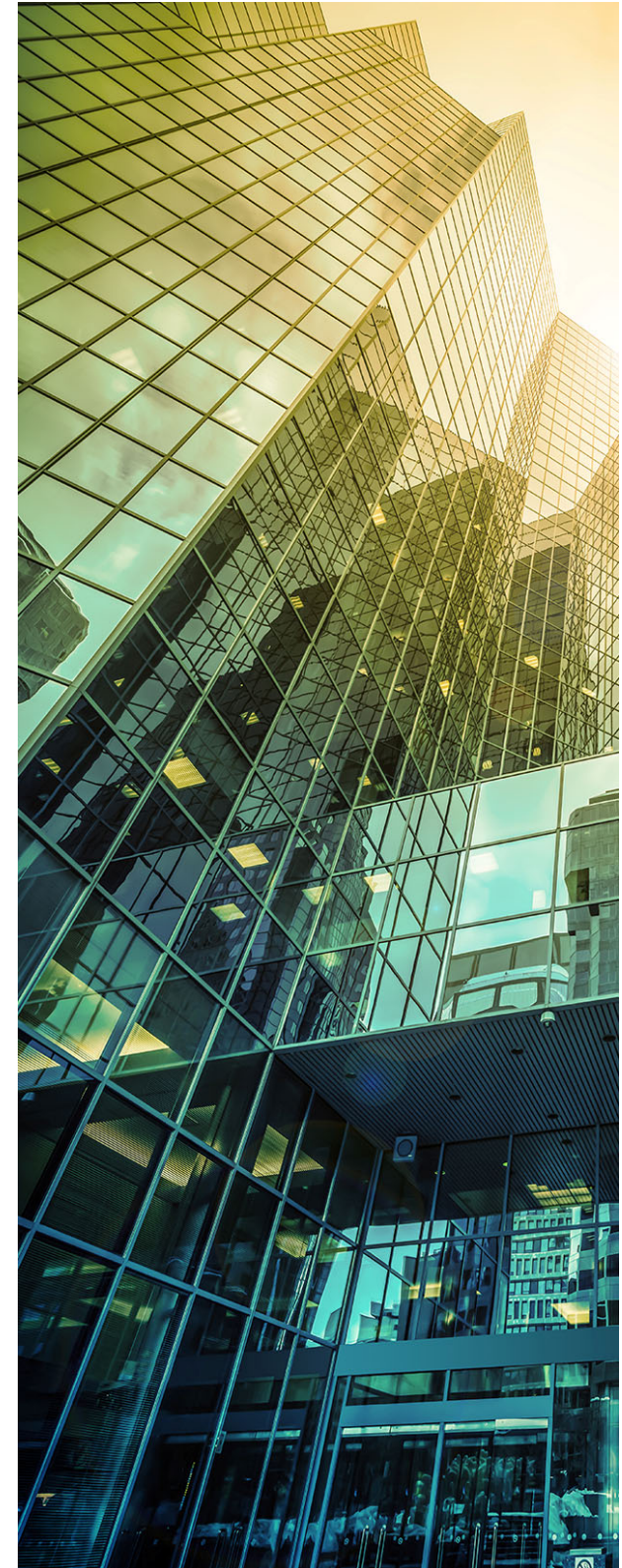
HERBERT  
SMITH  
FREEHILLS

# Report to ASX

Identification and management of intra-group conflicts  
relating to governance of CHES and CHES replacement

27 JULY 2023

Rebecca Maslen-Stannage and Mia Harrison-Kelf



## Table of Contents

<b>Executive summary</b>	<b>1</b>
<b>1 Background: Review process and scope</b>	<b>2</b>
<b>2 Current ASX governance framework relevant to intra-group conflicts relating to CHES and CHES replacement</b>	<b>3</b>
<b>3 Summary of ASX governance enhancements relevant to intra-group conflicts related to CHES and CHES replacement</b>	<b>14</b>
<b>4 Key findings</b>	<b>18</b>
<b>5 Summary of recommendations</b>	<b>24</b>
<b>Glossary</b>	<b>26</b>

## Executive summary

- Herbert Smith Freehills was instructed to provide expert advice (in accordance with the scope outline in section 1 of this Report) regarding identification and management of intra-group conflicts between the commercial interests of the ASX Group and the general licence obligations of ASX Clear and ASX Settlement, with respect to both the governance of the current CHES and the CHES replacement project.
- This involved a review of the existing ASX Group governance framework relevant to the identification and management of these intra-group conflicts, including a review of the recent changes to governance arrangements, consideration of the impact of these changes, and an assessment of how the ASX Group governance framework operates in practice to identify and manage intra-group conflicts relating to CHES and CHES replacement.
- A number of governance measures were introduced by ASX following the recommendations made by the RBA in respect of the ASX clearing and settlement facilities governance framework in the FY21 FSS Assessment Report. Since then, ASX has also applied an additional layer of focus to the governance arrangements applicable to CHES and CHES replacement, which has led it to adopt a number of additional governance changes in addition to those recommended by the RBA. These changes are outlined in section 3 of this Report. As a result, the governance framework that now applies within the ASX Group has been updated significantly from the arrangements that applied at the time of the original CHES replacement decision in 2017.
- Overall and having regard to the enhancements which have been put in place following the issue of the FY21 FSS Assessment Report and the November 2022 ASX announcement regarding the pause and reset of the CHES replacement project, the existing framework for conflict identification and management within the ASX Group (summarised in section 2 of this Report) is sophisticated and consistent with the framework we would expect from a listed group of the complexity and scope of potential conflicting operations of the ASX Group.
- Noting the scope of the advice we have been asked to provide, the critical financial market infrastructure nature of CHES, and the importance of compliance with the licence obligations of ASX Clear and ASX Settlement (including relating to the Financial Stability Standards) with respect to the governance of CHES, this Report identifies a number of recommendations (included with a summary of our key findings in section 4 of this Report) as to further improvements which could be made to identify and manage the conflicts between the commercial interests of the ASX Group and the general licence obligations of ASX Clear and ASX Settlement in relation to current CHES and CHES replacement.



# 1 Background: Review process and scope

In accordance with paragraph 15 of the letter from the Reserve Bank of Australia (**RBA**) to ASX Limited (ASX), ASX Clear Pty Ltd (**ASX Clear**) and ASX Settlement Pty Ltd (**ASX Settlement**) dated 15 December 2022 (**December 2022 RBA Letter**), Herbert Smith Freehills has been instructed to provide expert advice regarding identification and management of the conflicts between the commercial interests of the ASX Group and the general licence obligations of ASX Clear and ASX Settlement under section 821A of the Corporations Act (including relating to compliance with the Financial Stability Standards (**FFS**)) as well as any particular licence obligations that may be applicable from time to time (**intra-group conflicts**), with respect to both the governance of the current CHES and CHES replacement.

The scope of this advice is set out in further detail below:

- (a) Review the ASX Group governance framework relevant to the identification and management of intra-group conflicts relating to CHES and CHES replacement.
- (b) Review the 2022 uplift of the ASX Group governance arrangements and assess the actual or expected impact of these changes on the identification and management of intra-group conflicts relating to CHES and CHES replacement.
- (c) Assess how the ASX Group governance framework operates in practice to identify and manage intra-group conflicts relating to CHES and CHES replacement by:
  - (1) reviewing papers and minutes from meetings of the ASX Board, CS Boards, board committees and management committees in the period from Q4 2021 where matters relating to CHES and CHES replacement were considered;
  - (2) interviewing agreed directors (ASX Chair, CS Chair, non-ASX CS Directors, the Chair of the Audit and Risk Committee and the Chair of the Technology Committee) to assess how the governance framework operates in practice in respect of the ASX Group Boards and Board Committees with a particular focus on who is making the relevant decisions, the information that is made available by management to support those decisions and the identification, consideration and management of potential intra-group conflicts by directors in making those decisions (including practical arrangements for directors to recuse themselves from deliberations where appropriate);
  - (3) interviewing agreed management (the CS Lead Executive for the CS facilities operated by ASX Clear and ASX Settlement, the ASX Managing Director and Chief Executive Officer (**ASX CEO**), Chief Risk Officer, Chief Financial Officer, Group General Counsel and Company Secretary, General Manager - Enterprise Compliance and the Deputy General Counsel and Company Secretary providing support to non-ASX CS Directors) to assess how the governance framework operates in practice in respect of management committees and relevant executives, including a focus on who is making the relevant decisions, the information that is made available to support those decisions and the identification, consideration and management of potential intra-group conflicts in making those decisions;
  - (4) reviewing Terms of Reference, papers and minutes for strategic governance groups for CHES and CHES replacement (including decision frameworks for solution evaluation) and interviewing the CHES Solution Design Program Director; and
  - (5) workshops with ASX as and when required to develop and confirm our factual understanding.



## 2 Current ASX governance framework relevant to intra-group conflicts relating to CHES and CHES replacement

There are a number of aspects of the existing ASX Group governance framework that are relevant to the identification and management of intra-group conflicts relating to CHES and CHES replacement.

These include a number of governance measures which were introduced by ASX following the recommendations made in respect of the ASX CS facilities governance framework in the RBA Assessment of ASX Clearing and Settlement Facilities against the FSS for financial year ending 30 June 2021 (**FY21 FSS Assessment Report**).

The ASX Group has applied an additional layer of focus to the governance arrangements applicable to CHES and CHES replacement since the FY21 FSS Assessment Report, which has led to a number of additional governance changes having been adopted by the ASX Group in addition to those recommended by the RBA in the FY21 FSS Assessment Report. Both sets of changes are noted in section 3 of this Report, which summarises the changes to the ASX Group governance framework that are relevant to the identification and management of intra-group conflicts relating to CHES and CHES replacement).

As a result, the governance framework that now applies within the ASX Group has been updated significantly from the arrangements that applied at the time of the original CHES replacement decision in 2017.

### (a) Conflicts policies and guidance

ASX's general *Conflicts Management Policy* and *Conflicts Management Handbook* apply to all ASX Group staff, including directors, employees and contractors. This policy and handbook apply to conflicts of interests generally, and include details regarding the conflict management processes and notification obligations (to the relevant Manager and ASX Enterprise Compliance) if a conflict of interest is identified. The *Conflicts Management Policy* and *Conflicts Management Handbook* focus on personal conflicts and organisational conflicts. Organisational conflicts are described broadly in both the policy and handbook as "where an ASX entity has an interest that is or could be incompatible with the proper performance of its obligations or an obligation it owes to a party outside the ASX, to act in that party's interests". The *Conflicts Management Handbook* identifies examples of organisational conflicts of interest, but these are focused on conflicts with third parties or conflicts arising from ASX's role as a listed entity on its own market. The policy and handbook identify internal directorships as a potential source of conflicts but do not otherwise provide specific detail or guidance on intra-group conflicts.

In April 2022, as part of its response to the recommendations in the FY21 FSS Assessment Report, ASX provided additional guidance documents to directors on the responsibilities and duties of the CS Boards in the context of the particular legal and regulatory obligations of those companies in their capacity as operators of licensed clearing and settlement facilities, regarding licence obligations (including the FSS) and related regulatory expectations (including the *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia*). ASX also provided specific guidance on the approach to identification and management of actual or potential conflicts of duty that may arise between a CS Facility Licensee and ASX or between the CS Facility Licensees, in addition to the existing general *Conflicts Management Policy* and *Conflicts Management Handbook*.

We consider that this additional guidance provides the CS Directors with:

- a useful level of context and guidance for common directors in managing potentially competing duties, including consideration of their separate duties and the capacity in which the director is acting and taking appropriate steps to manage potential conflicts so as to ensure that the director is not acting against the best interests of either company (noting the importance of the non-ASX CS Directors in these circumstances);
- helpful summary information as to the applicable legal and regulatory obligations of the CS Facility Licensees and the directors statutory and common law duties, including the importance of the companies' compliance with their statutory licence obligations for the directors' duties of care and diligence; and
- practical guidance and strategies in relation to identifying and managing intra-group conflicts, including through proactively considering whether matters before the board raise potential conflicts, disclosing and discussing the nature of the conflict and managing a conflict that arises appropriately (including through separate meetings of the non-ASX CS Directors where appropriate).

The guidance provided by ASX also includes a number of detailed scenarios to provide guidance as to how certain identified potential conflicts may be managed in practice. While it does not provide an exhaustive list of all potential intra-group conflicts and how they may be managed (and it would not be practical to do so), it seeks to identify common issues that may arise in the course of the conduct of the ASX Group's businesses, including where there are competing requests for funding (e.g. for technology upgrades). This provides particularly relevant guidance to directors in the context of the management of current CHES and CHES replacement.

These more recent guidance documents provide a level of information and guidance in relation to potential or actual intra-group conflicts that is not included in the general *Conflicts Management Policy* or *Conflicts Management Handbook*. Some of the specific guidance has been targeted at the directors on the CS Boards and ASX Board. However, we consider there is scope to include some of this detail in the general conflicts documents which apply more broadly to management and other ASX staff.

**(b) Enterprise Compliance team**

The Enterprise Compliance team is a group-wide function that manages conflicts issues. The Enterprise Compliance team (through the General Manager, Enterprise Compliance) reports to the Chief Risk Officer. As set out in the ASX *Conflicts Management Policy* and *Conflicts Management Handbook* and confirmed through our discussion with the General Manager, Enterprise Compliance, the Enterprise Compliance team maintains a conflicts register that tracks identified conflicts (including standing intra-group conflicts) and the relevant risk assessment and controls that are implemented to manage the relevant conflict (such as segregation of functions/teams). Our discussions with relevant directors and management identified that in general, board level conflicts are largely managed through a combination of the Enterprise Compliance team, the company secretariat team and the legal team, with other conflicts managed through the Enterprise Compliance team. The Enterprise Compliance team does manage conflict sensitive matters for the CS Boards, including matters involving other Approved Market Operators (**AMOs**), and reports directly to the non-ASX CS Directors on these matters.<sup>1</sup>

The Enterprise Compliance team provides enterprise-wide conflict management training, which covers conflicts generally (including intra-group conflicts) but like many organisations, focuses on personal conflicts and dealing with third party entities, such as those on

<sup>1</sup> Article 22, Clearing and Settlement Boards Charter.

the ASX Conflicted Entities Watchlist published by ASX (of entities with a material connection with ASX, in competition to ASX, or where ASX might be seen to have a commercial interest in showing them favour or disfavour). Our interviews identified that directors and management recall the personal conflicts aspects of this training most clearly and our recommendations reflect the potential for an enhanced focus on intra-group conflicts in this training and the policy and handbook documents discussed above. This is particularly relevant given the potential complexity and nuance of such conflicts, and that they may be more difficult for members of the management team to identify than personal conflicts. The Enterprise Compliance team has provided specific training on potential conflicts between regulatory obligations specific to CS facilities and other considerations, and to the Securities & Payments business leadership team and the CHES Replacement SGG, to help the business understand the potential conflicts issues they may encounter but a broader emphasis on intra-group conflicts in all-staff training resources could be beneficial.

In terms of adoption and compliance with conflicts training requirements, the individuals we interviewed did recall completing their conflicts training. In connection with an update to the Conflicts Management Policy in November 2022, management confirmed to the ASX Group directors (in a Concurrent Board Meeting) that it is intended that this course would have 100% completion rates and this would be reflected in staff communications.<sup>2</sup>

**(c) External advice**

The CS Boards may seek external advice to assist them in the identification and management of potential or actual intra-group conflicts. For example, the scenario analysis in the guidance provided by ASX on identification and management of intra-group conflicts in relation to competing funding requests and potential conflicts between the course of action that is proposed by ASX and the CS Boards' views notes it may be appropriate for the CS Directors to seek expert advice to validate their views regarding the proposed approach, or independent legal advice as to their respective licence obligations.

Under the terms of the Clearing and Settlement Boards Charter (**CS Boards Charter**), the CS Boards (including the non-ASX directors) have the right (with the CS Chair's consent) to obtain any independent professional advice (including external legal advice) that they consider necessary to fulfil their responsibilities. This would include where a non-ASX director considers that an intra-group conflict of interest has arisen. The CS Boards Charter does not limit the type of external professional advice that may be sought and this would include external advice in relation to risk or technology issues if required.

As noted in the FY21 FSS Assessment Report,<sup>3</sup> the ASX Group operates on a day-to-day basis as a single group and the CS Facility Licensees do not have their own employees, premises or IT resources. All support and head office functions necessary or desirable to enable the CS Facility Licensees to perform their functions are provided to the CS Facility Licensees by ASX Operations Pty Limited (an ASX subsidiary) (**ASX Operations**) under the terms of the Group Support Agreement. The Group Support Agreement applies to a number of entities within the ASX Group, and most relevantly to our review, requires that each of ASX Clear and ASX Settlement is 'provided with adequate personnel and non-financial facilities to perform its obligations as the operator of a licensed clearing and settlement facility and the settlement and clearing services agreements with ASX.

---

<sup>2</sup> Minutes of the Concurrent Board Meeting, 9 December 2022.

<sup>3</sup> Section 4.1.1, FY21 FSS Assessment Report.



The FY21 FSS Assessment Report noted benefits to this ‘group-wide approach to governance and operations’, including the potential ability to ‘draw on greater resources, including financial and human resources, than may be available to an individual facility operating independently’. However, it also noted potential risks arising from this structure, including a potential that conflicts of interests arising between entities within the group are not appropriately identified and managed.

The RBA recommended that ‘the non-ASX directors should have unqualified access to independent legal advice and other expert advice on matters where the interests or obligations of a CS facility could potentially conflict with the interests of another entity in the ASX Group’. As part of the response to this recommendation in the FY21 FSS Assessment Report, in May 2022 the ASX provided additional specific guidance regarding the relevant processes for provision of legal support to the CS Facility Licensees, along with updates to the CS Boards Charter to clarify that the CS Boards have the right (with the CS Chair’s consent) to obtain independent professional advice. The ASX guidance notes that the circumstances where external legal advice may be requested includes where a non-ASX director considers that an intra-group conflict of interest has arisen, and specifically includes the example of the non-ASX directors wishing to receive legal advice in relation to the allocation and provision of resources to a CS facility.

This guidance clarifies that the CS Chair may exercise the right to external legal advice by providing a request to either the ASX Group General Counsel or the Deputy General Counsel responsible for providing advice on clearing and settlement matters (who are both authorised to engage external counsel directly). The Group General Counsel or Deputy General Counsel (as applicable) will discuss with the CS Chair whether the advice should be provided to the whole CS Board or just the non-ASX directors and will coordinate the provision of the advice. The Group General Counsel and Deputy General Counsel will keep information shared in these discussions confidential as required. The guidance notes that if there are circumstances where there are limits on facts and circumstances that directors can disclose to the Group General Counsel or Deputy General Counsel, the Group General Counsel will arrange for advice to be provided directly to the director, without needing to be provided with further details.

One of the two ASX Deputy General Counsels is the senior member of the legal team who is responsible for providing advice on clearing and settlement matters, including as the primary point of contact for the CS Boards, with the other Deputy General Counsel responsible for ASX’s listing and investment products. We understand from our interviews that the Deputy General Counsel responsible for providing advice on clearing and settlement matters attends the non-ASX CS Director meetings and can advise on any conflict concerns as required.

ASX guidance on the provision of legal services to the CS Boards notes that all fees and expenses incurred in obtaining any external legal advice required by the CS Boards will be met by ASX Operations pursuant to the ASX Group Support Agreement. The ASX Group Support Agreement was updated in April 2022 as part of the response to the recommendations in the FY21 FSS Assessment Report to expressly acknowledge (in addition to the general obligation to bear all costs and expenses of providing all support and head office functions) that the engagement for independent professional advice is to be entered into by the Group General Counsel and Company Secretary on the basis that the relevant CS facility is the client of the adviser, and ASX Operations must pay on behalf of the CS facility licensee all fees and expenses incurred in obtaining such advice.

**(d) CS Boards structure**

The structure of the CS Boards is an important part of the ASX governance framework applicable to the identification and management of intra-group conflicts, including those relating to CHES and CHES replacement.



Under the CS Boards Charter and the ASX Cash Equities Clearing and Settlement Code of Practice<sup>4</sup>:

- At least 50% of the directors on the boards of ASX Clear and ASX Settlement must be non-executive directors who are also non-ASX directors. There are currently 3 non-ASX directors and 3 ASX Directors on each of the boards of ASX Clear and ASX Settlement.
- The non-ASX CS Directors must be able to form a quorum for each of the CS Boards. A quorum is the minimum number of directors required to be present in order for the board meeting to proceed, consider items before it and make decisions. A requirement that the non-ASX CS Directors can form a quorum means that the CS Boards can consider matters and make decisions without the ASX Directors on the CS Boards and the non-ASX directors are able to make decisions in relation to the CS facilities without the ASX Directors. This is relevant where the ASX Directors on the CS Boards are subject to a conflict and unable to participate in deliberations or decisions in relation to the matter the subject of a conflict.

The CS Boards Charter also provides that the CS Chair must be an independent non-executive director and a non-ASX director. This role is currently held by Mr Stephen Knight, a non-ASX director on the CS Boards.

While generally, the CS Chair will represent the CS Boards' interests in any discussions regarding an actual or potential conflict of duty that may arise between the CS Boards and the ASX Board, the CS Boards Charter also provides that CS Boards can nominate a Lead Independent Director to represent a CS Board at any Concurrent Board Meeting where an intra-group conflict arises. This may be relevant in circumstances where there is also a potential conflict between the interests of the CS Boards themselves in respect of any matter for consideration.

As part of the response to the recommendations in the FY21 FSS Assessment Report, the ASX Board has determined that a non-ASX director on the CS Boards will not be considered for appointment as an ASX Director.<sup>5</sup>

The CS Boards have their own Company Secretary (i.e. who is not the Company Secretary of ASX) who is focused on CS Boards related matters.

As part of our review process, we considered whether the CS Boards should be comprised entirely of non-ASX directors and whether the ASX Board and CS Boards meetings should be completely separate (i.e. no Concurrent Board Meetings). We discussed these options in the interviews we conducted. Interviewees on both the CS Boards and the ASX Board saw advantages in having some ASX Directors on the CS Boards and in conducting concurrent board meetings. It was considered beneficial for the ASX Board to be across the issues relevant to the CS Boards, including to have a greater understanding of the regulatory obligations and compliance requirements and any resourcing issues which may arise for the CS facilities, in particular when making determinations regarding group funding priorities (such as for CHES and CHES replacement). The Clearing and Settlement and Markets businesses are complex and inter-related and it was seen as helpful that the directors on the ASX Board and CS Boards were able to share knowledge and learning at a technical and practical level (including through the ASX Directors on the CS Boards bringing additional skills to support the targeted skills matrix for the CS Boards). There was a general view that it was in the best interests of the CS facilities (and ASX) to have

<sup>4</sup> The ASX Cash Equities Clearing and Settlement Code of Practice sets out the public commitments by ASX Clear and ASX Settlement to comply with the Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia.

<sup>5</sup> Article 31, Clearing and Settlement Boards Charter; Minutes of the Concurrent Board Meeting, 20 April 2022.



that broader understanding and input, while acknowledging that it places a greater onus on the business to proactively identify and appropriately manage potential intra-group conflicts. On balance, we concluded that the advantages of having ASX Directors on the CS Boards and maintaining the Concurrent Board Meetings outweigh the potential disadvantages of this approach.

**(e) Board meetings**

Another aspect of the ASX governance framework that was recently updated as part of the response to the recommendations in the FY21 FSS Assessment Report is the approach to board meetings.

The regular ASX Group board days now consist of:

- an ASX Board meeting (**ASX Board Meeting**);
- a concurrent meeting of the ASX Board and CS Boards(**Concurrent Board Meeting**); and
- a meeting of the CS Boards (**CS Boards Meeting**), which were introduced as a regular part of the board days from June 2022 following the recommendations made in the FY21 FSS Assessment Report.

As part of this restructure of the board days, an assessment was undertaken regarding which matters should be considered as part of the respective meetings, with certain standing ASX Board Meeting agenda items moved to the Concurrent Board Meeting agenda and certain standing Concurrent Board Meeting agenda items moved to the stand-alone CS Boards Meeting agenda. Feedback from both ASX Directors and CS Directors (including the non-ASX CS Directors) that we interviewed was that this allocation has become increasingly effective as it has been refined over time.

The *ASX Guidelines on referral of matters to Boards and Committees*, prepared in May 2022, notes that the core focus of the meeting of the CS Boards is on the safety of the CS facilities (including their availability and reliability) and on the functioning of the CS facilities in a way that supports the stability of the financial system and other relevant public interest considerations, and any matters relevant to these areas should be considered at a CS Boards Meeting.

The CS Boards Meeting includes a standing agenda item for the Chief Risk Officer report and a recently introduced CS Lead Executive report, and also includes updates on CHES and CHES replacement as applicable. Agenda items may be added to the CS Boards Meeting as required, including by the CS Chair or CS Lead Executive.

Our review of CS Boards Meeting minutes evidenced that, as part of their consideration of current CHES and CHES replacement, the CS Boards have given consideration to whether CHES or CHES replacement needed further discussion beyond the items discussed at the Concurrent Board Meeting, and whether the Concurrent Board Meeting discussions gave rise to any matters that the CS Boards should consider separately, including specifically considering whether additional resourcing for current CHES was required and whether there were any conflicts of interest between the interests of ASX and ASX Clear or ASX Settlement in considering the CHES replacement decision in November 2022 (with the CS Boards satisfied that there were no conflicts of interest in relation to the CHES replacement decision at the time).

Current CHES and CHES replacement is also considered at the Concurrent Board Meeting, to give the directors of the ASX Board (as well as the CS Boards) the opportunity to consider and discuss the program, including giving primacy to the licence obligations of ASX Clear and ASX Settlement. In addition to the updated approach to board paper templates noted below (which requires potential



intra-group conflicts to be considered and identified, if applicable), approvals of ASX, ASX Clear and ASX Settlement at the Concurrent Board Meeting relevant to CHESS and CHESS replacement now specifically consider whether the matter would give rise to any conflicts between the commercial interests of the ASX Group and the licence obligations of ASX Clear or ASX Settlement.

While CHESS is discussed in both the Concurrent Board Meeting and the CS Boards Meeting (including presentations from the CHESS project director) CHESS is discussed from a CS-only perspective in the CS Boards Meeting. The selection of a preferred CHESS replacement option is proposed to be approved by both the boards of ASX Clear and ASX Settlement, as it is their technology and regulatory compliance obligation, and the ASX Board, as it will be funding the project and has an interest in the ASX Group as a whole complying with its regulatory obligations, including mitigating the reputational risk to the ASX Group of any non-compliance.

ASX has recently identified that there was scope to be more explicit in its board paper template that intra-group conflicts should be considered and identified in any papers provided to the ASX Group boards and board committees. ASX has implemented these changes in April 2023 in parallel to this review process. These changes require the management responsible for each board paper to specifically consider and address in the board paper whether the matter raises an actual, potential or perceived conflict between the commercial interests of any member of the ASX Group and compliance with the statutory licence conditions of any of the CS Facility Licensees, and if so, to include recommendations as to how this will be managed, including providing support to directors to enable them to comply with their directors' duties.

**(f) Non-ASX director meetings**

In addition to the CS Boards Meetings, quarterly meetings are held of the non-ASX directors of the CS Boards. These meetings provide a forum for the non-ASX directors to discuss potential conflict matters, including intra-group conflict matters relevant to CHESS and CHESS replacement.

The CS Boards Charter and guidance provided by ASX on identification and management of intra-group conflicts also emphasise that the non-ASX directors on the CS Boards can meet separately from the other directors as required in response to an intra-group conflict arising to consult on and discuss the conflict, how it may be managed, and make recommendations to the relevant board on that matter.

We understand from our interviews with the non-ASX directors on the CS Boards that these directors tend to meet informally ahead of each ASX Group board day to consider the agenda items (including those on the Concurrent Board Meeting agenda) and whether there are any items that require particular consideration by these directors, or raise potential conflict considerations.

**(g) Committees**

Under the CS Boards Charter, the CS Boards may establish committees or appoint a committee to assist the CS Boards in carrying out their responsibilities. The CS Boards have appointed the following ASX Board committees to assist them with the following matters:<sup>6</sup>

- the Audit and Risk Committee (**ARC**) to oversee certain risk matters, including risk matters outside of the areas reviewed by the CS Boards and the Technology Committee and which are ASX Group enterprise-wide in nature, and compliance and conflict management arrangements for the CS facilities – in relation to the reference to 'conflict management arrangements', we understand from our interviews with directors and management that the CS Boards manage significant conflict

<sup>6</sup> Article 23, CS Boards Charter.

considerations directly, including any organisational or intra-group conflicts and there is scope for this to be clarified, as identified in our recommendations;

- the Nomination Committee to consider nomination matters relevant to the CS Boards; and
- the People and Culture Committee to consider remuneration matters relevant to the CS Boards (the CS Boards Charter also specifies that the CS Boards will provide input to the People and Culture Committee on the remuneration arrangements and performance of the Chief Risk Officer and CS Lead Executive and may, in their discretion, provide inputs to the People and Culture Committee on the remuneration arrangements and performance of other ASX executives as it relates to matters relevant to the CS facilities).

The ASX Board and CS Boards have also established a joint Technology Committee, which considers technology, data and cyber resilience matters relevant to the CS facilities.

We note that there have been recent changes to formalise direct involvement by the CS Boards in the ASX Board committees in response to the recommendations in the FY21 FSS Assessment Report. In March 2022, the ASX and CS Boards approved that a standing invitation would be extended to Mr Stephen Knight, as CS Chair, to attend the ARC meetings as a representative of the non-ASX directors of the CS Boards.<sup>7</sup> The Audit and Risk Committee Charter was also updated to specify that a representative of the non-ASX directors of the CS Boards has a standing invitation to attend the Audit and Risk Committee meetings,<sup>8</sup> which enables involvement in the consideration of risks and acceptable risk levels that impact the CS facilities. As a result, these Audit and Risk Committee meetings are now attended by the CS Chair.

In principle it would be preferable if the ARC was structured in the same way as the Technology Committee as a joint committee of the ASX Board and CS Boards, acknowledging the equal status of the CS Boards. However, the current structure reflects ASX Listing Rule 12.7 and the relevant ASX Corporate Governance Principles which are binding on ASX, and which require that the ARC needs to be comprised only of ASX Directors. There could be potentially alternate ways to structure the ARC which would allow for a non-ASX director to be a member (e.g. through the composition of two separate committees that sit concurrently). However, we explored the ARC structure in our interviews with relevant directors and management and the consensus view was that there was no difference in how the Technology Committee and the ARC operate in practice and:

- the CS Chair is considered by all to be a full participant at the ARC and his input was as welcome and valued as those of the ARC members;
- the ARC does not vote on matters so the CS Chair's involvement as a representative of the non-ASX CS Directors does not limit his participation; and
- the CS Boards manage many of their conflicts matters directly, including through the non-ASX director meetings (noting we recommend that the CS Boards Charter be updated to make the allocation of responsibilities for conflicts between the CS Boards and the ARC clearer).

---

<sup>7</sup> Minutes of the Concurrent Board Meeting, 16 March 2022.

<sup>8</sup> Article 21, Audit and Risk Committee Charter.



In those circumstances, we do not consider it necessary to change the current structure by requiring an audit and risk committee which is expressly a committee of the CS Boards.

Following the change to the Audit and Risk Committee Charter to provide a standing invitation for a representative of the non-ASX CS Directors to attend ARC meetings, a similar change was made more recently (in February 2023) to the People and Culture Committee charter. As noted above, the CS Boards Charter provides that the CS Boards will provide input to the People and Culture Committee on the remuneration arrangements and performance of the Chief Risk Officer and CS Lead Executives (and may provide input on other ASX executives insofar as it relates to matters relevant to the CS Subsidiaries). In order to facilitate this, the People and Culture Committee Charter has been updated to give a standing invitation to a representative of the non-ASX directors of the CS Boards to attend the People and Culture Committee meetings.<sup>9</sup> This supports existing arrangements identified in our interviews of directors under which the CS Chair provides informal input on performance review process for key executives relevant to the CS facilities (including the Chief Risk Officer, General Counsel and CS Lead Executive) and the Concurrent Board Meetings review key performance indicators for management.

In those circumstances, we do not consider it necessary to change the current structure by requiring an audit and risk committee which is expressly a committee of the CS Boards.

The joint Technology Committee of the ASX Board and the CS Boards noted above was established in May 2022 in order to strengthen the oversight of technology project implementation, among other things. The Technology Committee charter provides that at least one member is a non-ASX director of the CS Boards<sup>10</sup> and the CS Boards Charter provides that the membership and composition of the Technology Committee will be determined by the ASX Board in consultation with the CS Boards.<sup>11</sup> Our interviews and review of the Technology Committee meeting minutes identified that, in practice, given the focus on CHES and CHES replacement across the organisation, most (if not all) of the ASX Group directors (i.e. ASX Directors and CS Directors) now attend the Technology Committee meetings as either members or observers.

Each of the Audit and Risk, Technology, Nomination and People and Culture board committees report to the ASX Board and CS Boards. Under the CS Boards Charter, the CS Boards receive reports from each of the board committees on matters they consider and which are relevant to the CS facilities. Minutes of board committee meetings are provided to the CS Boards.

**(h) CS Lead Executive**

In response to the recommendations in the FY21 FSS Assessment Report, ASX introduced the CS Lead Executive for the clearing and settlement facilities operated by ASX Clear and ASX Settlement in February 2022.<sup>12</sup> The CS Lead Executive is responsible for the operation of the CS facilities' businesses, including the following items specified in the role's accountability statement:

- leading achievement of strategies and objectives for the CS facilities determined by the CS Boards;

<sup>9</sup> Article 19, People and Culture Committee Charter.

<sup>10</sup> Article 7, Technology Committee Charter.

<sup>11</sup> Article 24, CS Boards Charter.

<sup>12</sup> Minutes of the Concurrent Board Meeting, 9 February 2022. A separate CS Lead Executive was also introduced for the CS facilities operated by ASX Clear (Futures) and Austraclear.



- making recommendations to the ASX CEO in relation to sufficiency of resources to properly operate the CS facilities;
- managing information requirements of the CS Boards from management; and
- executive sponsor of CHES replacement.

The CS Lead Executive reports directly to the ASX CEO, and the CS Boards are required to be consulted on the appointment and termination of the CS Lead Executive (the CS Boards also have similar consultation rights in respect of the Chief Risk Officer).<sup>13</sup>

Our interviews with directors and management identified that it was considered helpful to have an identified member of the senior management team with responsibility for the CS facilities. Interviewees also identified that the appointment of a CS Lead Executive provided clarity about management support to the CS facilities and non-ASX directors in the event of any potential or actual intra-group conflicts, for example, in the event the Group Support Agreement needs to be renegotiated.

However, the CS Lead Executive is a relatively new role and we identified a lack of clarity among some of the directors and executives we spoke with regarding the way this role operates in practice. We have recommended further detail be included in the CS Boards Charter to address this. We note comments from our interviews that there is value to the CS Lead Executive having visibility over the entirety of the Securities and Payments business, to inform the operation of the clearing and settlement functions.

**(i) CHES replacement project management**

The CS Lead Executive is the executive sponsor of CHES replacement. There is also a CHES Solution Design Program Director who leads the management of the CHES replacement project.<sup>14</sup>

There is also a CHES replacement Strategic Guidance Group (**SGG**) and a Portfolio Working Group for the Securities and Payments business (**PWG**), consisting of a broader group of ASX management and executives, responsible for oversight of the project.

The terms of reference of the SGG include requirements that:

- ASX must identify any conflicts between the commercial interests of ASX and the financial stability obligations of the CS facilities with respect to the governance of CHES replacement;
- members of the SGG and PWG must be aware of their responsibilities to take reasonable steps to avoid and declare any real or apparent conflict of interest; and
- each PWG and SGG meeting will have a standing agenda item for members to confirm any potential or actual conflicts of interest have been identified regarding the commercial interests of ASX and the financial stability obligations of the CS facilities. The minutes of the SGG meetings indicate there is a conflicts check at the commencement of each meeting, with scope for this to consider intra-group conflicts with more specificity in accordance with our recommendations.

<sup>13</sup> Article 19, CS Boards Charter.

<sup>14</sup> On 23 May 2023, ASX announced that the CHES Solution Design Program Director, Tim Whiteley, was appointed Chief Information Officer of ASX effective 1 July 2023, noting that he will continue to lead the CHES Replacement Solution Design team while he puts in place a new leadership team structure for the CHES replacement program and as CIO, he will also have accountability for delivery of the technical aspects of the CHES replacement program.



The SGG Report from February 2023 identifies that one of the two primary objectives of CHES replacement is to implement a system that maintains the CS facility licences, including a continued ability to meet the license obligations, including FSS and other regulatory obligations and expectations, and management of any real or perceived conflicts of interest both within the ASX Group as well as with external organisations. Together with the other primary objective of delivering a supportable technology solution that is enterprise grade and is capable of underpinning the Australian financial market, these prevail over the secondary, more commercial, program objectives identified by the SGG, such as the creation of new opportunities for customers.<sup>15</sup>

In addition to the internal project governance structures, ASX is also subject to a number of additional external oversights in relation to the CHES replacement project. This includes additional licence conditions imposed on ASX Clear and ASX Settlement, which require independent expert assessment of the project and also that both senior executives and the boards of ASX Clear and ASX Settlement provide certain attestations to ASIC relating to CHES replacement system readiness prior to go-live.

---

<sup>15</sup> CHES Replacement SGG Report, 3 February 2023.



### 3 Summary of ASX governance enhancements relevant to intra-group conflicts related to CHES and CHES replacement

ASX action	Basis of change	When introduced	Impact of change
<p><b>Non-ASX Chair of CS Boards:</b> The CS Boards Charter was updated in March 2021 to include a requirement that the Chair of the boards of ASX Clear and ASX Settlement must not also be an ASX Director.</p> <p>The CS Boards Charter was further updated in April 2022 to include a requirement that the Chair of the boards of each of the CS Facility Licensees must not also be an ASX Director.</p>	ASX initiated change	<p>March 2021</p> <p>April 2022</p>	We understand this change formalised long-standing practice. Our interviews identified a clear and prominent role for the CS Chair in representing the CS facilities, including in building strong relationships with management to further the best interests of the CS facilities.
<p><b>CS Lead Executive:</b> The CS Lead Executive role was introduced and the CS Boards Charter was updated to include details of appointment, responsibilities and reporting lines of the CS Lead Executive.</p> <p>An accountability statement was also adopted for the CS Lead Executive.</p>	FY21 FSS Assessment Report recommendation	<p>February 2022 (CS Lead Executive introduced)</p> <p>May 2022 (CS Boards Charter updated)</p> <p>July 2022 (accountability statement)</p>	Our interviewees affirmed the value of the CS Lead Executive in representing the CS facilities, including in ASX Group senior executive discussions. The CS Directors identified that the CS Lead Executive plays an important role as the equivalent to a Chief Executive Officer role within the CS facilities in terms of leadership and accountability, including making recommendations to the ASX CEO in relation to the sufficiency of the CS facilities resources.
<p><b>Approval of ASX policies with specific application to CS facilities:</b> A requirement was introduced for the CS Boards to approve any ASX Group-wide policies that have provisions that specifically apply to the CS facilities, and the <i>CS Board Policy Approvals Guidance</i> was developed to assist management to identify relevant policies that require CS Board approval.</p>	FY21 FSS Assessment Report recommendation	April 2022	Our review of Concurrent Board Meeting minutes identified that the ASX Board and CS Boards were provided with drafts of applicable new or amended policy documents to be considered and approved by the ASX Board and CS Boards at the Concurrent Board Meeting, including amendments to the <i>Conflicts Management Policy, Board Independence Policy &amp; Guideline, Non-Executive Director Appointment Process</i>





ASX action	Basis of change	When introduced	Impact of change
			<i>and Tenure Guidelines, ASX Group Non-Executive Director Shareholding Guideline</i>
<p><b>Guidance for CS Boards on intra-group conflicts:</b> New guidance documents were prepared by ASX to give guidance to the CS Boards on identifying and managing intra-group conflicts.</p>	<p>FY21 FSS Assessment Report recommendation and ASX initiated change</p>	<p>April 2022</p>	<p>The additional guidance documentation provides a user-friendly (but still detailed) resource for the CS Directors in relation to the obligations of the CS Boards (and the emphasis on FSS and other licence and regulatory obligations) and guidance on how intra-group conflicts can be identified and managed in practice (including through relevant examples and recommended steps).</p> <p>The directors from both ASX Boards and CS Boards who we spoke with emphasised the importance of compliance with the CS facilities' licence and statutory obligations. They all showed a strong level of awareness and attentiveness to potential for intra-group conflicts and noted a high level of focus in relation to conflicts across the organisation currently.</p>
<p><b>Standing invitation for non-ASX CS Director to attend ASX Board committee meetings:</b> The Audit and Risk Committee Charter was updated in April 2022 to extend a standing invitation for a representative of the non-ASX CS Directors to attend the ARC meetings.</p> <p>More recently, the People &amp; Culture Committee (in February 2023) and the Nomination Committee (in May 2023) have also extended a standing invitation for a non-ASX CS Director to attend committee meetings.</p>	<p>FY21 FSS Assessment Report recommendation (for ARC)</p> <p>ASX initiated change (for P&amp;C Committee and Nomination Committee)</p>	<p>April 2022 (February and May 2023)</p>	<p>Our discussions on this point focused on the ARC, as the more recent extension to the other ASX committees had either only been very recently adopted or not yet adopted when we conducted our interviews.</p> <p>The CS Chair who attends the ARC meetings noted that attendance at these meetings was useful and that there was no practical difference in his participation in the ARC, including the ARC's receptiveness to his comments, compared to the full members. This was also reiterated by ARC members and attendees who we spoke with.</p>
<p><b>Board tenure process:</b> New board renewal and tenure processes adopted, in the form of the ASX Group Non-Executive Director Appointment Process and Guidelines on ASX Group Director Tenure</p>	<p>FY21 FSS Assessment Report recommendation</p>	<p>April 2022</p>	<p>The tenure guidelines adopted for the CS Boards provide clarity regarding the director appointment and renewal process and assist with maintaining the independence of the non-ASX CS Directors.</p>



ASX action	Basis of change	When introduced	Impact of change
<p><b>Introduction of joint ASX and CS Technology Committee:</b> The Technology Committee was established as a joint committee of the ASX Board and CS Boards to support the boards to discharge their responsibilities with respect to technology and data strategies, operations, investments and projects and management of technology and data risks, including cyber security risks.</p> <p>Under the Technology Committee Charter, at least one member must be a non-ASX CS Director.</p>	ASX initiated change, endorsed by the FY21 FSS Assessment Report	May 2022	<p>The introduction of the Technology Committee was considered to be a positive development by everyone we interviewed, with many noting that, with the benefit of hindsight, it would have been useful to have had the committee at the time of the original CHES replacement decision.</p> <p>Interviewees noted (and Technology Committee meeting minutes also show) that all ASX Directors and CS Directors (not just the committee members) generally attend the Technology Committee meetings given the focus and importance of CHES and CHES replacement, and the key role of the Technology Committee in that project.</p>
<p><b>Clarification on ability to obtain external advice:</b> The CS Boards Charter and the Group Support Agreement were updated, and guidance was provided by ASX to confirm that the CS Boards may (with the CS Chair's consent) obtain independent professional advice (including external legal advice) that they consider necessary to fulfil their responsibilities with expenses met by ASX Operations (under the terms of the Group Support Agreement).</p>	FY21 FSS Assessment Report recommendation	May 2022	It was noted in our interviews that external legal advice had been obtained for a recent CS Boards matter. While this did not relate to an intra-group conflict matter, it demonstrates that arrangements to obtain external advice are being applied in potential conflict situations.
<p><b>Separate CS Boards Meeting and guidance on matters referred to different boards:</b> In addition to the Concurrent Board Meetings of the ASX and CS Boards, a separate CS Boards Meeting was introduced and guidance provided on which matters should be referred to the different boards and board committees in the <i>Guidelines on referral of matters to Boards and Board Committees</i>.</p>	FY21 FSS Assessment Report recommendation and ASX initiated change	May /June 2022	ASX Directors and CS Directors we spoke to noted an increased focus on, and ongoing improvement in, the allocation of matters between the ASX Board Meeting, Concurrent Board Meeting and CS Boards Meeting, with a general view that matters were being considered in the appropriate forum. Where relevant, the CS Boards will also separately consider (in the CS Boards Meeting) matters discussed as part of the Concurrent Board Meeting agenda (e.g. consideration of the CS Boards skills matrix at both the Concurrent Board Meeting and the CS Boards Meeting in June, and



ASX action	Basis of change	When introduced	Impact of change
			consideration of CHES / CHES Replacement at both the Concurrent Board Meeting and CS Boards Meeting in August and November 2022).
<b>CS Boards Company Secretary appointed:</b> A dedicated Company Secretary (i.e. not also Company Secretary of ASX or other ASX Group companies) was appointed to support the CS Boards.	FY21 FSS Assessment Report recommendation and ASX initiated change	October 2022	While ASX determined that a dedicated unit of staff was not required for the CS facilities, the amendments to the board meeting structure (including the addition of the CS Boards Meetings) has meant the appointment of a dedicated Company Secretary has been considered useful by the directors and members of the legal/company secretary team that support the CS Boards that we spoke with as part of our review.
<b>Annual self-assessment of FSS compliance:</b> ASX now undertakes an annual self-assessment of compliance with the Financial Stability Standards.	FY21 FSS Assessment Report recommendation	December 2022	As recommended by the RBA, the self-assessment process assists with ensuring ongoing attention to key aspects of the FSS, including relevant governance requirements.
<b>Meetings between ASX CEO and CS Chair:</b> The ASX CEO and the CS Chair now hold regular one-on-one meetings.	ASX initiated change	Commenced February 2023	In our discussion, the CS Chair identified that these meetings, which had commenced relatively recently, were helpful and supported the relationship between the CS Boards and senior management responsible for the operation of the CS facilities.
<b>Updated board paper templates:</b> New template board paper adopted to require management responsible for each board paper to specifically consider and address in the board paper whether the matter raises an intra-group conflict and include recommendations as to how any such conflict will be managed.	ASX initiated change	April 2023	This change was introduced in parallel with our review. Some of the directors we spoke with identified this update and noted it is beneficial for management to be involved in the process of considering whether a matter raises any intra-group conflicts.



## 4 Key findings

### (a) Overall impression

Our review considered the ASX Group's approach to the identification and management of the intra-group conflicts between the commercial interests of the ASX Group and the general licence obligations of the CS Facility Licensees (including the Financial Stability Standards in relation to the governance of current CHES and the CHES replacement project).

This review was undertaken in the context of, and in part precipitated by, significant developments in relation to CHES and CHES replacement, including the announcement in November 2022 that the project would be paused and all aspects of the project reassessed, and the resulting increased level of market and regulator attention on the project. It was apparent from our interviews with ASX Group directors and management that maintaining current CHES and successfully implementing CHES replacement project currently has a high level of focus within the ASX Group, with virtually all interviewees highlighting the importance of complying with, and maintaining the CS facilities' licences. The feedback from those we spoke with was that, following the November 2022 project reset, this is now clearly considered to be the highest priority across the ASX Group.

This focus of both the ASX Board and the CS Boards causes there to be, currently, a particularly high level of alignment between the interests of the CS Facility Licensees and ASX which naturally makes intra-group conflicts more manageable. Interviewees reported that obtaining the right CHES replacement solution to meet regulatory obligations with delivery certainty (and ensuring that current CHES is maintained while that process is undertaken) is the primary focus of the ASX Group, with confidence that the funding and other resources required to deliver that will be made available by ASX.

It was also apparent that ASX considers that the November 2022 announcement adversely impacted stakeholder perception of ASX and it wishes to build the confidence of participants and regulators in the systems and stability of market infrastructure of the ASX Group as a whole - and the CS Facility Licensees specifically. As part of this, the ASX and CS Boards are concerned to have in place, and be able to demonstrate to stakeholders, best practice governance measures as they progress the CHES replacement project and oversee existing CHES. All interviewees presented as open and interested in the review process and our findings, and receptive to improvements that could be made.

Prior to these more recent developments, ASX had also been separately implementing a range of governance enhancement measures, including as part of the response to the RBA's annual assessment of the ASX clearing and settlement facilities for FY21, which was released in September 2021. This FY21 FSS Assessment Report included a detailed review of the ASX Group's governance arrangements and proposed a range of recommendations for enhancements to ASX Group governance arrangements. As set out in section 3 of this Report, the ASX Group has adopted a range of measures since the release of the FY21 FSS Assessment Report to reflect the RBA's recommendations, as well as to implement additional ASX-initiated changes aimed at further developing and enhancing the governance uplift prompted by the RBA recommendations. This meant that the ASX Group systems and approach to identification and management of intra-group conflicts in place at the time of our review had already been subject to enhancement as part of these broader governance changes.



Based on our review, we consider that the ASX governance framework applicable to the identification and management of the intra-group conflicts in relation to the governance of current CHES and the CHES replacement project is sophisticated and consistent with what we would expect for a business of the complexity, and with the statutory licence obligations, of ASX and the CS Facility Licensees.

**(b) ASX was engaged and open to the review process**

As part of our review, we conducted interviews with directors and senior management of the ASX Group and reviewed relevant documents related to ASX Group governance arrangements, conflict management and CHES and CHES replacement. We were given a high level of access, with interviews arranged with everyone we requested to meet with and all documentation we requested provided.

Our interviews were conducted on an individual basis without other ASX attendees, other than the discussion with the Deputy General Counsel and the newly appointed and most recent Company Secretary to the CS facilities which was conducted together.

**(c) We noted a focus on compliance with regulatory / licence obligations as a priority**

ASX is conscious of the importance of the licences held by the ASX Group, its business and its reputation and of the need to comply with its licence obligations, including in respect of CHES and CHES replacement project. Relevant ASX guidance documents note that the duties of the CS Directors should be considered in the context of the particular legal and regulatory obligations of those companies in their capacity as operators of licensed clearing and settlement facilities, and acknowledge the link between their duty of care and diligence and ensuring that the company operates in compliance with its statutory licence obligations. A number of the directors and management across the ASX Group who we interviewed also emphasised that the CS facilities' licences are extremely important to the ASX Group and its operations (not only to the CS Facility Licensees themselves) and it is understood that the maintenance of these licences requires the CS Facility Licensees (with the support of the ASX Group) to comply with their licence obligations specifically, and legal and regulatory obligations more broadly.

In addition to the specific alignment in relation to current CHES and the CHES replacement project noted above, this focus on regulatory and licence compliance creates a high level of alignment between the interests of the ASX Clear and ASX Settlement and ASX itself. This mitigates, in some cases, the risk of intra-group conflicts arising and in others their potential impact on the management and operation of CHES and decisions relating to CHES replacement compared to a state where that was not the case.

**(d) Recent updates to governance arrangements support an enhanced governance framework**

As noted above, ASX has put in place a number of new governance measures in response to the FY21 FSS Assessment Report. As detailed in section 3 of this Report, our assessment based on our review of applicable documents and interviews with ASX Group directors and management is that these changes are relatively well established within the organisation. As a general comment, many of the changes adopted by ASX relate to the ASX Board and CS Boards and senior management, a relatively confined group, which has assisted with implementing and embedding these changes within a short time frame. A number of interviewees commented that there is now an enhanced consciousness of conflicts generally, and the potential for intra-group conflicts more specifically, and greater clarity on the applicable processes to identify and manage them.

In relation to some of the more recent changes adopted by ASX, we have identified some potential enhancements to support this governance uplift.

**Recommendation 1:** While the new measure of requiring ASX management to raise in board papers any potential intra-group conflicts relevant to the matter being considered should assist with identifying and managing such conflicts, we recommend that as a further final check, a standard procedure is adopted before a board resolution is passed at a Concurrent Board Meeting or CS Boards Meeting relating to the CHES replacement project or existing CHES, to require the board to consider and confirm whether the matter raises any potential intra-group conflicts. If any conflicts are identified, the matter should also be considered at a separate non-ASX CS Directors meeting.

**Recommendation 2:** The appointment, responsibilities and reporting lines of the CS Lead Executive in the CS Boards Charter are quite high level and grouped in with the Chief Risk Officer and Chief Compliance Officer. Given the prominence of the CS Lead Executive to the management and operation of the CS facilities operated by ASX Clear and ASX Settlement, we recommend that the CS Boards Charter more specifically set out the appointment, responsibilities and reporting lines for the CS Lead Executive.

**Recommendation 3:** The minutes of the meetings of the CHES Replacement SGG indicate there is a conflicts check at the commencement of each meeting. We recommend that the minutes specifically identify that intra-group conflicts were considered and record whether any intra-group conflicts were identified.

There have also been a number of director and senior management changes since the original CHES replacement decision and this has brought new perspectives, including on governance matters, as well as additional capability to address project challenges. A number of the more recently appointed directors and management commented on the high level of focus on conflicts within the ASX Group compared to other organisations they had worked with.

However, intra-group conflicts can be quite nuanced and less obvious than other types of conflicts, particularly to ASX Group staff who may not be as focused on this point as directors and senior management. While ASX has provided some very helpful policy guidance on intra-group conflicts, this has been more focused towards directors. The existing ASX *Conflicts Management Policy* and *Conflicts Management Handbook* managed by Enterprise Compliance provides a practical guide to managing conflicts and does identify organisational conflicts, including potential conflicts between ASX and the interests of unaffiliated AMOs. However, there is scope for these materials to be updated to reflect a greater emphasis and practical content on intra-group conflicts. This will provide further guidance to employees and officers to assist them to proactively identify and manage intra-group conflicts and will also provide an additional resource to management who prepare board papers and need to:

- consider whether the subject matter raises any potential intra-group conflicts; and
- provide guidance on potential strategies to manage such conflicts.

**Recommendation 4:** The ASX *Conflicts Management Policy* and *Conflicts Management Handbook* should be updated – or a separate resource for ASX and CS management prepared - to include guidance on intra-group conflicts. This could be drawn, for example, from helpful content in existing guidance provided by ASX to the CS Directors on identification and management of intra-group conflicts.

In addition, those we interviewed recalled an emphasis on personal conflicts in their annual conflicts training. Given that intra-group conflicts may be less obvious to ASX Group people who have dual roles, and that they need to be able to identify, flag and make recommendations to manage those conflicts, we recommend this be specifically addressed in relevant conflicts training.

**Recommendation 5:** We recommend that the ASX Group conflicts training curriculum more specifically (and in more detail) focus on identifying and managing intra-group conflicts.

(e) **Existing processes applied to other conflicts scenarios provide a useful guide for managing intra-group conflicts that arise**

The CS Directors interviewed referred to the well-developed approach that has been adopted when they have dealt with a situation involving unaffiliated AMOs, who are potential competitors of ASX who use the CS facilities for new products and the recent application of this process, including engagement of the Enterprise Compliance team, information barrier arrangements and consideration by non-ASX directors only.

Directors and management showed familiarity and comfort with this process and noted they thought it provided an effective conflict management framework. This conflict management process is a tested and robust procedure and provides a good framework which could be drawn on to manage other potential conflicts involving ASX and the CS Facility Licensees, including intra-group conflicts.

**Recommendation 6:** Some or all aspects of the process applied to unaffiliated AMO conflict matters could also be applied in other circumstances where the non-ASX directors identify a potential intra-group conflict (whether related to CHES/CHES replacement or otherwise) and require further assistance and consideration of the issue. It should be made clear in the conflicts policy documents and CS Boards Charter that the non-ASX directors can request this process be adopted in respect of other conflict matters if required. As part of these arrangements, the CS Lead Executive should be part of the team assisting the non-ASX directors to ensure they have appropriate management support on such matters.

**Recommendation 7:** We recommend that a non-ASX directors' meeting is held following the Concurrent Board Meeting on each occasion where there is a significant decision on current CHES or CHES replacement (including approval of a preferred replacement option), to enable the non-ASX directors to consider the decision separately from the ASX Directors. The meeting need not repeat discussion which has already occurred informally before the meeting, but it would be helpful for the non-ASX directors to meet and consider significant CHES decisions with the benefit of the presentation and discussion at the Concurrent Board Meeting.

**Recommendation 8:** The non-ASX CS Directors meet annually with the RBA and ASIC. This meeting is considered helpful to allow the regulators and the non-ASX directors to meet directly and exchange views on the operation of the CS facilities. Subject to RBA and ASIC views, consider increasing the frequency of these meetings to twice a year to facilitate this direct engagement between the non-ASX directors and the RBA and ASIC.



(f) **There are informal or undocumented arrangements which support conflicts management**

We noted a number of practices that the ASX Board and the CS Boards are applying in practice that support the identification and management of intra-group conflicts, which are not formalised in written processes.

Some of these practices do not lend themselves to being written into policy documents. For example, each of the non-ASX directors on the CS Boards we interviewed presented as strong and independent thinkers with deep relevant experience and the confidence to speak up and express a counterview. This suggested to us that the selection process produces directors of the CS Boards who will test and challenge when required. As ASX guidance notes, these independent directors play an important role in helping ensure that the decisions of the CS Boards reflect the best interests of any group (including management) and that role should be supported and encouraged.

There are some other items which we have recommended be formalised.

In addition to the scheduled quarterly non-ASX CS Director meetings, we understand from our interviews with the non-ASX CS Directors that they tend to confer ahead of the Concurrent Board Meetings to discuss the agenda and consider whether there are any issues particularly relevant to the CS facilities that should be considered and raised at the board meetings. While we would not suggest that these informal meetings be formalised or minuted generally, if particular matters discussed are relevant to how the CS Directors manage conflicts at the Concurrent Board Meeting or the CS Boards Meeting, it may be helpful to note and minute the key points at the CS Boards Meeting which follows.

**Recommendation 9:** Where the non-ASX CS Directors meet informally prior to the Concurrent Board Meetings and identify significant matters relevant to testing for and managing conflicts, the key points discussed should be formalised through noting and minuting at the subsequent CS Boards Meeting.

**Recommendation 10:** The focus of the quarterly non-ASX CS Director meetings has largely been on potential conflicts that arise in the provision of services to other AMOs. These meetings are not restricted in the scope of what they can consider, and in particular the CS Boards Charter and existing guidance provided by ASX to the CS Directors on identification and management of intra-group conflicts note that these meetings may consider any intra-group conflict and how it may be managed (including making recommendations to the relevant board). To reinforce this, we recommend the quarterly non-ASX CS Director meetings should contain a standing agenda item to consider whether there are any relevant intra-group conflicts that require consideration.

There are a few items where we understand practice differs slightly from (and is more favorable from the perspective of conflicts identification and management) than the position documented in the CS Boards Charter, which we have suggested be clarified.

The current CS Boards Charter notes that the CS Boards have delegated the management of the CS facilities to the ASX CEO, and except for those matters reserved by the CS Boards or delegated by the CS Boards to ASX Board committees, the CEO may make all decisions and take all action required to manage the CS facilities. It also notes that the ASX CEO is accountable to the CS Boards for the exercise of this authority. As part of the oversight and input to the management of the CS facilities, the CS Chair meets with the





CEO on a monthly basis, which provides an additional forum for the CS Boards to engage with ASX on issues relevant to the CS facilities, including to raise any concerns which may arise regarding resourcing or conflicts.

**Recommendation 11:** We recommend that the CS Boards Charter is updated to identify that the monthly meetings between the ASX CEO and the CS Chair will occur.

The current CS Boards Charter contemplates that each of the Chief Risk Officer, the CS Lead Executives, the General Manager, Internal Audit and the General Manager, Enterprise Compliance are “entitled to appear and be heard at all CS Board meetings”. This language risks causing confusion regarding the capacity in which they attend those meetings. In practice, both the CS Directors and the relevant executives confirmed that:

- the executives attend subject to the discretion of, and for the purpose of assisting the CS Boards and that they are answerable to the CS Boards, consistent with customary corporate governance practices; and
- the CS Boards can require those executives to attend to provide the directors with relevant information (rather than these executives having any entitlement to attend the meetings irrespective of the wishes of the CS directors). The CS directors had no concerns about this point, or how access to management operates in practice. However, in order to align the CS Boards Charter with practice, we recommend updating the CS Boards Charter to clarify that the specified management team members may be required by the CS Boards to attend meetings, and remove the reference to an “entitlement” to attend the meetings.

**Recommendation 12:** The CS Boards Charter should be updated to clarify that the Chief Risk Officer, the CS Lead Executives, the General Manager, Internal Audit and the General Manager, Enterprise Compliance may be required by the CS Boards to attend meetings and remove the reference to an entitlement to attend the meetings.

The matters identified in the current CS Boards Charter as being items the ARC assists the CS Boards with includes overseeing “compliance and conflict management arrangements” for the CS Boards. We understand that the CS Boards manage intra-group conflicts directly, as is appropriate, and we recommend that the CS Boards Charter be updated to clarify that the ARC is not responsible for intra-group conflict management arrangements.

**Recommendation 13:** The CS Boards Charter should be updated to clarify that the ARC is not responsible for intra-group conflict management arrangements of the CS Boards.



## 5 Summary of recommendations

**Recommendation 1:** While the new measure of requiring ASX management to raise in board papers any potential intra-group conflicts relevant to the matter being considered should assist with identifying and managing such conflicts, we recommend that as a further final check, a standard procedure is adopted before a Board resolution is passed at a Concurrent Board Meeting or CS Boards Meeting relating to the CHES replacement project or existing CHES, to require the board to consider and confirm whether the matter raises any potential intra-group conflicts. If any conflicts are identified, the matter should also be considered at a separate non-ASX CS Directors meeting.

**Recommendation 2:** The appointment, responsibilities and reporting lines of the CS Lead Executive in the CS Boards Charter are quite high level and grouped in with the Chief Risk Officer and Chief Compliance Officer. Given the prominence of the CS Lead Executive to the management and operation of the CS facilities operated by ASX Clear and ASX Settlement, we recommend that the CS Boards Charter more specifically set out the appointment, responsibilities and reporting lines for the CS Lead Executive.

**Recommendation 3:** The minutes of the meetings of the CHES Replacement SGG indicate there is a conflicts check at the commencement of each meeting. We recommend that the minutes specifically identify that intra-group conflicts were considered and record whether any intra-group conflicts were identified.

**Recommendation 4:** The *ASX Conflicts Management Policy* and *Conflicts Management Handbook* should be updated – or a separate resource for ASX and CS management prepared - to include guidance on intra-group conflicts. This could be drawn, for example, from helpful content in the existing guidance provided by ASX to the CS Directors on identification and management of intra-group conflicts.

**Recommendation 5:** We recommend that the ASX Group conflicts training curriculum more specifically (and in more detail) focus on identifying and managing intra-group conflicts.

**Recommendation 6:** Some or all aspects of the process applied to unaffiliated AMO conflict matters could also be applied in other circumstances where the non-ASX directors identify a potential intra-group conflict (whether related to CHES/CHES replacement or otherwise) and require further assistance and consideration of the issue. It should be made clear in the conflicts policy documents and CS Boards Charter that the non-ASX directors can request this process be adopted in respect of other conflict matters if required. As part of these arrangements, the CS Lead Executive should be part of the team assisting the non-ASX directors to ensure they have appropriate management support on such matters.



**Recommendation 7:** We recommend that a non-ASX directors' meeting is held following the Concurrent Board Meeting on each occasion where there is a significant decision on current CHES or CHES replacement (including approval of a preferred replacement option), to enable the non-ASX directors to consider the decision separately from the ASX Directors. The meeting need not repeat discussion which has already occurred informally before the meeting, but it would be helpful for the non-ASX directors to meet and consider significant CHES decisions with the benefit of the presentation and discussion at the Concurrent Board Meeting.

**Recommendation 8:** The non-ASX CS Directors meet annually with the RBA and ASIC. This meeting is considered helpful to allow the regulators and the non-ASX directors to meet directly and exchange views on the operation of the CS facilities. Subject to RBA and ASIC views, consider increasing the frequency of these meetings to twice a year to facilitate this direct engagement between the non-ASX directors and the RBA and ASIC.

**Recommendation 9:** Where the non-ASX CS Directors meet informally prior to the Concurrent Board Meetings and identify significant matters relevant to testing for and managing conflicts, the key points discussed should be formalised through noting and minuting at the subsequent CS Boards Meeting.

**Recommendation 10:** The focus of the quarterly non-ASX CS Director meetings has largely been on potential conflicts that arise in the provision of services to other AMOs. These meetings are not restricted in the scope of what they can consider, and in particular the CS Boards Charter and the existing guidance provided by ASX to the CS Directors on identification and management of intra-group conflicts note that these meetings may consider any intra-group conflict and how it may be managed (including making recommendations to the relevant board). To reinforce this, we recommend the quarterly non-ASX CS Director meetings should contain a standing agenda item to consider whether there are any relevant intra-group conflicts that require consideration.

**Recommendation 11:** We recommend that the CS Boards Charter is updated to identify that the monthly meetings between the ASX CEO and the CS Chair will occur.

**Recommendation 12:** The CS Boards Charter should be updated to clarify that the Chief Risk Officer, the CS Lead Executives, the General Manager, Internal Audit and the General Manager, Enterprise Compliance may be required by the CS Boards to attend meetings and remove the reference to an entitlement to attend the meetings.

**Recommendation 13:** The CS Boards Charter should be updated to clarify that the ARC is not responsible for intra-group conflict management arrangements of the CS Boards.

## Glossary

Term	Meaning
<b>AMO</b>	Approved Market Operator.
<b>ARC</b>	the Audit and Risk Committee of ASX Limited
<b>ASIC</b>	Australian Securities and Investments Commission.
<b>ASX</b>	ASX Limited.
<b>ASX Board</b>	the board of directors of ASX Limited.
<b>ASX CEO</b>	the Managing Director and Chief Executive Officer of ASX.
<b>ASX Chair</b>	the Chair of the ASX Board.
<b>ASX Clear</b>	ASX Clear Pty Ltd.
<b>ASX Directors</b>	a director of the ASX Board.
<b>ASX Group</b>	ASX and its subsidiaries.
<b>ASX Board Meeting</b>	a meeting of the ASX Board.
<b>ASX Operations</b>	ASX Operations Pty Limited.
<b>ASX Settlement</b>	ASX Settlement Pty Ltd.

Term	Meaning
<b>CHESS</b>	ASX Clearing House Electronic Subregister System.
<b>Concurrent Boards Meeting</b>	a concurrent meeting of the ASX Board and the CS Boards.
<b>Corporations Act</b>	<i>Corporations Act 2001 (Cth).</i>
<b>CS Boards</b>	the board of directors of each of the CS Facility Licensees and their intermediate holding companies (ASX Clearing Corporation Limited and ASX Settlement Corporation Limited).
<b>CS Chair</b>	the Chair of the CS Boards.
<b>CS Boards Charter</b>	the Clearing and Settlement Boards Charter.
<b>CS Director</b>	a director of a CS Board.
<b>CS facilities</b>	clearing and settlement facilities.
<b>CS Facility Licensees</b>	ASX Clear, ASX Settlement, ASX Clear (Futures) Pty Limited and Austraclear Limited.
<b>CS Lead Executive</b>	the lead business executive of the CS facilities operated by ASX Clear and ASX Settlement.
<b>CS Boards Meeting</b>	a concurrent meeting of the CS Boards.



<b>Term</b>	<b>Meaning</b>
<b>December 2022 RBA Letter</b>	the letter from the RBA to ASX, ASX Clear and ASX Settlement dated 15 December 2022.
<b>FSS</b>	the Financial Stability Standards for Central Counterparties determined under section 827D(1) of the Corporations Act.
<b>FY21 FSS Assessment Report</b>	the RBA Assessment of ASX Clearing and Settlement Facilities against the Financial Stability Standards for financial year ending 30 June 2021.
<b>intra-group conflicts</b>	conflicts between the commercial interests of the ASX Group and the general licence obligations of ASX Clear and ASX Settlement under section 821A of the Corporations Act (including relating to compliance with the Financial Stability Standards) as well as any particular licence obligations that may be applicable from time to time.
<b>non-ASX director</b>	an independent non-executive director who is not also a director of ASX Limited.
<b>non-ASX CS Director</b>	a CS Director that is not an ASX Director.
<b>PWG</b>	the Portfolio Working Group.
<b>RBA</b>	the Reserve Bank of Australia.
<b>SGG</b>	the CHES replacement Strategic Guidance Group.