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ASX RESPONSE TO COMPETITION IN THE PROVISION OF CLEARING AND SETTLEMENT SERVICES – EXPOSURE DRAFT LEGISLATION

ASX Limited (**ASX**) welcomes Treasury's consultation on the exposure draft legislation to support competition in the provision of clearing and settlement services (**draft CICS legislation**) and appreciates the opportunity to comment. As a provider of critical financial market infrastructure, ASX is committed to ensuring Australia's clearing and settlement infrastructure is world-class, well capitalised and well regulated.

ASX notes the significant policy work and consultations that have led to this legislative package, including the numerous consultations undertaken by the Council of Financial Regulators (**CFR**). Notably the Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia (the **Regulatory Expectations**), the Minimum Conditions for Safe and Effective Competition in Cash Equity Settlement in Australia and the Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia (together the **Minimum Conditions**) have provided the policy framework for competition in clearing and settlement since 2017. ASX considers the draft CICS legislation as the logical next step in ensuring that the regulatory framework supports competition in clearing and settlement in the best long-term interests of the Australian market.

ASX has been operating in compliance with the Regulatory Expectations since their introduction, and before that has operated in compliance with its own ASX Cash Equities Clearing and Settlement Code of Practice, which has been in place since 2013. ASX's core commitments under the Code of Practice include providing transparent and non-discriminatory pricing of and access to its clearing and settlement (**CS**) services, protecting the confidential information of users, and establishing mechanisms for meaningful user input into the development of cash equity CS services. ASX has also complied with additional obligations under the Regulatory Expectations, including to retain at least 50 per cent non-executive directors on the Boards of ASX Clear and ASX Settlement who are not directors of the ASX Limited Board.

ASX Clear and ASX Settlement as the licensees of the cash equities CS facilities are committed to providing a fair and dynamic marketplace for all, together with upholding the regulatory requirements under the respective CS facility licences. ASX Clear and ASX Settlement have provided access to clearing and settlement services to non-affiliated market operators on non-discriminatory terms for over a decade via the Trade Acceptance Service and Settlement Facilitation Service.

In this context, ASX supports the policy intent of the draft CICS legislation and will work with the Government to ensure it achieves its intent. This submission provides some suggestions for targeted improvements to the draft CICS legislation to ensure that the regulatory framework operates as envisaged, does not result in unintended consequences for ASX or other participants, and is supported by appropriate safeguards.

ASIC CS services rules

Our comments on the legislative framework for the ASIC CS services rules are limited.

We note that the proposed definition of CS services in the *Corporations Act 2001* (Cth) (**Corporations Act**) applies only in relation to the proposed new CS services rules, to facilitate competition in clearing and settlement. ASX considers that this is appropriate and gives clarity that the rules are not intended to broaden the scope of Part 7.3 of the Corporations Act, which relates to licensing and regulation of CS facilities. However, ASX considers that it will be important to maintain the strong regulatory framework in Part 7.3 by carefully considering if any new services developed fall within the definition of a clearing and settlement facility and, as such, need to be regulated under that Part to ensure that the intent for safe and effective competition is aligned to upholding the broader regulatory framework.

Broad stakeholder consultation on the new ASIC rules, along with Ministerial and parliamentary oversight, is key to ensuring that these rules are appropriately designed. ASX therefore supports the requirements for consultation and Ministerial consent in the draft CICS legislation, and proposes an express articulation of the consultation requirements for the Ministerial determination on the scope of services covered.

Our submission proposes that the criteria for Ministerial determination of CS services that may be subject to the new ASIC rules expected to cover the conduct and governance matters currently included in the Regulatory Expectations should be clarified to limit the scope of the rules to monopoly provided CS services, consistent with the scope and policy intent of the current Regulatory Expectations.

ACCC arbitration regime

Regarding the ACCC arbitration regime, ASX supports and agrees that the new arbitration framework should be modelled on the National Access Regime, as this is a well-established and well understood framework for promoting competition through regulated access to monopoly facilities. Our key comments on the proposed ACCC regime are directed at ensuring consistency with best practice for regulation of access to critical infrastructure. This includes ensuring that matters to be taken into account by the ACCC when determining an access dispute reflect those in the National Access Regime, including appropriate pricing principles.

We also seek to ensure that appropriate safeguards are included in the legislation to balance against the broad remit of the proposed ACCC arbitration framework. ASX understands the desire to ensure that the legislation establishes a flexible framework that can be applied to new circumstances as required. However, the necessary corollary of such future-proofing is that there must be appropriate protections such as a clear criteria for the Minister's declaration on scope (limited to monopoly provided services), express expectations for public consultation and access to merits review. As part of this, ASX considers that it is important that the Minister's declaration on scope of services be based on a National Competition Council stakeholder inquiry and evidence-based recommendation to the Minister, as is the case under the National Access Regime.

Finally, a clear delineation between the ACCC's powers under the access regime and ASIC's new rule-making powers relating to CS services will also be important to avoid overlap and inconsistency between the ASIC rules and direction powers and the arbitration framework. ASX considers that it should be clear that the ASIC rules should not address pricing methodologies (including how 'efficient costs' are assessed) for CS services as these are matters best addressed by the ACCC under the new arbitration framework.

These issues are explored in detail in our submission at **Attachment A**. For convenience, we have also included a summary of our comments on each of the draft provisions in the draft CICS legislation at **Attachment B.**

We would welcome the opportunity to discuss the matters raised in this submission in more detail. If you have any questions, please contact Diane Lewis via phone or at diane.lewis@asx.com.au.

Kind regards

Johanna O'Rourke
Group General Counsel and Company Secretary

Attachments:

- Attachment A - ASX Submission on the Draft CICS Legislation
- Attachment B – ASX Comments on specific provisions of the draft CICS legislation

ATTACHMENT A: ASX submission to competition in the provision of clearing and settlement services exposure draft legislation

Executive Summary

ASX supports measures designed to facilitate safe and effective competition in the provision of clearing and settlement (**CS**) services. In 2017, important steps were taken towards supporting competition with the introduction of the Minimum Conditions for Safe and Effective Competition and the Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia. The draft CICS legislation represents the next step in the evolution of the regulatory framework.

ASX broadly supports the policy rationale underlying the draft CICS legislation and key elements of the proposed framework, including the consultative process for development of ASIC rules and the broad architecture of the ACCC arbitration regime.

Our comments and suggestions in this submission are directed at ensuring that the regulatory regime is targeted to achieve the objectives, includes appropriate checks and balances for all stakeholders, and reflects best regulatory practice.

ASX supports the consultative process for making ASIC CS services rules

Broad stakeholder consultation on the new CS services rules, along with Ministerial and Parliamentary oversight, is key to ensuring that these rules are appropriately designed to support the efficient delivery of CS services and the emergence of competition. ASX therefore supports the requirements for consultation and Ministerial consent in the draft CICS legislation, and proposes an express articulation of the consultation requirements for the Ministerial determination on the scope of services covered.

Scope of services that may be subject to ASIC rules

'CS services' are defined very broadly in the draft CICS legislation. ASX understands this definition is intended to be flexible and 'future-proofed'. While the Government envisages that the CS services rulesrules would, in the first instance, only relate to CS services in connection with cash equities, it is intended that the legislative framework be flexible enough to extend to other CS services and classes of financial products in future, should circumstances require and based on CFR advice.[1]

Given the broad definition of CS Services, it is essential that there be clear criteria around Ministerial determination of services that may be the subject of ASIC rules.

Currently, the draft CICS legislation does not include clear criteria for Ministerial determinations. Instead, the Minister is only required to have regard to certain matters pertaining to the likely effect of the determination.

ASX considers that the legislation should include clear criteria for Ministerial determinations. This provides a protection that is the corollary to the flexibility and future proofing provided by the broad definition of CS services. These criteria should be designed to focus the application of CS services rules on CS services that are ***monopoly services***, consistent with the scope and policy intent of the current Regulatory Expectations.

The Minister should also be required to consult with affected stakeholders, including as to the appropriate scope of the determination and its likely effect on the safety, fairness and effectiveness of competition in the provision of CS services.

The Explanatory Materials should also be clear on the circumstances in which the Minister would revoke or amend a determination, including where services become subject to competition.

[1] Draft Explanatory Materials, [1.20].

Importance of preventing overlap and inconsistency between ASIC CS services rules and direction powers and the arbitration framework

A key issue of concern for ASX is the potential for overlap and inconsistency between the ASIC rules and the ACCC arbitration powers. ASIC's rule-making power is framed broadly, and it is intended that rules may extend to (among other things) pricing, investment and service levels for CS services.[2] Separately, the ACCC is empowered to make a determination on these matters in the context of a specific dispute. This creates the potential for overlap and inconsistency between ASIC rules relating to CS service delivery and pricing, and the terms of access determined for those services by the ACCC.

ASX considers it is important to have a clear delineation between the ASIC and ACCC powers.

It is appropriate for ASIC to make rules to address most elements of the current Regulatory Expectations, including:

- governance frameworks;
- user consultation;
- commercial, transparent and non-discriminatory access to CS services; and
- non-price aspects of access to CS services, including service levels, information handling and confidentiality.

However, given the ACCC powers to determine prices for CS services in an access dispute context, the ASIC CS services rules should not cover the same matters. In particular, the ASIC rules should not address pricing methodologies for CS services, or how the "efficient costs" of providing CS services should be assessed. These are matters that are best addressed by the ACCC under the arbitration framework, and having different rules on these matters will create uncertainty and confusion.

ASX agrees that the access and pricing framework should be modelled on the National Access Regime

As noted in the Draft Explanatory Materials, the new framework for ACCC arbitration of CS service access disputes has parallels with the National Access Regime (**NAR**) (Part IIIA of the Competition and Consumer Act 2010 (Cth) (**CCA**)). Like the NAR, it is designed to address potential imbalances in bargaining power between a CS service provider and an access seeker. It also contains several elements drawn from the NAR, including a process for declaring services that will be subject to the regime, and powers for the ACCC to arbitrate disputes where an access seeker cannot agree on the terms of access with a CS service provider.

ASX considers that the NAR provides an appropriate model for the new CS service access framework. The design of the NAR reflects decades of policy development, starting with national competition policy reforms of the 1990s and refined through multiple economic policy reviews (including reviews by the Productivity Commission and most recently the Harper Review Committee). It is a framework that is well understood by all stakeholders.

While there are a number of parallels between the proposed CS service access framework and the NAR, there are also some important departures. ASX accepts that some departures may be needed to reflect the particular characteristics of CS services. However, ASX considers that key design elements of the CS service access framework should reflect well-established practice for the design of access regimes.

Declaration criteria should be appropriately focused – as they are in the National Access Regime

The draft CICS legislation does not contain clear criteria for declaration of services that may be subject to ACCC arbitration. The relevant section (section 153ZEF) states that the Minister may make a declaration, having regard to certain matters.

[2] Exposure Draft Explanatory Materials to Financial Sector Reform (Competition in Clearing and Settlement) Bill 2023, p 8.

This is in contrast to the NAR and other Australian infrastructure access regimes, which provide that a Minister may only make a declaration if certain criteria are satisfied in relation to the service.[3] These criteria usually require (among other things) that access to the service would promote a material increase in competition in at least one market, other than the market for the service.[4] These criteria for declaration reflect the policy underpinnings for access regulation, as reflected in numerous economic policy reviews and intergovernmental agreements.[5]

Having clear criteria for declaration of services provides certainty for all stakeholders regarding the circumstances in which regulation may apply. It also ensures that the scope of declaration (and therefore the scope of regulation) is aligned with the policy rationale for access regulation – access regulation will only apply where this is necessary to promote competition.

It also recognises that, where there is a facility of national significance, not all services provided by that facility should be subject to access regulation. It is frequently the case that a piece of infrastructure will provide a range of services, including some that warrant declaration and regulation, and others that are instead subject to the constraints of competition. Clear criteria for declaration allow for a delineation between those services that should be subject to regulation in order to *facilitate* competition, and those that do not need regulation because they are *subject to* competition.

ASX recognises that the Clearing House Electronic Sub-register System (**CHESS**) infrastructure is critical financial market infrastructure, and that some forms of regulation may need to apply broadly to that infrastructure. ASX notes that its operation of this infrastructure is already subject to a range of regulatory measures and conduct rules.

However *economic* regulation – that is, oversight of ASX's revenue and/or prices relating to CS services – is a particular form of regulation that should be targeted at services which meet certain criteria. Economic regulation should only apply where this is necessary to support the development of competition. Where the supply of a particular service is already subject to effective competition, economic regulation is unnecessary and likely to distort the efficient functioning of the market for that service.

ASX therefore recommends that the access regime include specific criteria for declaration of CS services, consistent with those set out in the NAR.

ASX also seeks clarity regarding the a declaration in the context of changed market circumstances, for example, the ability for it to be amended or revoked if a CS service becomes a competitive service or if there are new competitive services introduced.

Service declaration should follow a NCC inquiry and evidence-based recommendation

The NAR provides for Ministerial declarations to be based on evidence-based recommendations from the National Competition Council (**NCC**). NCC recommendations reflect the outcome of a public consultation process and review of relevant evidence. This recognises that any decision to declare a service will necessarily require an assessment of its economic characteristics, including the existence of any substitute services and its importance to upstream or downstream competition.

ASX recognises that CFR has undertaken significant policy work around the application of such a regime to the clearing and settlement of cash equities. However, the regime is framed broadly so that it can be applied to other circumstances in the future. On that basis, it is particularly important that declarations regarding the scope of the ACCC arbitration regime follow a process for a recommendation to be made to the Minister. Recommendations could be made by the NCC, following a public consultation process and applying the declaration criteria.

[3] CCA, ss 44H, 44CA.
[4] CCA, s 44CA.
[5] The declaration criteria in the National Access Regime and other State and Territory access regimes closely reflect clause 6(1) of the Competition Principles Agreement between the Commonwealth, States and Territories.

Principles to be applied by the ACCC in making an arbitration determination should reflect those in the National Access Regime and good regulatory practice

The pricing principles to be applied by the ACCC in determining access disputes appear to be modelled on those in the NAR, but with some material modifications. Notably, the reference to a return on investment commensurate with risk (an important part of the NAR principles) has been omitted from the draft CICS legislation..

The pricing principles in NAR – including the requirement that regulated access prices include an appropriate return on investment – reflect the Commonwealth's commitments under the Competition Principles Agreement.[6] This in turn reflects the recommendations of various economic policy reviews, including recommendations made by the Productivity Commission in its 2001 review of the NAR.

Under section 153ZER, the ACCC is not required to take into account the pricing principles and certain other matters that are mandatory considerations under the NAR (including the legitimate business interests of the service provider and its investment in the CS facility). It is not clear from the explanatory materials why a different approach has been taken for the CS services access regime.

Similarly, the statutory restrictions on access determinations should align with those in the NAR. Again, these appear to have been modelled on the NAR, but with some modifications. In particular, the usual restrictions on preventing existing users from obtaining sufficient access and exercising pre-notification rights have been modified so that they do not apply to existing rights of users that are related to the CS service provider. This modification is not explained in the Explanatory Materials. ASX considers that this protection should apply equally to all existing users – regardless of whether they are related to the service provider.

Merits review should be available for key decisions – as it is under the national access regime

The draft CICS legislation does not include provisions for rights of appeal on the merits.

In contrast, recognising that decisions relating to economic regulation are both complex and have the potential to materially impact the interests of service providers and customers, rights to merits review are included in the NAR. This is because effective and efficient merits review:

- ensures good governance and regulatory accountability and contributes more broadly to better decision making;
- offers protection to regulated businesses and users against erroneous regulatory decisions that would otherwise go uncorrected; and
- promotes predictability and certainty in the regulatory framework for investors, which in turn serves the long-term interests of consumers through efficient investment.

ASX considers that it is particularly important for an efficient and effective framework for merits review to be included in the proposed regime, given this is the first time that CS services (or any similar services) have been subject to such economic regulation in Australia. This means that there is a significantly greater risk of regulatory error compared to an established regulatory regime. To protect against the risk of merits review becoming 'embedded' in the regime, the CICS legislation could provide for a review of the merits review framework after ten years.

[6] Competition Principles Agreement, cl 6(5).

1. ASIC CS services rule-making framework

Schedule 1 of the draft CICS legislation provides for the insertion of rule-making powers for ASIC under a new Part 7.3A of the *Corporations Act 2001* (Cth) (**Corporations Act**). As outlined in the Explanatory Materials, this new framework will provide ASIC with powers to make rules for a monopoly provider of CS services to operate in a way that achieves competitive outcomes, and ensure that competition, should it emerge, is safe and effective (the **CS services rule-making framework**).

ASX broadly supports the proposed CS services rule-making framework, and agrees, subject to appropriate consultation on the rules themselves, that these measures will help facilitate outcomes that are consistent with those expected in a competitive market for CS services and ensure that competition, should it emerge, is safe and effective.

ASX also acknowledges that the draft CICS legislation seeks to include appropriate checks and balances, including requirements for public consultation, Ministerial consent and Parliamentary disallowance around the rules. Such checks and balances are fundamental controls for the appropriate exercise of delegated legislative power and essential for ensuring that any rules are fit for purpose.

In this section, ASX makes a number of comments on the draft CICS legislation as it relates to the CS services rule-making framework, with a view to ensuring that it meets the policy objectives:

1 ASX supports consultation in relation to the development of the CS services rules, and seeks assurance that consultation will be undertaken prior to the making of any Ministerial determination that will define the scope of these rules.

2 ASX notes that the definition of CS Services is broad and intended to be flexible. Given this broad definition of services that may potentially be subject to the ASIC rules, we suggest clarifying the criteria for Ministerial determinations defining the services that rules may apply to. As set out in the Explanatory Materials, the CS services rule-making framework is intended to "*ensure the regulators have the ability to put in place adequate regulatory arrangements to give effect to certain elements of the Regulatory Expectations and Minimum Conditions*." In order for the rule-making framework to adequately give effect to the Regulatory Expectations, it should be amended to reflect the scope of the Regulatory Expectations and apply to *monopoly* CS services only. This could be achieved by including, as a criterion for Ministerial determinations, that the CS service in question is a monopoly service.

3 Consideration should be given to separate determination criteria for setting the scope of rules for different purposes. The determination criteria relating to the Monopoly Conduct Rules (e.g. rules on governance, the provision of services to users and accountability) should limit the scope of the rules to monopoly CS services. Determinations for application of the Competitive Conduct Rules (e.g. rules on interoperability) should be framed differently, to reflect their different purpose and potentially broader application.

4 ASX notes that circumstances in which consultation and Ministerial consent is not required on CS services rules may more appropriately be confined to situations that reflect an emergency for Australia's financial markets. The drafting in proposed section 828L permits ASIC to exercise the emergency rule-making powers to protect the 'safety, fairness and effective competition in the provision of CS services' which may extend to situations not considered 'emergency'. Rules relating to these matters should be subject to consultation and Ministerial consent.

5 ASX recommends a clear delineation between the matters that may be addressed in CS services rules and ACCC determinations under the new arbitration regime. While it is appropriate for ASIC to make rules on most matters relating to CS services, the ACCC is better equipped to deal with matters relating to pricing methods and the assessment of service costs. Accordingly, ASX submits that the rule-making powers should be amended to clarify that ASIC does not make rules on pricing methods. If further guidance on pricing is considered necessary,

the ACCC could be given powers to conduct a pricing assessment from time to time and issue guidelines on how it will assess costs in arbitrating an access dispute.

1.1. ASX supports the inclusion of appropriate checks and balances around making of ASIC rules – and considers that these should be extended to Ministerial determinations

Under proposed section 828J, ASIC must not make a CS services rule unless ASIC has consulted the public, the ACCC, the RBA, and any other person as required by regulations.ASX supports this requirement for consultation on the CS services rules, and notes that such a requirement ensures:

- **Evidence-based rule making**. Any CS services rules that are made by ASIC will be made after public and stakeholder engagement, ensuring that ASIC will understand the likely effect of the proposed rule, including any potential impacts on stakeholders.

- **The objects of the CS services rule-making framework are met**. Consultation will allow ASIC to determine whether a proposed CS services rule will effectively regulate the conduct of a monopoly provider of CS services and ensure safe and effective competition where it may emerge.

- **Increased transparency.** Consultation allows stakeholders to understand ASIC's approach to the CS service, and how proposed rules may apply. This will ensure increased transparency that any consequent CS services rules have been made with sufficient and relevant evidence.

- **Appropriate scrutiny of delegated legislation.** As recognised by the recent Australian Law Reform Review report on the financial services and corporations law[7], meaningful consultation is an important process-oriented safeguard on the exercise of delegated legislative power.

ASX also supports the proposed additional safeguards in the CS services rule-making framework, including that the CS service rules must be consented to by the Minister under section 828K and that CS service rules are subject to review by the Parliament due to their nature as legislative instruments. This ensures an appropriate level of oversight and scrutiny by Parliament over the rules.

ASX notes that the scope of the CS service rules (to be set by determinations made by the Minister under section 828B) is a fundamental element of the CS services rule-making framework.

Determinations made under proposed section 828B are legislative instruments, and subject to an express statement otherwise, ASX understands as a result are subject to the requirements of the *Legislation Act 2003 (Cth).* Section 17 of the *Legislation Act 2003 (Cth)* requires that an instrument-maker be satisfied that appropriate consultation, to the extent that it is reasonably practicable, has been undertaken, before making the instrument.

As the appropriateness of the scope of the CS services rules is fundamental to achieving the policy intent of the draft CICS legislation, ASX considers that consultation is critical in the Minister's determination process. Stakeholders including service providers and customers, are likely to hold information that will be relevant to the Minister's determination, including:

- the way in which the service is currently provided and any available substitute services; and

- the potential impact of regulation on the on the safety, fairness and effectiveness of competition in the provision of CS services.

ASX suggests including an express reference in the Explanatory Materials to the application of the Legislation Act, or to the expectation that consultation will be undertaken ahead of the Minister making a determination.

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[7] *Financial Services Legislation: Interim Report B (ALRC Report 139),* Report by the Australian Law Reform Commission, September 2022, p 131. <https://www.alrc.gov.au/wp-content/uploads/2022/09/ALRC-FSL-Interim-Report-B-139.pdf>

1.1.1 Appropriate consideration of the CS services rules in rule disallowance decisions

ASX notes that as a result of the proposed amendment to section 822E, the Minister must have regard to matters set out in the CS services rules (which will be made by ASIC) when making a decision as to whether to disallow changes to the operating rules. This creates an anomaly whereby the Minister is required to have regard to matters set out by ASIC, rather than factors more appropriately set in primary legislation. Like consultation, this is an important oversight mechanism for the appropriate exercise of delegated legislative power.

ASX acknowledges that in practice, the Minister's power to disallow changes to operating rules is delegated to ASIC. However, in the interests of a coherent hierarchy of primary and delegated legislation, ASX suggests consideration is given to whether the matters specified in the CS services rules for the purposes of the Minister's consideration of rule disallowance should be set out in regulations or legislation.

1.2. Criteria for Ministerial determination should be clarified to reflect CFR's recommendations and the Regulatory Expectations

CS services are defined very broadly to include any services which rely on access to a clearing and settlement facility, or to data used in the operation of such a facility. ASX understands that the intent is for this definition to be flexible enough to accommodate future regulatory requirements. As articulated in the Explanatory Materials, the Government's intent is that a Ministerial determination and CS services rules would, in the first instance, only relate to CS services in connection with cash equities traded in Australia. However, the draft CICS legislation contemplates a legislative framework that is flexible enough to extend to other CS services and classes of financial products in the future, should circumstances require and based on CFR advice.[8]

While ASX acknowledges the desire for flexibility, it is also important that there is clarity around the scope of services that may potentially be subject to regulation. It is essential that there is clear criteria and appropriate consultation around Ministerial determination of services that may be the subject of the CS services rules.

ASX considers that a key criterion for a Ministerial determination should be that the relevant service is currently a monopoly service. This would be consistent with the long-standing policy rationale for the implementation of CS service rules.

In 2015, the Council of Financial Regulator's (**CFR**) conducted a review of competition in clearing Australian cash equities and published its conclusions in its report *Review of Competition in Clearing Australian Cash Equities: Conclusions* (**2015 Conclusions Paper**). The 2015 Conclusions Paper recommended legislative amendments to give the relevant regulators rule-making powers to facilitate safe and effective competition in clearing and/or settlement, and to deal with the continued monopoly provision of cash equity CS services. The 2015 Conclusions Paper made clear that these recommended rule-making powers were intended to address only monopoly services stating:

> *The rule-making powers would **only be used to address systematic issues associated with the provision of relevant services by a monopoly provider**, rather than specific issues arising between particular parties.*[9]

To date, there has not been consultation or analysis supporting any extension of regulatory measures beyond monopoly services. Without further policy and market analysis, there is no clear policy justification for extending regulation to services and markets where there is already competition.

The 2015 Conclusions Paper also noted the potential for "*regulatory overreach*" in the scope of rule-making powers. A key conclusion was that "*the scope of any such powers would therefore need to be appropriately confined in the relevant legislation.*"[10]

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[8] Draft Explanatory Materials, 1.20.
[9] *Review of Competition in Clearing Australian Cash Equities: Conclusions,* A Report by the Council of Financial Regulators, June 2015, p 59. <https://treasury.gov.au/sites/default/files/2019-03/C2015-007_CFR-ConclusionsPaper.pdf>.
[10] *Review of Competition in Clearing Australian Cash Equities: Conclusions,* A Report by the Council of Financial Regulators, June 2015, pp 56-57, available at <https://treasury.gov.au/sites/default/files/2019-03/C2015-007_CFR-ConclusionsPaper.pdf>.

Following the 2015 Conclusions Paper and the 2017 report, CFR published three policy statements: the Regulatory Expectations, the Minimum Conditions (Clearing) and the Minimum Conditions (Settlement) (with the minimum Conditions only applying should a committed competitor emerge). The Regulatory Expectations and Minimum conditions are similarly limited to monopoly services, applying to "*ASX's engagement with, and provision of services to, users of its monopoly cash equity CS services for both ASX-listed and non-ASX-listed securities.*"[11]

The Explanatory Materials make clear that the intention of the ASIC rule-making framework is to "*ensure the regulators have the ability to put in place adequate regulatory arrangements to give effect to certain elements of the Regulatory Expectations and Minimum Conditions*."[12] This suggests that the CS services rule-making framework, like the Regulatory Expectations, is intended to apply to monopoly CS services only.

However, without appropriate criteria around Ministerial determinations, there is the potential for the CS services rule-making framework to apply beyond monopoly CS services. As the definition of CS services is broad, there is no requirement to consider monopoly power when determining the class of CS services. Once the Minister has determined the class of CS services, ASIC then has a broad powers to make rules that deal with the activities, conduct or governance of CS facility licensees, and associated entities of CS facility licensees, in relation to CS services.

ASX submits that in line with the recommendations made in the 2015 Conclusions Paper and Regulatory Expectations, and to avoid the risk of "regulatory overreach" identified by CFR, amendments should be made to the determination criteria to make clear that the ASIC rule-making framework should only apply to *monopoly* CS Services.

1.1.2 Trigger for amendment and/or revocation of determinations

ASX notes section 828B(9) which provides for the Minister to amend or revoke a determination on the scope of services covered by the ASIC CS services rules.

ASX seeks clarification on the circumstances in which this section would be enlivened, specifically in regard to circumstances where a determination has been made about certain CS services, and those CS services have since become subject to competition.

Additional explanation in the Explanatory Materials may be beneficial on this point.

1.3. Determinations for future rules dealing with competitive conduct should be subject to a separate rule-making criterion

ASX understands that the draft CICS legislation may be seeking to provide for two types of rules:

1 Rules governing the conduct of a monopoly provider of CS services (**Monopoly Conduct Rules**); and

2 Rules that would govern a future competitive environment, should a committed competitor emerge, to ensure there is safe and effective competition for CS services (**Competitive Conduct Rules**) – these rules would potentially address matters such as interoperability between competing CS facilities.

ASX considers separate criteria necessary for the appropriate operation of the determination of services to be covered by these different types of rules.

The determination criteria relating to the Monopoly Conduct Rules (e.g. rules on governance, the provision of services to users and accountability) should limit the scope of the rules to *monopoly* CS services, for reasons discussed above. Determinations for application of the Competitive Conduct Rules (e.g. rules on interoperability) should be framed differently, to reflect their different purpose and potentially broader application.

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[11] Policy Statement by the Council of Financial Regulators, *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia,* September 2017, p 3, available at <https://www.cfr.gov.au/publications/policy-statements-and-other-reports/2016/regulatory-expectations-policy-statement/pdf/policy-statement.pdf>.

[12] Exposure Draft Explanatory Materials to Financial Sector Reform (Competition in Clearing and Settlement) Bill 2023, p 9.

ASX considers that this approach would be preferable to a single broadly framed determination power, as it would provide greater clarity and certainty to stakeholders around the purpose and scope of the ASIC rules.

1.4. Criteria for exercise of emergency rule-making power should be narrowed

Proposed section 828L allows ASIC to make rules in emergency circumstances without the need for public consultation or Ministerial consent. Subsection (1) states that the circumstances in which ASIC can use the emergency rule-powers is if it is of the opinion that it is necessary, or in the public interest, to do so in order to protect:

(a) the Australian economy; or

(b) the efficiency, integrity and stability of the Australian financial system; or

(c) safety, fairness and effective competition in the provision of CS services.

By way comparison, a similar rule making power exists for the financial benchmarks rules at section 908CN of the Corporations Act. The circumstances in which ASIC can exercise this power include if it is of the option that it is necessary, or in the public interest, to do so in order to protect:

(a) the Australian economy; or

(b) the efficiency, integrity or stability of the Australian financial system; or

(c) the security or confidentiality of financial benchmark data.

Protecting the security and confidentiality of financial benchmark data is an appropriately narrow circumstance in which the risks outweigh the benefits of the safeguards of consultation and ministerial consent. In contrast, protecting safety, fairness and effective competition is an objective of the draft CICS legislation more broadly, and therefore is not a situation in which ASIC should make rules without the checks and balances established by the legislation.

ASX acknowledges that the use of emergency rule-making powers is rare and would only be used in exceptional circumstances. However, ASX submits that protecting the safety, fairness and effective competition in the provision of CS services does not constitute an emergency, and suggests this criterion be narrowed appropriately.

ASX acknowledges the need for flexibility to act quickly in emergency circumstances, and suggests that this provision be narrowed to appropriately reflect the circumstances in which the safeguards against potential regulatory overreach can be set aside.

1.5. It is appropriate for ASIC to make rules on most matters relating to CS services, but the ACCC is better equipped to deal with matters relating to pricing of CS facility services

A key issue of concern for ASX is the potential for overlap and inconsistency between the CS services rules and the ACCC arbitration powers. As recognised by the Explanatory Materials, the CS services rule-making powers allow rules to be made on a range of matters, including matters directly or indirectly related to the provision of CS services.[13] The broad framing of the rule-making power means that the rules may extend to (among other things) pricing, investment and service levels for CS services. Separately, the ACCC is empowered to make a determination on these matters in the context of a specific dispute – including in relation to CS service prices, pricing methodologies, and an appropriate level of return on investment. This creates the potential for overlap and inconsistency between CS services rules relating to CS service delivery and pricing, and the terms of access determined for those services by the ACCC.

ASX supports ASIC's ability to make rules in relation to most of the matters identified in the Explanatory Materials, many of which overlap with the current Regulatory Expectations. In particular, it is appropriate for the ASIC CS services rules to address:

- dealings between the CS licensee and users of the facility;

[13] Exposure Draft Explanatory Materials to Financial Sector Reform (Competition in Clearing and Settlement) Bill 2023, p 7.

- the CS licensee's governance arrangements;
- the CS licensee's arrangements for conflicts of interest;
- the CS licensee's accountability (including public reporting);
- coordination, cooperation and links between CS facilities and other CS facilities (including interoperability), and CS facilities and registries and issuers;
- the cessation of the provision of services by a CS facility; and
- the CS facilities licensee's commercial, transparent and non-discriminatory provision of services to users.

However, given the ACCC powers to determine prices for CS services in an access dispute context, the CS services rules should not also address such matters. In particular, the CS service rules should not address pricing methodologies for CS services, or how the "efficient costs" of providing CS services should be assessed. These are matters that are best addressed by the ACCC under the arbitration framework.

There are two reasons for this:

1 Clarifying that ASIC's rule making powers does not extend to pricing will avoid any potential overlap and inconsistency between the two frameworks. In particular, it would avoid any inconsistency between pricing rules that may be made by ASIC for a particular service and an ACCC arbitration determination for the same service.

2 The ACCC has the relevant expertise in relation to assessment of service costs and price determination for monopoly infrastructure. Pricing determinations are a key function of the ACCC in its regulation of access to monopoly infrastructure, including under the NAR, the telecommunications access regime, water industry regimes and the national energy laws (through the Australian Energy Regulator). In performing these functions in other infrastructure sectors, the ACCC already conducts regular monitoring, investigations, reviews, along with the extensive analysis required to support these activities. The ACCC is also experienced in applying pricing principles similar to those proposed for CS services (as discussed in Part 2 below, the CS service pricing principles are similar to those in the NAR and other access regimes). The ACCC therefore has the relevant institutional knowledge and expertise to perform price regulation functions for CS services.

ASX notes that in the 2015 Conclusions Paper, CFR recommended for 'relevant regulators' to hold rule-making powers.[14] This appears to be a recognition by CFR that certain powers would fall to different regulators, depending on their role, expertise and experience. In line with this, ASX submits that regulators' expertise should determine the powers they hold under the proposed regime. It follows that the ACCC's expertise in pricing should require the ACCC to be the relevant regulator to conduct any pricing assessments, with ASIC's rule making powers to exclude any such assessments.

If further guidance on pricing is considered necessary, it would be more appropriate for the ACCC, within the arbitration framework, to issue guidelines on how it will assess costs and determine CS service prices in arbitrating access disputes. This would be consistent with the approach adopted in other infrastructure sectors where the ACCC has arbitration powers.[15]

[14] *Review of Competition in Clearing Australian Cash Equities: Conclusions,* A Report by the Council of Financial Regulators, June 2015, p 56, <https://treasury.gov.au/sites/default/files/2019-03/C2015-007_CFR-ConclusionsPaper.pdf>.
[15] For example: ACCC, *Access Pricing Principles – Telecommunications: A Guide*, July 1997; ACCC, *Arbitrations: A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, April 2006.

2. ACCC arbitration framework

The draft CICS legislation provides for insertion of a new Part XICB of the *Competition and Consumer Act 2010* (Cth) (**CCA**). This new part will provide the ACCC with powers to arbitrate disputes in relation to access to certain CS services (the **ACCC arbitration framework**).

The ACCC arbitration framework is directed at facilitating competitive outcomes in the provision of CS services for Australian financial markets.[16] ASX supports the policy intention behind the draft legislation and the introduction of a framework directed at achieving these outcomes based on the NAR.

Section 153ZEA of the draft CICS legislation sets out six related objectives for the ACCC arbitration framework:

1 facilitate access to CS services on terms and conditions, including pricing, that are transparent, non-discriminatory, fair and reasonable;

2 support the long-term interests of the Australian market by delivering outcomes that are consistent with those that might be expected in a competitive market for CS services;

3 address the imbalance in bargaining power between providers of CS services and access seekers;

4 provide incentives for providers of CS services to negotiate commercial and non-discriminatory terms of access with access seekers of the CS services;

5 provide for the timely resolution of access disputes between providers of CS services and access seekers, if they arise; and

6 discourage providers of CS services from exerting market power to the detriment of competition in upstream and downstream markets.

ASX notes that the objectives for the ACCC arbitration framework are similar to those of other frameworks for economic regulation, including the NAR and other sector-specific regimes. For example, the NAR objective is to "*promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.*"[17] The NAR achieves this object of promoting competition through regulation of access to 'bottleneck' services – i.e. monopoly services that are necessary to support upstream and/or downstream competition.

As noted in the Explanatory Materials, the broad architecture of the ACCC arbitration framework is also similar to the NAR and other Australian access regimes. These frameworks give primacy to commercial negotiations between service providers and users, while providing access to ACCC arbitration where agreement cannot be reached on the terms of access.

The consistency in policy objectives and design of Australian access regimes reflects several decades of economic policy development and collaboration between the Commonwealth and state governments, as reflected in the Competition Principles Agreement (**CPA**). Among other things, the CPA sets out:[18]

- the broad objective that a Commonwealth, State or Territory access regime should seek to achieve (i.e. the objective of promoting the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets); and
- certain principles that should be incorporated in such an access regime, including principles for regulation of access prices.

[16] Exposure Draft Explanatory Materials to Financial Sector Reform (Competition in Clearing and Settlement) Bill 2023, p 1.
[17] Competition and Consumer Act 2010 (Cth) (**CCA**), s 44AA.
[18] CPA, cl 6(5).

ASX supports an ACCC arbitration framework for CS services that is consistent with these well-established principles of regulatory design.

While the broad architecture of the ACCC arbitration framework aligns with the NAR and other Australian access regimes, ASX notes that there are several important points of departure from regulatory best practice. These include a different process and criteria for declaration of services, material modifications to the pricing principles, and an absence of merits review rights. These are all important elements of a robust and effective regime.

In order to align the ACCC arbitration framework with regulatory best practice, ASX recommends the following modifications:

1 amendments to the declaration criteria for CS services to ensure that the regime only captures monopoly services that are necessary to support competition;

2 amendments to the processes surrounding the declaration of CS services to ensure appropriate checks and balances such as requiring consultation with stakeholders, and an evidence-based recommendation to the Minister;

3 amendments to the matters the ACCC can take into account when making an arbitration determination to align with those included in the NAR; and

4 the introduction of a mechanism for merits review of key decisions under the CS services access regime to promote accountability, predictability and certainty in the regulatory framework for all stakeholders.

Each of these modifications is discussed below.

2.1. The declaration criteria should be targeted to monopoly services that are necessary to support competition

Similar to the NAR, the draft CICS legislation includes a process for declaration of CS services that will be subject to the ACCC arbitration regime. This is an important element of any access regime, which allows regulation to be appropriately targeted at those services that are necessary to support safe and effective competition.

However, unlike the NAR, the draft CICS legislation does not include clear criteria for declaration of services, but rather a list of matters to which the Minister must have regard in making a declaration.[19] In the absence of clear criteria for declaration, there will be uncertainty for all stakeholders regarding the scope of the ACCC arbitration framework. Given the broad scope of the 'CS service' definition, it also creates the potential for contestable services to be captured, which can distort the efficient functioning of the market for those services.

ASX considers that section 153ZEF of the draft CICS legislation should be modified to include criteria that will need to be satisfied before a declaration is made. These criteria should include that:

- the relevant CS service is a monopoly service; and
- access (or increased access) to the service, on reasonable terms and conditions as a result of declaration, would promote a material increase in competition in at least one market, other than the market for the service itself.

Criteria for declaration of this nature would be consistent with both the policy rationale for CS service regulation, and the economic underpinnings for access regulation more generally.

[19] Draft CICS Legislation, s 153ZEF(4).

2.1.1 Declaration criteria should focus regulation on the economic issue that the arbitration framework is seeking to address

ASX understands that the ACCC arbitration framework is directed at ensuring access to monopoly CS services that are necessary to support competition in upstream or downstream markets.

CFR reflected this approach in its recommendations on the scope of the arbitration powers in its 2015 Conclusions Paper, noting:

*Arbitration would be available to parties requiring access to **ASX's monopoly clearing and/or settlement services** for both ASX securities and non-ASX listed cash equity securities **in order to compete with ASX's vertically integrated operations**.*[20]

The Explanatory Materials identify the economic issue in similar terms:[21]

CS facilities are often part of vertically integrated monopolies, where listing, trade execution, clearing, settlement and other processes are undertaken by related companies within a corporate group. In these circumstances there is an incentive for the facility to provide access to its services to affiliated entities on more favourable terms than for unaffiliated entities, giving rise to discriminatory terms of access.

As discussed below, this is a frequently cited economic rationale for access regulation, and is typically reflected in the criteria for declaration of services that will be subject to an access regime. In order to target access services that are necessary to compete with a vertically integrated monopoly provider, access regimes will typically allow services to be declared where this will *promote a material increase in competition*.

Consistent with this policy rationale for regulation of CS services, ASX considers that the criteria for the declaration should focus on those services that are necessary to support safe and effective competition.

2.1.2 Targeted economic regulation is regulatory best practice

The policy intent of CS service regulation, as reflected in the 2015 Conclusions Paper and the Explanatory Materials, is consistent with the broader economic rationale for access regulation. It has been recognised in numerous economic policy reviews that access regulation should be carefully targeted at situations where it is necessary to promote competition. For example:

- The Productivity Commission (**PC**) in its 2013 Review of the NAR stated: "The only economic problem that access regulation should address is an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services where access is required for third parties to compete effectively in dependent markets".[22]

- The Harper Committee, in its review of Australia's competition laws similarly stated: "The burdens of access regulation should not be imposed on the operations of a facility unless access is expected to produce significant efficiency gains from competition. This requires that competition be increased in a market that is significant and that the increase in competition is substantial".[23]

The conclusions of the PC and Harper Committee on the appropriate scope of access regulation are now reflected in the NAR declaration criteria (the PC / Harper recommendations having been endorsed by the Government). These criteria now require (among other things) "*that access (or increased access) to the service, on reasonable terms and conditions,*

[20] Council of Financial Regulators, Review of Competition in Clearing Australian Cash Equities: Conclusions, June 2015, p 6, available at <https://treasury.gov.au/sites/default/files/2019-03/C2015-007_CFR-ConclusionsPaper.pdf>.
[21] Explanatory Materials, [1.70].
[22] *Review of the National Access Regime – Inquiry Report,* Report No. 66, dated 25 October 2013 (**2013 Review**), p 7, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.pc.gov.au/inquiries/completed/access-regime/report/access-regime.pdf>.
[23] Harper Review Final Report, p 433.

as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service".[24]

Importantly, in the NAR and other Australian access regimes, the declaration criteria must be satisfied before a declaration can be made. If the 'promotion of competition' test (as well as the other declaration criteria) is not satisfied, a service cannot be declared.[25]

This recognises that access regulation will only deliver economic benefit where it is expected to promote a material increase in competition. Where the supply of a particular service is subject to effective competition, economic regulation is not necessary, since the terms of access (including pricing) will be constrained by competition. Moreover the application of economic regulation to a service that is subject to competition is likely distort the efficient functioning of the market for that service, particularly if only one supplier is subject to regulation and not its competitors.

2.1.3 It may not be necessary or appropriate to subject all CS services to the ACCC arbitration framework

Processes for declaration of services recognise that not all services provided by a particular piece of infrastructure should be subject to economic regulation. It will often be the case that a piece of infrastructure is used to supply *both* monopoly services (including monopoly services that are necessary to support upstream or downstream competition) and contestable services.

In such cases, economic regulation is applied on a service-by-service basis, having regard to the economic characteristics of each service (and in particular, the scope for contestability). This approach is reflected in the NAR and other Australian access regimes, including the Telecommunications Access Regime and national energy laws.[26] The NAR and Telecommunications Access Regime require declaration of a *specific service* in accordance with a clear set of declaration criteria (which require consideration of the service's economic characteristics) before a party can notify a dispute in relation to that *specific service* (and not any service provided by means of the facility).[27] Similarly, the energy laws require a service classification decision (again based on economic considerations) before economic regulation can be imposed.

ASX's CHESS infrastructure also provides services that are currently monopoly services (e.g. clearing and settlement of cash equities) and services that are contestable. An example of a contestable service provided by CHESS is set out in **Box 1** below.

[24] CCA, 44CA(1).
[25] CCA, s 44H(4).
[26] The **Telecommunications Access Regime** requires carriage services and services which facilitate the supply of carriage services to be declared. Once a service is declared the ACCC can make an access determination that sets out the terms and conditions of access to that service only (and not other services provided under the same infrastructure): see *Competition and Consumer Act 2010* (Cth) ss 152AL, 152AR and 152BC. Under **Australia's Energy Laws**, services provided by a distribution network or pipeline are *classified* by the regulator, with different forms of regulation (or no regulation at all) applying depending on their classification. For example, services provided by means of an electricity distribution network may be classified as either 'direct control services', 'negotiated services' or 'unclassified / unregulated services: see *National Electricity Rules* cl 6.2.1; Australian Energy Regulator (AER) Service Classification Guidelines. Services provided by a scheme pipeline may be either 'reference services' or 'non-reference services': see *National Gas Rules,* part 8.

[27] CCA ss 44H, 44S.

Box 1: Example of contestable services provided by CHESS infrastructure – Primary Market Facility

The Primary Market Facility (**PMF**) is an optional administrative service available to issuers to help simplify the acceptance and allocation process for advisor or broker led capital raisings (including IPOs and placements). The PMF works by allowing a temporary allocation interest (i.e. dummy security) to be set up in CHESS for the capital raise which can then be converted into actual securities in CHESS upon settlement. This process then gives:

- brokers the ability to use their own existing systems to administer the allocation of the underlying security and collection of cash; and
- investors the ability to track their allocations to new securities in CHESS.

There are various alternatives to the PMF service that are used by participants and CHESS users. These include traditional accounting and booking systems, back office systems and registry systems. Which service is chosen will generally depend on the entity running the capital raise (e.g. lead bank arranger, broker, issuer or registry), and the size and the complexity of the capital raise.

In FY 2022, there were approximately 11,500 capital raises. Of these 11,500 capital raises, only 2,400 could use the PMF as it can only be used for certain types of capital raising (e.g. IPOs and placement).

The PMF was used 997 times in FY 2022. Accordingly, the PMF was used in:

- **9%** of all capital raises in FY 2022; and
- **42%** of capital raises where the PMF could have been used in FY 2022.

More generally, the set of services that could fall within the 'CS service' definition in the draft CICS legislation is very broad, and could include a range of services which rely on access to the CHESS infrastructure, but which are competitively provided. It is essential that the criteria for declaration are appropriately targeted at those that are essential to support safe and effective competition.

2.1.4 Declaration criteria should align with the National Access Regime and reflect regulatory best practice

Under section 153ZEF of the draft CICS legislation, the Minister may make a declaration specifying the CS services or classes of CS services to which access may be the subject of negotiation or arbitration. In considering whether to make a declaration, the Minister:

(a) *must* have regard to the following in consultation with the Commission prior to making a declaration:
  (i) the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system, of making the declaration;
  (ii) the likely regulatory impact of the declaration;
  (iii) the extent to which a provider of a CS service that will be affected by the declaration has a monopoly or significant market power over the provision of the service; and

(b) *may* have regard to other factors the Minister considers relevant.

ASX agrees that the matters specified in (a) will be relevant to making a declaration. In particular, it is highly relevant whether the service provider has a monopoly or significant market power over provision of the service. Careful consideration will also need to be given to the likely effect of declaration on the efficiency, integrity and stability of the Australian financial system.

However, ASX is concerned that the proposed drafting of section 153ZEF is not sufficiently clear on the circumstances in which CS services will be declared and therefore subject to the ACCC arbitration framework.

For clarity, ASX proposes that section 153ZEF specify criteria which *must be satisfied* (as opposed to matters which must just be considered) before a declaration can be made, consistent with the declaration framework under the NAR.

The declaration criteria should reflect the matters already identified in section 153ZEF(4)(a). That is, the Minister should be satisfied that:

- the declaration would not have any material adverse effect on the Australian economy, or on the efficiency, integrity and stability of the Australian financial system; and
- the provider of the CS service that will be affected by the declaration has a monopoly or significant market power over the provision of the service.

Additionally, ASX suggests the inclusion of a criterion reflecting the objective of the access regime to promote competition. This additional criterion could be modelled on the equivalent criterion of the NAR as follows:

"*that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service*"[28]

ASX also suggests that the Minister's discretion should be removed from section 153ZEF(4). The NAR declaration criteria is an exhaustive and clear list of requirements that *must* be satisfied before declaration can be made. In contrast, the power granted to the Minister in the ACCC arbitration framework provides for *optional* consideration of any other matter the Minister considers relevant. This broad discretionary power creates uncertainty for stakeholders, and is unnecessary if the criteria for declaration are clearly specified.

ASX considers that with the above amendments, the declaration criteria will be appropriately targeted at access to monopoly services that are necessary to support competition, and will allow the ACCC arbitration framework to better achieve its intended objectives.

2.1.5 Clarity is required regarding the provisions allowing the Minister to amend or revoke a declaration

ASX suggests additional explanation to explain the application of the declaration process in order to provide for changing market circumstances, for example, if a CS service becomes a competitive service or if there are new competitive services.

ASX notes section 153ZEG which provides for the Minister to amend or revoke a determination on the scope of services covered by the ASIC CS services rules. Similarly, section 153ZEF(2) allows the Minister to set out specific services that are *not* covered by a declaration.

ASX seeks clarification on the circumstances in which these sections would be enlivened, specifically in regard to circumstances where a determination has been made about certain CS services, and those CS services have since become subject to competition.

Additional explanation in the Explanatory Materials may be beneficial on this point.

2.2. Declaration of a service should occur through public consultation and an evidence-based approach

Other Australian access regimes include additional checks and balances on the declaration process for services. These include consultation with stakeholders and an evidence-based recommendation to the Minister – as well as provision for merits review of the ultimate decision. Such checks and balances should be included in the ACCC arbitration framework as this would be consistent with regulatory best practice, including the process for declaration of services under the NAR. This is particularly important where the definition of CS services is broad and there is flexibility for the regime to extend to services beyond cash equities, which have not previously been considered by CFR.

[28] CCA s44CA.

2.2.1 Evidence-based recommendations to the Minister should be mandatory to ensure regulatory best practice

ASX acknowledges the collaboration between the CFR agencies and the ACCC on cash equities clearing and settlement to establish a policy rationale for additional regulatory measures that has been undertaken over recent years. However, given the more targeted policy objectives of the new ACCC arbitration regime and the fact that it can apply more broadly than cash equities, it is appropriate that a declaration is proceeded by an inquiry, consultation and evidence-based recommendation to the Minister, to ensure appropriate safeguards are in place.

ASX considers that a recommendation to the Minister from the NCC (or in the alternative, the ACCC) on whether a declaration should be included in the proposed regime.

The decision on whether economic regulation should apply to a particular service must have regard to the economic and market context for service provision, including existence of any substitute services, assessment of barriers to entry, and other factors bearing on contestability. Such an assessment is best conducted by an economic regulator, taking into account market and economic evidence and submissions from stakeholders.

Under the NAR**,** this evidence-based assessment is performed by the NCC.[29] Once the NCC has conducted its assessment, a recommendation is made to the Minister on whether to declare the service.

The NCC could perform a similar role under the CS services access regime, providing recommendations to the Minister on which CS services should be subject to the ACCC arbitration regime.

2.2.2 Consultation should be extended to the public to ensure informed and effective decision making and align with the national access regime

The ACCC arbitration framework should include a requirement for stakeholder and public consultation, prior to the making of a declaration recommendation or decision. As a legislative instrument, similar to a determination on the scope of the ASIC CS services rules, ASX understands that, subject to the express decision otherwise, the consultation requirements set out in section 17 of the *Legislation Act 2003 (Cth)* will apply.

Public consultation around service declaration is provided for in numerous Australian access regimes, including the NAR. For example:

- Under the NAR, the NCC may invite public submissions on a declaration application and have regard to any submissions they receive.[30] The NCC and Minister may invite written submissions on their preliminary recommendation or decision from the applicant, provider (or others they deem relevant) and must have regard to these submissions in making their recommendation or decision.[31]

- Under the telecommunications access regime, the ACCC can only declare a service after holding a public inquiry.[32] Where the ACCC holds a public inquiry it must provide a reasonable opportunity for any member of the public to make a written submission.[33]

ASX suggests that the legislation and/or Explanatory Materials should be amended to explicitly recognise the expectation that consultation, where it is practicable will be undertaken on the declaration on the scope of services subject to the arbitration framework. At a minimum, consultation should be conducted with the affected parties prior to declaration. This would be in line with the current consultation requirements in the NAR,[34] to ensure the decision maker is best place to make a declaration decision where the likely effect and impact of making such a declaration has been fully considered.

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[30] CCA s 44GB.
[30] CCA s 44GB.
[31] CCA ss 44GC, 44HA.
[32] CCA s 152AL.
[33] See *Telecommunications Act 1997* (Cth) ss 498, 500.
[34] See NAR ss 44GC, 44HA.

In addition, the legislation should follow the consultation processes included in the NAR. If an inquiry is included as an element of the declaration process, consultation could accompany a public inquiry, with the NCC conducting this consultation (similar to the telco access regime consultation process[35]). In the absence of any public inquiry, the Minister or the NCC could lead consultation and invite public submissions on the declaration decision (consistent with the NAR consultation process[36]).

The benefits of consultation are outlined above in Section 1.1 of this submission. Ensuring consultation with the public will ensure that these benefits are realised.

2.2.3 The determination criteria should require mandatory consideration of certain factors

Under section 153ZER of the proposed regime, the ACCC *may* take into account certain matters, including the following:

- the pricing principles;
- the legitimate business interests of the provider (or holder of the Australian CS facility licence), and the provider's (or holder's) investment in the CS facility;
- the interests of all persons who have rights to access the CS service; and
- the public interest, including the public interest in having competition in markets (whether or not in Australia).

This is in contrast to the NAR, which *requires* consideration of equivalent matters to those set out above.[37] It is not clear in the Explanatory Materials why a different approach has been taken for the ACCC arbitration framework.

ASX submits that like the NAR, the ACCC should be *required* to take these matters into account when determining access disputes for CS services. This is not only to align with the NAR and regulatory best practice, but also to ensure the ACCC arbitration framework meets its objectives.

This is particularly important for the following determination criteria:

- **The legitimate business interests of the provider and the provider's investment in the facility**. Ensuring protection for the legitimate business interests of the service provider and the provider's investment in the facility is a cornerstone of Australian access regulation. The Hilmer Committee report which provides the policy underpinnings for Australian access regulation (**Hilmer Report**) noted that a right of access to a facility should *only* be created if these legitimate interests will be appropriately protected.[38] It is therefore a mandatory consideration in numerous Australian access regimes, including the NAR,[39] the telecommunications access regime,[40] and various state access regimes.[41]

Requiring the ACCC to consider the legitimate business interests of CS service providers and their investment in the facility will ensure that infrastructure will be provided on terms and conditions that are transparent, non-discriminatory and fair and reasonable – in line with the first objective of the ACCC arbitration framework. An optional consideration of this criteria does not reflect the balance required by this objective.

Further, having regard to the provider's investment in the facility in determining the terms and conditions of access, signals support for further investment in the facility, which is critical to supporting the long-term interests of the Australian market – the second objective of the ACCC arbitration framework.

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[35] See *Telecommunications Act 1997,* ss 498, 500.
[36] See NAR ss 44GB, 44GC and 44HA.
[37] CCA, s 44X.
[38] *National Competition Policy Review,* 25 August 1993 (**Hilmer Report**), p 266.
[39] CCA, s 44X(1)(a).
[40] CCA, s 152BCA(1)(b).
[41] For example: Part 5 of the *Queensland Competition Authority Act 1997* (Qld) (particularly s 120); and Part 3 of the *Maritime Services (Access) Act 2000* (SA) (particularly s 32).

- **Pricing principles.** Similar to the above, pricing principles promote access to CS services on terms and conditions, including pricing, that are fair and reasonable. Indeed, the Hilmer Report considered that pricing principles would provide for a "fair and reasonable" access fee.[42] Further, as recognised in the Hilmer Report, *requiring* specific pricing principles to be considered when determining the right of access is favourable to giving a regulator a broad discretion guided by general guidelines as to factors to be taken into account, as the former provides the parties with "*a greater degree of certainty over their respective rights and obligations*".[43]

This certainty is key to achieving two other objectives of the ACCC arbitration framework:

- Support the long-term interests of the Australian market: It is generally accepted that regulatory certainty promotes investment. In turn, the Australian market will benefit over the long-term, through higher levels of reliability and lower prices.

- Provide incentives for providers of CS services to negotiate commercial and non-discriminatory terms of access with access seekers of the CS services in Australia: Certainty surrounding the terms of access required by the regime incentivises parties to reach an agreement on terms of access prior to an application being made under the ACCC arbitration framework, as the parties can be more confident that the agreement aligns with what would be ultimately decided the framework.

ASX submits that the ACCC arbitration framework should be amended to *require* all matters that are currently optional to be taken into account when determining access disputes for CS services, but in particular the pricing principles, and the legitimate business interests of the provider and the provider's investment in the facility.

2.2.4 The pricing principles should reflect the National Access Regime to include a consideration of whether return on investment is commensurate with the regulatory and commercial risks

As set out above, the pricing principles are a key consideration under the determination criteria. The proposed pricing principles are set out in subsection (3) of section 153ZER.

ASX recognises and supports that the principles adopted in the ACCC arbitration framework have been modelled on those in the NAR. However, ASX notes a material modification has been made in the ACCC arbitration framework compared to the NAR: the requirement for access prices to include a return on investment commensurate with the regulatory and commercial risks has been omitted.

It is well established as a matter of economic policy and regulatory best practice any regulated access price should include a return on investment that is commensurate with the regulatory and commercial risks involved in providing access. This is reflected in:

- **The Commonwealth's commitments under the CPA:** This agreement sets out that regulated access prices should be set so as to include a return on investment commensurate with the regulatory and commercial risks involved.[44]

- **The PC's 2001 and 2013 review of the NAR:** In its 2001 review of the NAR, the PC found that a key requirement for pricing principles in pricing determinations is that they provide a sufficient return to service providers to justify continuing investment in the infrastructure concerned.[45] The PC reinforced this in its 2013 review of the NAR, noting that the NAR pricing principles – which include a requirement to consider whether return on investment is commensurate with the regulatory and commercial risks – are appropriately focused on efficiency

[42] Hilmer Report, p 261.
[43] Hilmer Report, p 255.
[44] Competition Principles Agreement, cl 6(5)(b)(i).
[45] Productivity Commission, *Review of the National Access Regime Inquiry Report,* 28 September 2001, available at: < https://www.pc.gov.au/inquiries/completed/access/report/access.pdf>.

and competition, and that the evidence on how they have been applied in regulatory decision making supports a decision that they are appropriate.[46]

- **Other national and state access regimes:** In addition to the NAR, numerous national and state access regimes include a requirement to consider whether return on investment is commensurate with the regulatory and commercial risks (or some similar requirement) when determining pricing for access to a service. These include:
  - the National Gas Law[47] and National Electricity Law[48]; and
  - the Queensland access regime.[49]

  This reflects the commitments made by the Commonwealth, States and Territories under the CPA.

If the ACCC arbitration framework were to exclude reference to an appropriate return on invested capital, it would be a clear outlier among Australian access regimes.

In order for the pricing principles to achieve the objectives of the ACCC arbitration regime set out in section 2.2.3 above, a requirement to consider whether return on investment is commensurate with the regulatory and commercial risks should be included. In particular, as recognised by the PC's 2001 review of the NAR, cost reflective pricing, that includes a reasonable return on investment, ensures incentives for efficient investment in the infrastructure used to provide those services. Further, this criterion supports the ability to determine an access fee that is fair and reasonable for all parties.

Accordingly, ASX submits that with the inclusion of return on investment commensurate with the regulatory and commercial risks, the pricing principles in the ACCC arbitration framework will reflect regulatory best practice, align with the NAR and better achieve the objectives of the ACCC arbitration framework.

2.2.5 Restrictions on ACCC determinations should also align with the National Access Regime

Statutory restrictions on access determinations (section 153ZEQ) should also align with those in the NAR. Again, these appear to have been modelled on the NAR, but with some modifications. In particular, the usual restrictions on preventing existing users from obtaining sufficient access and exercising pre-notification rights have been modified so that they do not apply to existing rights of users that are related to the CS service provider. This modification is not explained in the Explanatory Materials. ASX considers that this protection should apply equally to all existing users – regardless of whether they are related to the service provider.

2.3. Merits review should be available under the ACCC arbitration framework

ASX considers that the draft CICS legislation should be amended to include provisions for appropriately limited merits review of key decisions, including decisions to declare services under section 153ZEF and ACCC arbitration determinations under section 153ZEP.

This would be consistent with the NAR and reflects a recognition such decisions can be complex and have the potential to materially impact the interests of service providers and customers.

An effective and efficient process for merits review:

- ensures good governance and regulatory accountability and contributes more broadly to better decision making;
- offers protection to all stakeholders – including service providers and users – against erroneous regulatory decisions that would otherwise go uncorrected; and
- promotes predictability and certainty in the regulatory framework for investors, which in turn serves the long-term interests of the Australian market through efficient investment in critical infrastructure.

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[46] Productivity Commission, *Review of the National Access Regime, ACCC Submission to Issues Paper,* February 2013, 2.5.1, available at: <https://www.pc.gov.au/inquiries/completed/access-regime/submissions/submissions-test/submission-counter/sub016-access-regime.pdf>.
[47] Section 24 of the National Gas Law, which is adopted in each of NSW, Queensland, Victoria, South Australia, Tasmania and Western Australia
[48] Section 7A of the National Electricity Law, which is adopted in each of NSW, Queensland, Victoria, South Australia and Tasmania.
[49] Part 5 of the QCA Act.

ASX considers that it is particularly necessary for an efficient and effective merits review process to be included in the ACCC arbitration framework, as this is the first time that CS services (or any similar services) have been subject to economic regulation in Australia. There is therefore a greater risk of regulatory error compared to an established regulatory regime. Further, substantial new investment in ASX's CS services is required in the near term and it is critical for all stakeholders that this investment occurs in a timely and efficient manner.

Provision could be included for a review of the merits review framework after the first ten years of its operation. This review would consider whether the merits review framework should continue or be amended or repealed.

2.3.1 Merits review ensures good governance, regulatory accountability and contributes more broadly to better decision making

Checks and balances on decision-makers, including appeal rights, are important for a regime to produce sound regulatory decisions. Numerous competition policy reviews have recognised that sound regulatory decision making ensures that a correct, preferable and fair decision is made, and promotes more consistent and predictable decision making over the longer term, which in turn promotes efficient investment in services and serves the long-term interests of consumers.[50]

ASX considers that access to merits review, in particular, promotes sound decision making in the following ways:

- Where regulation involves complex expert, economic, technical and commercial analysis, there is scope for error, even by competent and effective regulators. Merits review can provide an efficient and effective means of correcting these errors. The Attorney-General's Department (**AG Department**) recognised this in its review of what decisions should be subject to merits review, stating "*[a]s a general principle, decisions made by an expert body or that require specialist expertise, or that have consequences for affected companies should be reviewable on the merits*."[51]
- Even if very few decisions are actually reviewed on their merits, the availability of merits review will promote more thorough and careful regulatory analysis and better decision making. The availability of merits review for all decisions incentivises decision-makers to provide fair, reasonable and transparent decision-making, based on sound economic principles and an accurate understanding of the relevant facts.[52] This transparent decision-making also contributes to the development of a body of precedent to assist in the making of consistent and predictable determinations.
- Merits review can help clarify how complex regulatory rules and legal principles should be interpreted and applied. An example of this is how key criteria and principles in the NAR have been tested and clarified over time through merits review. This has included decisions of the Australian Competition Tribunal and Full Federal Court in the Sydney Airport[53] and Port of Newcastle[54] matters (principally clarifying the promotion of competition criterion), and a decision of the High Court in the Pilbara railways matter[55] (principally clarifying the natural monopoly and public interest criteria). More recently, in the access dispute between and Port of Newcastle Operations Ltd, the ACCC factors have been clarified and certain errors in the ACCC's determination corrected (see Box 2 below). This clarification of how complex regulatory rules and legal principles should be interpreted and applied can also further assist regulators refine and improve their decisions.

[50] *Review of the Competition Law Provisions of the Trade Practices Act, 2003* (**Dawson Report**).
[51] Attorney-General's Department, Administrative Review Council Publication, *What decisions should be subject to merit review?,* available at: <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>.
[52] *Fels, A. 2012, The Merits Review Provisions in the Australian Energy Laws, Submission to the Review of the Limited Merits Review Regime,* [4.3.6].
[53] *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124.
[54] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115.
[55] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

Box 2: Example of merits review correcting substantial regulatory errors

The access dispute between Glencore Coal Assets Australia Pty Ltd (**Glencore**) and Port of Newcastle Operations Pty Ltd (**PoN**) under the NAR is a recent example of merits review being used to correct substantial regulatory errors.

In this dispute, the ACCC arbitration determination was appealed to the Australian Competition Tribunal (the **Tribunal**) (the **Access Proceedings**).[56] PoN successfully sought review of the ACCC's final determination which required PoN to reduce the charge for the service by approximately 20% to $0.61 per gross tonne in two circumstances: where Glencore owned or chartered a vessel which moved through the Port to load Glencore's coal and where Glencore brought itself within the extended PMA Act definition of "owner" in respect of a vessel that moved through the Port to load Glencore's coal. In determining the amount of the charge by reference to the value of the port assets, the ACCC deducted from the value of the port assets the financial contributions made by past users of the port to build the port. The Tribunal disagreed with the ACCC's approach and increased the service charge from $0.61 to $1.0058 after declining to deduct from the value of the Port assets the financial contributions made by past users of the Port to build the Port. The Tribunal also confined the scope of the service charge to the circumstance where Glencore owned or chartered a vessel.

Glencore sought judicial review of this decision by the Full Court[57] and PoN subsequently appealed the Full Federal Court's decision to the High Court.[58] Relevantly, the High Court agreed with the Tribunal's approach for determining the navigation of the service charge.

The highly technical nature of this decision highlights the importance of merits review in regulation for complex services where special expertise is required.

The importance of merits review for access decisions has been recognised in numerous policy reviews of the NAR. Most recently in the Harper Review, the Panel noted:[59]

The Australian Competition Tribunal fulfils an important role in both the development and the administration of Australia's competition laws.

Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of making a wrong decision are likely to be high.

The Panel favours empowering the Tribunal to undertake a merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

In its response to the Harper Panel's recommendations, the Government agreed that the Tribunal's merits review role under Part IIIA should remain in place.[60]

2.3.2 Inclusion of merits review would support the objectives of the ACCC arbitration framework

ASX considers that including merits review in the ACCC arbitration framework aligns with the objectives of the draft CICS legislation. It will promote sound decision-making on complex matters relating to the scope of regulation and terms of access to CS service. This will in turn ensure that access is provided on terms that are fair and reasonable, while supporting necessary investment in CS infrastructure.

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[56] *Application by Port of Newcastle Operations Pty Ltd [2019] ACompT 1.*
[57] *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194.
[58] Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd *(2021) 395 ALR 209* [2021] HCA 39.
[59] Harper Review Final Report, p 439.
[60] Australian Government Response to the Competition Policy Review, p 43.

Most obviously, merits review prevents erroneous regulatory decisions, which can have a negative effect on users, either through prices that are too high and/or under-investment in CS infrastructure.

Merits review also provides for checks and balances on decision-making, which in turn will promote longer term predictability, stability and certainty in the regulatory framework. This stability and regulatory certainty will support efficient investment in CS infrastructure, including investment required to support ongoing system security and deliver services demanded by users.

Judicial review is not an alternative to merits review as it does not provide the same scope to correct regulatory error. There are several well-known weaknesses of judicial review for correcting regulatory error, including:

- judicial review is only concerned with whether the regulator made an error of law, and will not address errors of fact or failures of reasoning in a regulator's decision;
- judicial review is more cumbersome and often more expensive than merits review, which can make it an impractical option, particularly for service users;
- judicial review provides limited remedies, in contrast to merits review which can allow not only setting aside an erroneous decision but also making the correct or preferable decision in its place.[61]

Judicial review alone therefore will not be sufficient. Merits review is necessary to provide for appropriate checks and balances on complex regulatory decision making.

2.3.3 Decisions under the CS service access regime should be subject to merits review, at least for an initial period

In its review of what decisions should be subject to merits review, the AG Department noted:

"The principle objective of merits review is to ensure that those administrative decisions in relation to which review is provided are correct and preferable:

- *Correct – in the sense that they are made according to law; and*
- *Preferable – in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts*

This objective is directed to ensuring fair treatment of all persons affected by a decision.

Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced".[62]

ASX considers that ensuring *correct* and *preferable* decisions will be particularly important under the new CS services access regime. This will be the first time that CS services (or any similar services) have been subject to economic regulation in Australia. As regulation starts to be applied to these services, there will be complex decisions to be made in relation to the appropriate scope of regulation and various matters relating to pricing (e.g. the appropriate methods for valuing CS assets and determining the rate of return). In this context, there will be a significantly greater risk of regulatory error compared to an established regulatory regime.

ASX notes that in many established regulatory regimes the potential for regulatory error has been reduced over time as various parameters have been "locked in" (e.g. asset values) and/or codified through industry rules.[63] Indeed, in some

[61] Administrative Review Council, *The Scope of Judicial Review - Discussion Paper,* 2003, p 48, available at: <https://coat.asn.au/wp-content/uploads/2019/11/JudicialReview21_3.pdf>.
[62] Attorney-General's Department, Administrative Review Council Publication, *What decisions should be subject to merit review?,* [1.1], available at: <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>.
[63] An example of this is the framework for electricity network regulation, where the framework for price determination is codified in prescriptive rules (Chapters 6 and 6A of the National Electricity Rules) and asset values are locked in and periodically rolled forward.

industry-specific regulatory regimes (e.g. under the national energy laws and the telecommunications access regime) merits review rights have been rolled back as the regime has become more established and scope for regulatory error has been reduced.

However in the case of new regulatory regime, such as the proposed ACCC arbitration framework for CS services, ASX considers that merits review is essential to guard against the risk of regulatory errors which may impact both service providers and users. Merits review would provide parties seeking arbitration with comfort that a correct and preferable decision will be made, ultimately ensuring transparency and accountability around decision-making.[64] Rather than increasing barriers to arbitration as suggested in the Explanatory Materials, ASX believes that in this way merits review will provide greater confidence to parties seeking arbitration.

As under the NAR, merits review could be conducted by the Australian Competition Tribunal, on application by one or both of the parties to the dispute. The Tribunal is a specialist review body constituted with judicial and lay members having knowledge of, or experience in, industry, commerce, economics, law or public administration. Accordingly, the Tribunal is uniquely competent to deal with complex legal, economic and factual matters, such as those posed by regulating CS services.

To protect against the risk of merits review becoming 'embedded' in the regime, the CICS legislation could provide for a review of the merits review framework after ten years. At that time, Treasury could decide to either maintain merits review, amend the framework, or repeal it.

2.3.4 Key regulatory regimes with effective and streamlined merits review can be drawn on to implement an effective and efficient merits review process

Merits review can (and has been) implemented in a way that provides for efficient and streamlined review of regulatory decisions and minimises cost and process delays.

Relevant precedents are available within the CCA in the merits review processes under the NAR and the Merger Authorisation Regime. These merits review regimes have been refined over time, incorporating elements designed to make the review process for efficient, effective and accessible for stakeholders.

Decision-making under these two regimes (particularly the NAR) has parallels with the ACCC arbitration framework for CS services, which implies that a similar form of merits review is likely to be appropriate. For example:

- The Minister's declaration of a service and negotiate-arbitrate model is a key component of both the ACCC arbitration framework and the NAR.
- Under each regime decision-making is complex and often involves large bodies of material to be considered by the regulator, including detailed submissions, expert reports, economic modelling, factual and legal submissions and historical evidence. This complexity increases the risk of regulatory error.
- The ACCC arbitration framework includes time limits for the ACCC to make decisions, similar to NAR arbitration determinations and authorisation applications. While this generally assists all parties, in circumstances where the ACCC faces resourcing constraints this can increase the risk of regulatory error.

Given these parallels between the ACCC arbitration framework and each of the Merger Authorisation Regime and NAR, it is likely to be appropriate for elements of the merits review processes in these regimes to be adopted in the ACCC arbitration framework.

[64] Attorney-General's Department, Administrative Review Council Publication, *What decisions should be subject to merit review?,* [1.5], available at: <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>.

ASX proposes the following elements should be adopted from these other merits review regimes within the CCA, which have been refined over time, to formulate an efficient and effective merits review process for the proposed regime:[65]

- **Standing for merits review should be limited to a person affected by the administrative action of the designated minister or the ACCC.**

- **An application for review of a decision should be required within a strict timeframe.** Parties applying to the Tribunal for a review of a decision should be required to make an application within a defined time period after a final determination has been made. This will prevent any unnecessary delay.

- **Strict timeframes should be imposed on the tribunal for merits review.** For example, the NAR requires all decisions made on review under Part IIIA to be made within 180 days, unless certain events take place which stop the clock in this period.[66] The Merger Authorisation rules also require the tribunal to make a decision within 90 to 120 days, as applicable, unless extended. Strict timeframes have resulted in the tribunal conducting multiple expeditious reviews, for example Application by Controlabill Pty Ltd [2021] ACompT 6 (review completed in 67 days) and Application by Tabcorp Holdings Limited [2017] ACompT 1 (review completed in 101 days).[67] ASX considers that a timeframe similar to the NAR could be implemented as a part of a merits review process in the proposed regime, however amendments could be made to limit the extent to which the clock stopping provisions are exercised by the tribunal and parties.

- **The tribunal's decision should only be based on information which was available to the regulator in the original decision making process.** This element incentivises parties to provide all evidence to the initial decision maker and prevents any ability to game the regulatory process.

These elements for limiting merits review create a streamlined merits review process that ensures that the benefits of the review outweighs any costs to stakeholders.

[65] This includes some new elements proposed in submissions in response to the Competition and Consumer amendment (National Access Regime) Bill 2021 exposure draft legislation (the **NAR Bill**), intended to make the NAR merots review regime more streamlined and effective.
[66] CCA, s 44ZZOA.
[67] See timeline for Application by Controlabill Pty Ltd [2021] ACompT 6 here: https://www.competitiontribunal.gov.au/concluded-recent-mattes/act-3-of-2021; and timeline for Application by Tabcorp Holdings Limited [2017] ACompT 1 here: https://www.competitiontribunal.gov.au/concluded-recent-mattes/act-1-of-2017.

ATTACHMENT B: – ASX comments on specific provisions of the draft CICS legislation

Part 1 – ASIC rule-making framework

Draft CICS Legislation reference	ASX comment
Division 1: Preliminary	
Section 822E(4)	ASX notes that including a reference to the CS services rules in this section may undermine oversight of the operating rules by the Minister. See section 1.1.1 of Attachment A.
Section 828 – Meaning of *CS service*	ASX notes that this definition is very broad – potentially including a range of upstream and downstream services offered by market participants which simply rely on access to CS infrastructure, but are subject to competition. If the definition is not amended and remains broad, then it is essential that there be clear criteria and appropriate consultation around Ministerial determination of services that may be the subject of ASIC rules. The drafting of the definition could be improved – the use of the word 'it' is unclear. See section 1.2 of Attachment A, and comments on s 828B below.
Division 2: Regulation of CS Services: CS Services rules	
Section 828A – CS services rules	Given the ACCC powers to determine prices for CS services under the arbitration framework, ASX suggests the ASIC rule making powers should exclude the ability to make rules in relation to pricing. In particular, the ASIC rules should not address pricing methodologies for CS services, or how the "efficient costs" of providing CS services ought to be assessed. See section 1.3 of Attachment A.
Section 828B – CS services in relation to which rules may impose requirements	**Determination criteria:** ASX suggests that in line with the recommendations made in the 2015 Conclusions Paper and Regulatory Expectations, amendments should be made to the determination criteria to make clear that the ASIC rule-making framework should only apply to monopoly CS Services. See section 1.2 of Attachment A. **Consultation:** ASX suggests that the expectations for consultation be made explicit in the Explanatory Materials to to include consultation with all potentially affected stakeholders, including the provider and users of the service that is the subject of the proposed determination. See section 1.1 of Attachment A. **Amending/revoking the determination**: Additional explanation may be beneficial around the circumstances in which a Minister will amend or

Draft CICS Legislation reference	ASX comment
	revoke a determination, particularly in circumstances where a service becomes subject to competition. See section 1.1.2 of Attachment A. **Incorrect cross-reference**: Reference to failure to consult as required by subsection (5) should potentially refer to subsection (6).
Section 828C – Obligation to comply with CS services rules	ASX has no comments.
Section 828D – Obligation to notify ASIC in respect of breach	
Section 828E – Alternatives to civil proceedings	
Section 828F – Failure to comply with CS services rules does not invalidate transaction etc.	
Section 828G – ASIC's power to give directions to person not complying with obligations	
Section 828H – Matters to which ASIC must have regard when making rules	
Section 828J – ASIC to consult before making rules	
Section 828K – Ministerial consent to rules required	
Section 828L – Emergency rules: consultation and consent not required	ASX suggests amending subsection (c) to appropriately reflect emergency circumstances. See section 1.4 of Attachment A.
Section 828M – Amendment and revocation of CS services rules	ASX has no comments.
Division 3: Other provisions	
Section 828N – ASIC may give advice to Minister	ASX has no comments.
Section 828P – ACCC may give advice to Minister	
Section 828Q – RBA may give advice to Minister	
Section 828R – Exemptions by the regulations or by ASIC	

Part 2 – ACCC arbitration framework

Draft CICS Legislation reference	ASX comment
Division 1: Preliminary	
Section 153ZEA – Objects of Part	ASX has no comments.
Section 153ZEB – Definitions	In relation to the definition of *CS service* to monopoly services, see comments on s 828B of the Corps Act (above).
Section 153ZEC – How this Part applies to partnerships and joint ventures	ASX has no comments.
Section 153ZED – Constitutional limits on operation of this Part	
Section 153ZEE – This Part binds the Crown	
Division 2: Declaration of CS services	
Section 153ZEF – Minister may declare a CS service	**Declaration criteria:** ASX suggests including criteria for Ministerial declaration of services, and a requirement that the Minister be satisfied of these criteria – similar to s 44H(4) of the NAR. Declaration criteria should be modelled on those in the NAR (s 44CA). See section 2.1 of Attachment A. **Declaration to be based on evidence-based recommendations to the Minister:** ASX suggests including a requirement for a recommendation to the Minister from the NCC (or in the alternative, the ACCC) on whether a declaration should be included in the proposed regime – similar to sections 44G and 44CA(1) of the NAR. See section 2.2.1 of Attachment A. **Public consultation:** ASX suggests including a express reference to a requirement for stakeholder and public consultation, prior to the making of a declaration decision. See section 2.2.1 of Attachment A. **Merits Review:** ASX suggests including provisions for effective and efficient merits review of the Minister's declaration – similar to section 44K (and related provisions) of the NAR. See section 2.4 of Attachment A.
Section 153ZEG – Amendment and revocation of declarations	Additional explanation may be beneficial around the circumstances in which a Minister will amend or revoke a declaration, particularly in circumstances where a service becomes subject to competition. See section 2.1.5 of Attachment A.

Draft CICS Legislation reference	ASX comment
Division 3: Negotiations of access	
Section 153ZEH – Notification of negotiations under this Division	ASX has no comments
Section 153ZEI – Ending negotiations under this Division	
Section 153ZEJ – Conducting negotiations under this Division	
Section 153ZEK – Information request by bargaining party – general	
Section 153ZEL – Information request by bargaining party – miscellaneous rules	
Division 4: Notification of access disputes	
Section 153ZEM – Notification of access disputes	ASX has no comments.
Section 153ZEN – Withdrawal of notifications	
Division 5: Arbitration of access disputes	
Section 153ZEO – Parties to the arbitration	ASX has no comments.
Section 153ZEP – Determination by Commission	ASX considers that section 153ZEP(3)(a) should be amended to require the ACCC to issue a draft determination – consistent with the NAR (section 44V(4)). Issuing a draft determination is an important part of the process for arbitrating a dispute. As noted in the Explanatory Materials, it provides an opportunity for the parties to make submissions on matters that are material to the determination allows the ACCC to further consider its analysis and position before making its final determination.
Section 153ZEQ – Restrictions on access determinations	ASX considers that this provision should be aligned with the equivalent provision of the NAR (section 44W). In particular the restrictions on preventing existing users from obtaining sufficient access and exercising pre-notification rights should apply equally to all existing users – regardless of whether they are related to the service provider. This departure from the usual restrictions on access determinations is not explained in the Explanatory Materials.
Section 153ZER – Matters that the Commission must take into account	**Determination criteria:** ASX suggests including mandatory consideration of certain criteria, including: the pricing principles; the legitimate business interests of the provider (or holder of the Australian CS facility licence), and the provider's (or holder's) investment in the CS facility; the interests of all persons who have rights to access the CS service; and the public interest, including the

Draft CICS Legislation reference	ASX comment
	public interest in having competition in markets (whether or not in Australia) – similar to section 44X(1)(a) of the NAR. See section 2.3.1 of Attachment A. **Pricing principles:** ASX suggests including a requirement for access prices to include a return on investment commensurate with regulatory and commercial risks – similar to section 44ZZCA of the NAR. See section 2.3.2 of Attachment A.
Section 153ZES – Time limit for Commission's final determination	ASX has no comments.
Section 153ZET – Arbitration reports	
Section 153ZEU – Commission may terminate arbitration in certain cases	
Review by Tribunal	**Merits review:** ASX suggests including provisions for effective and efficient merits review of ACCC determinations – similar to section 44ZP (and related provisions) of the NAR. See section 2.4 of Attachment A.
Division 6: Procedure in arbitration	
Section 153ZEV – Subdivision D of Division 3 of Part IIIA to apply	ASX has no comments.
Section 153ZEW – Commission's powers if information not provided in negotiations	
Section 153ZEX – Sharing information with and requesting advice from ASIC and RBA	
Division 7: Effect of determinations	
Section 153ZEY – Operation of final determinations	ASX has no comments.
Section 153ZEZ – Effect and duration of interim determinations	
Division 8: Variation and revocation of determinations	
Section 153ZFA – Variation and revocation of determinations	ASX has no comments.
Division 9: Enforcement and remedies	
Section 153ZFB – Prohibition on hindering access to declared services	ASX has no comments.

Draft CICS Legislation reference	ASX comment
Section 153ZFC – Division 7 of Part IIIA to apply	
Division 10: Miscellaneous	
Section 153ZFD – Register of determinations	ASX has no comments.
Section 153ZFE – Provisions of Division 8 of Part IIIA to apply	