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Regulators and Capital Markets Branch
Financial System Division
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COMPETITION IN THE PROVISION OF CLEARING AND SETTLEMENT SERVICES – MINISTERIAL INSTRUMENT

ASX Limited (**ASX**) welcomes the opportunity to comment on the exposure draft of the *Corporations and Competition (CS Services) Instrument 2024 (the instrument)*, made under the recently passed competition in clearing and settlement (**CICS**) legislation.

As expressed in ASX's submission to the exposure draft legislation, ASX supports the policy intent behind the legislation and draft instrument, and 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. Implementation of the CICS legislation represents the next step in the evolution of the regulatory framework.

The draft instrument specifies the classes of CS services in relation to which ASIC may impose requirements under the CS services rules, and the declared CS services to which access may be the subject of negotiations or arbitration under the new ACCC regime. Broadly, ASX considers the scope of services covered to be consistent with the overall policy intent of the CICS legislation.

ASX's submission makes two suggestions to ensure the effective operation of the CICS legislation:

1. That the explanatory materials include an explanation of the matters taken into account by the Minister in making the instrument.
2. That a mechanism for review and amendment is clearly articulated, to provide for any changes to the instrument in the event that competition emerges in any of the services covered by the instrument, or a new service is provided on a competitive basis.

Further information on these suggestions is provided below.

Definition of cash equity

ASX considers that the definition of cash equity contained in the instrument is aligned with industry's understanding of a financial product covered by the term 'cash equity'. The definition aligns with the approach taken by ASX with regard to preparing management accounts for the clearing and settlement of cash equities, published as part of ASX's commitment to transparent and non-discriminatory pricing under the Code of Practice for Clearing and Settlement of Cash Equities in Australia.

Factors taken into consideration

In making a determination regarding the CS services subject to the CS services rules, section 828B(5) of the *Corporations Act 2001 (Corporations Act)* provides that the Minister must have regard to:

- > the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system, of making the determination; and
- > the likely regulatory impact of making the determination; and
- > the likely effect of making the determination on the safety, fairness and effectiveness of competition in the provision of CS services

The Minister must also have regard to any matters raised by ASIC, the ACCC or the RBA.

In making a declaration regarding the CS services subject to the negotiation or arbitration regime, section 153ZEF of the *Competition and Consumer Act 2010 (CCA)* provides that the Minister must have regard to:

- > the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system, of making the declaration; and
- > the likely regulatory impact of the declaration; and
- > 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 CS service.

The Minister must also have regard to any matters raised by the ACCC.

For both instruments, the Minister may also have regard to other matters considered relevant, for example relevant international standards and international commitments.

ASX considers that the Explanatory Statement would benefit from an explanation of how the above matters were taken into account in making the instrument. This would provide transparency to stakeholders that the requirements of the legislation have been fulfilled, and provide a clear explanation of the Minister's rationale for the scope of services covered.

Mechanism for amending the instrument in the future

While ASX considers that the instrument achieves the policy intent at present, it is not clear how the instrument would be amended if new CS services were provided on a competitive basis, or if CS services currently provided and captured by the instrument became subject to competition. In particular, ASX seeks clarity on the circumstances in which amendments would be considered and enacted.

ASX notes that section 828B(7) of the *Corporations Act* provides for the Minister to amend or revoke a determination on the scope of services covered by the ASIC CS services rules, in like manner and subject to like conditions of making the instrument. Similarly, section 153ZEG of the *CCA* allows the declaration on the scope of the arbitration regime to be amended or revoked in the same way. The 'like manner' requirement means that the Minister would need to have regard to the factors outlined in any amendment process.

While these provisions set out the process for amending or revoking the instrument, it is not clear what would trigger that process. In the event that competition emerges in one of the services covered by the instrument, ASX considers that it would be beneficial for all stakeholders if submissions could be made to ASIC and/or the ACCC requesting review and potential amendment of the instrument. These submissions would inform the advice given to the Minister, which the Minister must have regard to when making, amending or revoking the instrument.

Consideration may also be given to requiring the regular review of the instrument by imposing a sunset requirement, requiring the consideration and remaking of the instrument after a specified period of time. Given the content of the instrument, ASX considers three years to be an appropriate sunset period.

We would welcome the opportunity to discuss the matters raised in this submission in more detail. We note that regulators may request follow up bilateral meetings with stakeholders if more information is required in formulating their advice to the Minister on the draft instrument. If you have any questions, please contact myself or Shelby Brinkley, Senior Policy Adviser, at [REDACTED] or on [REDACTED]

Kind regards

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