



31 January 2020

Office of General Counsel
ASX Limited
20 Bridge Street
Sydney NSW 2000

ATTENTION: DIANE LEWIS

By email: regulatorypolicy@asx.com.au

Dear Ms Lewis

ASX Consultation Paper - CHES Replacement Tranche 1 Rule Amendments

Chi-X Australia Pty Ltd (**Chi-X**) is grateful for the opportunity of providing a submission in response to the ASX Consultation Paper on the first tranche of rule amendments to accommodate the replacement of CHES.

Chi-X has comments on the following aspects of the CP:

- (a) The consultation is inappropriately being undertaken by ASX Limited and not ASX Clear or ASX Settlement;
- (b) The preferential treatment given to clients and customers of ASX Limited over those of entities with which ASX Limited competes;
- (c) the nature of the consultation text itself, including:
 - (i) the generally worded nature of the proposed new rules;
 - (ii) the lack of precise links between consultative text and proposed rules making it difficult to follow a policy proposal through to associated linked text.
- (d) The inadequate consultation on the competition effects of the proposed rules and which may result in the rules being incapable of being lawfully made.

Chi-X is of the view that taking into account these circumstances, the CP should be withdrawn and re-published by ASX Clear and ASX Settlement, with a focus on those rules and proposals relating to the clearing and settlement licences held by those entities. This submission has been shared with the Council of Financial Regulators given its possible relevance to the work of the Council in this area.

1. The role of ASX Limited

The CP is consulting on proposed amendments to the Operating Rules of ASX Clear and ASX Settlement. These rules specify that there are two approved market operators: ASX Limited and Chi-X Australia¹.

The CP and consultation process is managed by ASX Limited².

It is fundamentally inappropriate for the CP to be conducted by the same entity that is licenced to operate the markets with which Chi-X competes. The persons conducting the consultation on behalf of ASX Limited presumably have obligations to that entity which must place them a position of unresolvable conflict in managing the consultation process on behalf of ASX Clear and ASX Settlement. For example, ASX Clear and ASX settlement have obligations to treat the markets operated by ASX Limited and Chi-X on an equal footing. That must conflict with the fundamental obligation of a person engaged by and acting on behalf of ASX Limited with respect to the markets operated by ASX Limited.

2. Preferential treatment of ASX Limited Clients

Not surprisingly, a consultation undertaken by ASX Limited gives preference to ASX Limited clients over those of entities with which ASX Limited competes, including Chi-X.

The CP states:

Changes are being made in respect of account and holder functionality, including...Creating the framework for additional non-mandatory data fields to be populated in a Holder Record... the types of non-mandatory data fields under consideration include: –

- *Tax and residency details for mFund (to assist issuers to comply with their CRS and FATCA reporting obligations)*

The CP does not outline why this functionality is available to mFund issuers only.

Chi-X competes with mFund, which is jointly operated by ASX Limited and ASX Settlement³.

It is inappropriate for ASX Limited to use the clearing and settlement operations of ASX Clear and ASX Settlement, which are currently the subject of by statutorily mandated monopoly functions, to enhance the services provided by ASX Limited businesses that are subject to competition.

¹ See ASX Clear Operating Rules – Procedures, Section 2 definition Approved Market Operator and the equivalent procedure in the ASX Settlement Operating Rules – Procedures.

² See, for example, page 2 of the consultation.

³ See ASIC Class Order 13/1621

Chi-X understands that the operational aspects of the CHES replacement project also feature an issuer portal to which Chi-X does not have access.

The Regulatory Expectations of the Council of Financial Regulators state:

ASX should facilitate access to its cash equity CS services (including data) on commercial, transparent and non-discriminatory terms. Non-discriminatory terms in this context are terms that do not discriminate in favour of ASX-affiliated entities.

It is not clear how the mFund proposals in the CHES replacement programme, including those outlined in the CP, comply with this regulatory expectation.

3. The CP Text and Structure

Some of the rules being consulted upon represent an ambit claim for the ASX to have the power to collect and distribute a new and significant data pool.

The ASX is using the regulated function of clearing and settlement as the source of its power to collect and store data which will then be distributed and used for unrelated and generally described commercial purposes.

Some of these commercial purposes are areas where ASX is currently subject to competition by entities that do not have statutorily mandated monopolies and will not have access to the data being used by ASX to compete with them.

This possible outcome is not discussed in the CP.

The rule changes by which this outcome is achieved are definitions: see row number five in the table in Attachment A.

The use of the data is subject to a generally worded principle that “Users [only receive] information if they are party to a transaction or business purpose which the information relates to”. “Business purpose” is not prescribed and it is not an easy task to identify the relevant rules that provide safeguards or controls on the use of this data. As a result, it is not clear what ASX entity will be ‘using’ the data in this manner. The CP does not discuss the competition implications of this provision at all and only lightly touches upon the privacy implications.

In these circumstances, the CP does not address critical aspects of the rules on which it consulting.

4. The Potential Impact of the CP’s Failure to Enable the Assessment of the Impact of the Proposals on Competition

The power to disallow changes to the rules in the CP has been delegated to ASIC. The Responsible Minister has issued guidelines for the exercise of powers delegated to ASIC under chapter 7 of the *Corporations Act 2001*, which state that:

The delegate should, to the degree practicable, ensure that the exercise of any delegated power promotes competition. In meeting this condition, the delegate should therefore strive to:

- *facilitate competition between entities who are subject to the regulation; and*
- *consider the impact of matters under the delegation on other stakeholders that may be affected by the decision, including other market operators.*

The nature of the consultation may undermine the ability of the delegate to discharge this obligation in respect of the rules being consulted upon, including in the following ways:

- (a) it fails to identify those areas or proposals that may impact on competition and in some circumstances makes it very difficult if not impossible to identify those areas;
- (b) it fails to identify those areas where rules are being made pursuant to the clearing and settlement licence held by ASX and so are governed by the legislative framework relating to those licences, including RBA stability obligations.

The problematic nature of this feature of the CP is highlighted in the area of sub-registers. ASX is proposing a number of services for issuers that may impact on the division within Australia of investor and issuer sub-register functions. This may have significant long term impacts on the pricing and cost of these functions, given the historical track record of the ASX in its pricing policies.

Further the CP consults on rules that may give ASX clients, that are not Chi-X clients, enhanced services over those provided to Chi-X clients (see sections 2 and 3 above). The lack of any clarity on how the rules will operate in these circumstances make it impossible for the delegate to consider, in compliance with the guidelines, the impact of the rules on competition.

In these circumstances, Chi-X is of the view that the CP should be withdrawn and re-issued by ASX Clear and ASX Settlement in compliance with the regulatory obligations and expectations of those two entities.

I hope this submission is of assistance, please do not hesitate to contact us if you have any queries.

Yours sincerely



Chi-X Australia Pty Ltd