

ATTACHMENT – RESPONSE TO COUNCIL OF FINANCIAL REGULATORS (CFR) REVIEW AND RECOMMENDATION 44 OF THE FINANCIAL SYSTEM INQUIRY

CFR REVIEW RECOMMENDATIONS

Recommendation 1: Confirm a policy stance that supports openness to competition in the clearing market for ASX securities and implement legislative changes to facilitate safe and effective competition in accordance with the Minimum Conditions.

Recommendation 2: The Agencies publicly set out regulatory expectations for ASX's conduct in operating its cash equity clearing and settlement facilities until such time as a competitor emerged.

Recommendation 3: Implement legislative changes that would allow the relevant regulators to impose requirements on ASX's cash equity clearing and settlement facilities, consistent with the regulatory expectations, if these expectations were either not being met or were not delivering the intended outcomes.

Recommendation 4: Implement legislative changes to grant the ACCC an arbitration power to provide for recourse to binding arbitration in disputes about the terms of access to ASX's monopoly cash equity clearing and settlement services.

FINANCIAL SYSTEM INQUIRY

Recommendation 44

Corporations Act 2001 ownership restrictions

Remove market ownership restrictions from the *Corporations Act 2001* once the current reforms to cross-border regulation of financial market infrastructure are complete.

RESPONSE:

- The Government endorses the conclusions and recommendations set out in the CFR's *Review of Competition in Clearing Australian Cash Equities*.
- Recognising the potential benefits of competitive discipline, the Government supports a policy stance of openness to competition (Recommendation 1). At the same time, the Government acknowledges that there remain strong forces in favour of a single provider. Furthermore, ASX's planned development of distributed ledger technology for the Australian equity market could have significant implications for the role of central clearing, which may reduce the likelihood of a competing central counterparty (CCP) emerging.
- Against this background, the Government will ask the CFR to develop regulatory expectations for ASX's conduct in operating its monopoly cash equity clearing and settlement facilities (Recommendation 2).
- In accordance with the CFR recommendations, the Government will ask the CFR to set out the minimum conditions for safe and effective competition in a publicly stated policy (Minimum Conditions). Given that a competing CCP may not emerge, or at least not for some time, the policy would set out the high-level requirements of the Minimum Conditions. After this step is completed, and as part of the overall legislative package, the Government will develop and consult on high-level provisions within the legislative framework to support the Minimum Conditions (Recommendation 1).

- The Government will then develop and consult on legislation to provide the relevant regulators with rule-making and arbitration powers, which would underpin both the Minimum Conditions and the regulatory expectations (Recommendations 3 and 4).
- Given the uncertainty over competitors emerging and the potential for technological developments to outpace regulation, specific requirements under the Minimum Conditions would not be developed or implemented until such time as a committed competitor emerged.
- While the Government will consider any clearing or settlement facility licence applications on their merits as they arise, it notes that the CFR Review states that the relevant regulators would not be in a position to recommend the approval of a competing cash equity CCP licence application until the specific requirements of the Minimum Conditions had been implemented. As the Government is likely to give considerable weight to the regulators' views, in practice a licence is unlikely to be approved before the Minimum Conditions are in place. It is anticipated that this would take no less than 18 months from the time that a committed competitor emerges.
- The Government recognises the potential benefits of ASX's investment in new technology for the Australian market. While implementing the recommendations of the CFR Review, the Government and the CFR agencies commit to working with ASX as it progresses its technology initiative. At the same time the Government notes that the regulatory expectations should seek to ensure that technological developments do not preclude effective competition in post-trade services.
- Finally, ASX Limited is currently subject to the unusually strict requirement that individual voting power of its shareholders can exceed 15 per cent only by the making of a specific regulation. This constraint was imposed when ASX was a monopoly provider of trading, as well as clearing and settlement services, and when it had a more substantial role as a co-regulator. In August 2010, the market supervision of Australia's domestic licensed financial markets was transferred from ASX to ASIC, altering the ASX's regulatory role.
- Now, as the Government opens its stance toward competition with ASX, it is appropriate that a more flexible approach be taken toward individual control of ASX that would put it on a more level playing field for capital raising purposes, but would also acknowledge that it remains an important entity in the financial system and so should be subject to an appropriate limit on ownership concentration. Financial sector entities such as banks and insurers are subject to 15 per cent limits in ownership concentration but these can be exceeded with the Treasurer's approval. The Financial System Inquiry recommended that ASX should be subject to a restriction equivalent to other financial sector entities (Recommendation 44). The Government supports this recommendation.
- Accordingly, the Government will, concurrently with implementation of the measures outlined above, develop and consult on amendments to make ownership restrictions on ASX Limited consistent with similar limits on other important financial sector entities with a 15 per cent cap that can be exceeded where the Treasurer is satisfied that it is in the national interest.