

The Treasury
Langton Crescent
PARKES ACT 2600

1 Bligh Street
Sydney NSW 2000
t +61 2 9233 0100
e info@nsx.com.au
w nsx.com.au

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Sent by email to: FMIConsultation@treasury.gov.au

To whom it may concern,

RE Financial Market Infrastructure Regulatory Reforms

Introduction

National Stock Exchange of Australia ('NSXA') is pleased to provide this response to The Treasury's Consultation on Financial Market Infrastructure Regulatory Reforms.

NSXA is generally supportive of the proposed reforms, especially to the extent that the reforms seek to clarify and streamline the current powers provided to Australian Securities and Investments Commission ('ASIC'), the Reserve Bank of Australia ('RBA') and the Minister.

NSXA has provided more specific feedback below.

Consultation Questions

Establishing a crisis management regime

NSXA is generally supportive of the crisis management regime and views this as a positive step toward protecting investors. Paragraph 1.48 of the Explanatory Memorandum states that the 'RBA's primary objectives will be to maintain the overall stability of the financial system and provide for the continuity of CS facility services that are critical to the functioning of the financial system.' NSXA is supportive of the fact that shareholders and other stakeholders will be protected with this holistic approach. Other than noting that statutory management is to be used as a measure of last resort, there is not much commentary on the extent to which the RBA will be required or will seek to provide consideration to the preservation of the CS facility's business/status quo where the RBA needs to access its resolution powers.

Transfer powers

Regarding the power of the RBA to transfer some or all of the shares or business of a body corporate to a consenting body corporate, NSXA views the term 'consenting' to be key. There does not appear to be sufficient consideration as to a situation where a consenting body corporate cannot be identified. Therefore, the question is: on the assumption that the other powers granted to the RBA are not appropriate, would the Commonwealth step in and operate the CS facility until such time that an appropriate party can be identified?

Further, NSXA is of the view that the Minister's power to decide that consent is not required should be used sparingly as it suggests that a transfer can be imposed on a body corporate. This could have unwanted effects on the CS facility as well as the receiving body corporate.

Paragraph 1.138 of the Explanatory Memorandum states that any transfer of shares or alteration in the status of members of a company is void except with either the consent of the RBA or statutory manager. NSXA does not oppose



this. NSXA does, however, seek clarification on the application of this requirement where a body corporate or the group is listed. For example, with the powers proposed to be granted to the RBA and the statutory managers, it would make sense that the listed entity is suspended for the duration of the statutory manager's appointment. The shareholders of the entity would also need to be consulted.

NSXA agrees that the transfer power should lie with the regulators and not with the statutory manager. The proposed changes give discretion to the RBA based on its assessment. Paragraph 1.168 of the Explanatory Memorandum clarifies that '[w]here a related body corporate has an Australian Market Licence under Part 7.2 of the Act, a Derivative Transaction Reporting Licence under Part 7.5A or a Benchmark Administrator Licence under Part 7.5B, the RBA must consult with ASIC as soon as possible.' However, considering the role that ASIC plays in assessing applications and granting licences, NSXA is of the view that ASIC should, at a minimum, be consulted even where a related body corporate does not hold the abovementioned licences but should ideally, in all cases, review the 'new' body corporate or bridge entity as an applicant. The proposed changes regarding fit and proper persons, in NSXA's view, support this view.

Where a transfer occurs, the changes grant ASIC the power to issue a CS facility licence to the 'receiving' body on an expedited basis. NSXA is of the view that this entity should be assessed by ASIC, with reference to licence requirements, and the RBA and ASIC should be satisfied that the 'new' body corporate can operate a CS facility.

The changes in relation to bridge entities state that the bridge arrangement is temporary, and that the RBA must complete an exit arrangement as soon as possible. NSXA agrees with this stance, but it would be helpful to know what options would be available to the RBA should this situation arise. Assuming that there is only one CS facility in Australia and the resolution requires a bridge entity, would one of the exit options be to wind up the CS facility and require the market to transact using certificates or some other mechanism? The Competition in Clearing and Settlement Reforms were a positive step forward however NSXA suggests that more may need to be done to facilitate this type of competition.

Statutory management

The Explanatory Memorandum states that 'statutory management would generally be used as a measure of last resort, however this is ultimately at the discretion of the RBA'. NSXA is supportive of the extension of the appointment of statutory management regime to related entities. Strict and formal guidelines should be published by Government, as to when these arrangements can be used.

It is noted that a statutory manager '...may only alter the body corporate's constitution or rules if it considers it is necessary or convenient for facilitating the performance of the statutory manager's functions and duties, or the exercise of powers...' and that this power of the statutory manager is '...intended to override any restrictions that are present in the Act, the body corporate's constitution, any contracts, agreements or arrangements to which the body corporate is a party, and any listing or operating rules of a financial market on which the body corporate is listed'. NSXA suggests that this power should be used in consultation RBA and ASIC, considering their respective and joint roles in regulating CS facility licensees. Although acknowledging that these changes would occur during a 'crisis' event, inappropriate changes could have unwanted, negative effects going forward, even after the statutory management arrangement is dissolved.

The RBA is given the power to appoint a statutory manager and the oversight of the statutory manager, however, there is no mention of the RBA having to consult with ASIC on this aspect. Would it be expected that the RBA would do so, considering the joint responsibility for regulation of the CS facilities? Further, where the RBA appoints itself as the statutory manager, who will have oversight of the RBA in this regard?

Minister authorisations

In relation to the maximum amount of \$5 billion that is contemplated to be potentially authorised as financial support per event and noting that a smaller amount may be appropriated, NSXA questions whether this amount is too high. Furthermore, the proposed section 846A allows the Minister to amend an authorisation made under the section but only as to the amount that is provided for financial assistance and not for any other purpose and not to revoke it. Should new information arise that would suggest that the authorisation under this section, whether financial or not, was not appropriate, what would the expected course of action be?

Repayment of costs



There are also numerous references to requirement for repayment throughout the proposed reforms, including repayment to the RBA and the Commonwealth, however there is no mention of repayment time frame. Also, there is also no mention of a situation where a CS facility cannot repay the cost and what course of action will be taken in that scenario, if at all.

In relation to the repayment of costs incurred by the RBA in appointing statutory management, NSXA does not oppose this but does propose that the RBA be required to keep these costs minimal, to the maximum extent possible, especially where the body corporate's crisis is financial in nature. It would seem to be counterproductive to take action to 'fix' a CS facility's financial position and then impose a significant debt to be repaid to the RBA. Again, there is also no mention of a period for repayment.

Overseas CS facility crisis

The NSXA is supportive of the RBA and overseas regulators working together to ensure stability in Australia, noting that the 'home' regulator will be primarily responsible for resolving a distressed body corporate. NSXA is somewhat speculative about whether the financial assistance should be available to an overseas CS facility if Australians are not affected by the overseas CS facility's crisis.

Protections

The NSXA is supportive of the protections granted throughout the proposed changes, including the stays, moratoriums, and protection from criminal proceedings.

Crisis prevention (RBA powers)

The proposed changes encapsulate changes that CS facility licensees must notify the RBA once they become aware of the existence of changes in their circumstances. With ASIC also being responsible for supervision of these licensees, NSXA suggests that this notification should go to both regulators. Although acknowledging the RBA's role in monitoring financial stability, it would certainly be of interest to ASIC to receive this information as well. The legislative changes should reflect this or there should be an obligation for the RBA to share this information with ASIC. NSXA notes that there is a provision outlining the fact that where notification is provided to ASIC of material changes, additional notification is not required to be provided to the RBA. A similar provision should be included to the opposite effect.

The proposed changes require notice to ASIC where the licensee has been directed to change its rules. The proposed changes contemplate the scenario where this notice is not provided within the disallowance period. Considering ASIC's role in disallowing rules in the ordinary course of business, it seems somewhat counterproductive to exclude ASIC from this process. It would surely be possible for ASIC to expedite and review any changes to rules or to be consulted on this type of direction.

NSXA does not oppose variation or revocation of directions issued by the RBA however NSXA wonders whether more clarity could be provided as to when a variation or revocation may occur, that is, can a direction be revoked after it has been actioned?

NSXA agrees with the provision of the power to issue Resolvability Standards as this will be helpful in providing clarity to the market. NSXA would question the decision to not make compliance with resolvability standards recurring.

Where the RBA is afforded additional powers that mirror ASIC's existing powers, including the ability to exempt licensees from certain obligations, NSXA notes that these powers should be used together with ASIC. In NSXA's view, this would avoid any disagreement as to the approach taken.

Enhancing and streamlining ASIC's licensing and supervisory powers

NSXA is very supportive of the proposed changes focusing on the redistribution of powers to ASIC and RBA. NSXA does have the following questions:

- Where a proposal to acquire more than 15% of the voting rights in a domestically incorporated licensee needs approval, how will ASIC regulate this for an entity that is listed? What if the shareholder accumulates a 15% holding through numerous smaller purchases over a short or long period?



- Does Treasury proposed that there will be no checks and balances on ASIC's new power to disallow a Market Operator's rules? NSXA is of the view that this power should remain with the Minister. Alternatively, NSXA firmly believes that there should be an appeals process.
- With reference to the requirement to ensure individuals performing certain roles in CS facility licensee, a derivative trade repository licensee and a benchmark administrator licensee are fit and proper persons, will ASIC need to retrospectively check and approve individuals currently in such positions? Further, there does not seem to be any judicial review of this test, as is the case for banning directors, so this would be a lesser test which the NSXA believes should be at the same level.

Conclusion

As detailed above, NSXA is of the view that there are certain aspects of the proposed changes that need further consideration or review. For example, the transfer powers provided to the RBA for crisis management that may require some review, including consent of a 'receiving' body and suitability of a 'receiving' body to accept the role of operating a CS facility. Furthermore, some review may be required around repayment of costs incurred by the CS facility as part of the crisis management regime.

Overall, the proposed changes do not seem to consider an entity that is, or is part of a group which is, listed and in terms of crisis prevention, there are some aspects which seem to separate the RBA and ASIC's joint regulation of CS facilities which may require clarification or review.

NSXA is, however, generally supportive of the changes which have been proposed especially to the extent that these changes promote investor protection and stability of the financial system. Further to this, where the proposed changes look to clear uncertainty and ambiguity is viewed positively by NSXA.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Chan Arambewela', is positioned below the text 'Yours faithfully,'.

Chan Arambewela
Chief Operating Officer