

20 April 2023

Capital Markets Unit
Financial System Division
Treasury
Langton Cres
Parkes ACT 2600

By email: CICS@treasury.gov.au

Dear Sir/Madam

Competition in the provision of clearing and settlement services

1. This submission has been prepared by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) and relates to the exposure draft *Financial Sector Reform (Competition in Clearing and Settlement) Bill 2023* (the **Bill**) and accompanying Explanatory Memorandum, which Treasury released for consultation on 23 March 2023.
2. The Committee thanks Treasury for the opportunity to comment on the Bill and Explanatory Memorandum.
3. The Bill proposes amendments to the *Corporations Act 2001* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth). Those amendments are intended to facilitate competitive outcomes in the provision of clearing and settlement (**CS**) services for Australia's financial markets.
4. The two core elements of the Bill are:
 - (a) a framework for the making of CS services rules; and
 - (b) a framework for resolving disputes with respect to access to CS services provided by a CS facility licensee.
5. The Committee has only considered the former framework. Whilst the Bill provides the framework for the CS services rules, the Committee notes that whether these rules have a substantive effect on competition will ultimately depend on the rules as drafted. These rules are not yet available for review.
6. The Committee wishes to make the following comments on the effectiveness of the framework as contemplated in the Bill.

Definition of CS services

7. The Bill seeks to introduce the following definition of “CS service” into a new section 828 of the Corporations Act:

“a service that can only be provided if it has access to a clearing and settlement facility, or to data used in the operation of a clearing and settlement facility”.

8. This is an important definition, as the relevant rules that the Australian Securities and Investments Commission (**ASIC**) would have the power to make are “in relation to CS services”.
9. The Committee has the following comments on the draft wording of this definition.
10. Firstly, it is not clear from this definition that the term would extend to services provided by the CS facility licensee itself (as the definition only refers to services which require “access” to the facility, presumably services provided by competitors or users). If the definition of “CS services” does not cover the services provided by the CS facility licensee, then the Committee believes that this would significantly limit the ability for ASIC to impose rules relating to the conduct, governance and activities of the CS facility licensee. The Committee submits that, if the intention of the Bill is to permit the making of rules to regulate the CS facility licensee’s conduct, governance or activities, then the focus of the “CS service” definition should be on the service to which access is required, rather than the service which can only be provided if access to the facility is granted.
11. Secondly, on a related note, if the purpose of the Bill is to give ASIC greater powers to regulate the conduct, governance and activities of CS facility licensees, the Committee queries whether the rule-making power should extend to matters relating to the provision of services by CS facility licensees more generally, regardless of whether there are particular concerns regarding competition.
12. Thirdly, the Committee queries whether the focus on “access” is the optimal approach. Competition may not require or involve “access” to the facility or data at all, but rather the separate provision of services by a third party of competing services. If the purpose of the Bill is to facilitate competition, the Committee submits that it may be appropriate for the ASIC rule-making power to extend to the conduct, governance and activities of the incumbent CS facility licensee in its provision of services, to the extent that those matters may impact an emerging or existing competitor.
13. Finally, the Committee submits that limiting the definition to services that can only be provided with access to the licensed CS facility or its data could be potentially problematic. For example, a CS facility licensee that wishes to challenge the validity of a rule may argue that the particular service is not one which can only be provided with access to the relevant CS facility. It may be the case that a service can technically be provided without access to the CS facility licensee’s service, but that such service can only be provided in an inefficient way, or at a price which is not competitive with the incumbent CS facility licensee, if access to the licensee’s service is not provided.

Rules “in relation to CS services”

14. Under proposed section 828A of the Corporations Act, the proposed CS services rules may deal with the activities, conduct or governance of CS facility licensees (and

others), in relation to CS services (noting the submissions above on the present confusion of the scope of that definition).

15. Paragraph 1.30 of the Explanatory Memorandum provides a list of examples of matters that could be covered in the rules, including rules with respect to a CS facility licensee's governance arrangements, arrangements for handling conflicts, the licensee's accountability, investment in core infrastructure, and cessation of services. In each case, these matters could apply and are relevant to the CS facility licensee generally as an organisation. They are matters that could have an impact beyond the CS services and access to the CS facility.
16. The Committee queries whether some rules impacting the above-mentioned matters could be open to challenge as they may not be strictly "in relation to CS services". The Bill appears to contemplate that there may be an indirect relationship between governance and CS services. However, it is silent as to whether the "activities" or "conduct" of the CS facility licensee could similarly have an indirect relationship with the CS services. The Committee anticipates that ASIC would therefore need to consider whether a particular proposed rule is in respect of the activities, conduct or governance of the CS licensee, and then consider whether the rule had a relationship with the CS services or not. The Committee anticipates that this could be a challenging exercise at times.
17. The Committee appreciates that the main aim of this proposed rules framework is to facilitate competition and access to the incumbent CS facilities. Safety, fairness and effectiveness of competition are matters to which the Minister and ASIC must have regard.
18. However, as discussed above, if the intention is to give ASIC increased powers to regulate the conduct, governance and activities of CS facility licensees more broadly, then this should be made clear.

Application of the rules to "other persons"

19. The Bill provides that ASIC may make the CS services rules in respect of CS services provided by "other persons" who are prescribed by regulations (proposed paragraph 828A(1)(b) of the Corporations Act). The Explanatory Memorandum states that this will enable the rules to be "applied swiftly" to others if it becomes clear that this is necessary.
20. The Committee queries whether those "other persons" need to be prescribed by regulations. The Committee would expect that, if speed and response to market development is required, a Ministerial determination could be made specifying "other persons" to which the CS services rules would apply. This is consistent with the approach for Ministerial determination of CS services which are subject to the rules under proposed section 828B of the Corporations Act.

Ministerial determination by reference to matters

21. The Bill provides that a Ministerial determination may specify a class of CS services by reference to CS facilities "to which the CS services have access" (proposed subsection 823B(3) of the Corporations Act). Given that the purpose of the rules is to facilitate access, the Committee submits that the provision should be drafted prospectively by reference to CS facilities "to which the CS services may require

access” (noting the comments the Committee has expressed about the focus on “access” above).

22. The Committee also does not see any real benefit in separating out proposed paragraphs 828B(3)(a) and (b) of the Corporations Act to separately deal with access to the facility and access to data. However, the Committee appreciates that this drafting covers both elements of the definition of “CS services”, and submits that it should be reviewed against any changes that may be made to that definition.
23. If Treasury has any questions or would like to further discuss with any matters raised in this submission with the Committee, please do not hesitate to contact Pip Bell, Chair of the Financial Services Committee (pbell@pmclegal-australia.com).

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section