



13 July 2023

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Reforms to the *Payment Systems (Regulation) Act 1998*

ASX welcomes the opportunity to comment on the Government's proposals to update the *Payment Systems (Regulation) Act 1998* (Cth) (**PSRA**). We note the proposal to expand the regime under the current PSRA to accommodate new technology in the changing payments landscape, and agree with the importance of ensuring new risks relating to such changes are suitably addressed. At the same time, we submit there should be a balance between this objective and ensuring that entities which are already highly regulated are not subject to additional unnecessary regulation.

ASX submits that clearing and settlement facility licensees (**CS facility licensees**) should not be subject to regulation under the PSRA because these entities already operate in a highly regulated environment and have arrangements in place to mitigate systemic risk. Capturing the functions of such entities would be an unintended consequence of the proposals. Excluding CS facility licensees from the remit of the changes could be achieved by expressly excluding such entities as 'payment systems' and 'participants' under the proposed amended legislation.

Alternatively, we recommend that CS facility licensees are afforded an exemption under the PSRA.

The submission below addresses questions 3 and 16 of the consultation paper. We note that ASX will also provide a submission to the Government's consultation on "Payments System Modernisation (Licensing: Defining Payment Functions)".

1. Background to ASX CS facilities

ASX operates a significant part of the infrastructure that enables and supports Australia's financial markets.

The ASX Group operates two licensed markets (the ASX market operated by ASX Limited and the ASX 24 market operated by Australian Securities Exchange Limited) and four licensed clearing and settlement facilities:

- > ASX Clear Pty Limited – a central counterparty for the ASX market and other approved Australian equity markets;
- > ASX Clear (Futures) Pty Limited – a central counterparty for the ASX 24 market and for OTC interest rate derivatives;
- > ASX Settlement Pty Limited - a securities settlement facility for the ASX market and other approved Australian equity markets; and
- > Austraclear Limited – securities settlement facility for Australia's wholesale debt market,
(together **ASX CS facilities**).

The ASX CS facilities play a central role in Australia's financial markets, helping to increase efficiency and reduce systemic risk. ASX also performs other important regulatory functions as the operator of licensed clearing and settlement facilities. In particular:

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- CHES is the core system used by ASX Settlement to perform its functions and provide its services in connection with the clearing and settlement of trades and other post trade service facilities under the relevant operating rules.
 - Austraclear provides a wide range of depository, registration, cash transfer and settlement services for debt instrument securities in financial markets in Australia and the Asia-Pacific region.

2. Clearing and settlement facilities regulatory framework

The policy objective of the PSRA is to ensure that regulators and the Government are able to address new risks to the payments system landscape as this evolves and increases in complexity. The proposals include:

- expanding the existing definitions of ‘payments system’ and ‘participant’ to ensure such entities are appropriately regulated;
- introducing new ministerial powers to be exercised in the ‘national interest’ (rather than the public interest). Such powers could include designating payment systems, allocating responsibilities under the PSRA to another regulator, and issuing directions to regulators.

The *Corporations Act 2001* (Cth) (**Corporations Act**) is the principal Australian legislation for the regulation of post trade infrastructure. Part 7.3 of the Corporations Act provides a licensing framework for domestic clearing and settlement facilities.

CS facility licensees operate in a highly regulated environment overseen by two independent government agencies – the Australian Securities and Investments Commission (**ASIC**) and the Reserve Bank of Australia (**RBA**). ASIC has responsibility to assess each CS facility licensee on compliance with its licence obligations under the Corporations Act. The scope of these assessments can include any or all of the obligations of a CS facility licensee under section 821A(c) to have adequate arrangements for operating a facility.

Pursuant to section 823CA of the Corporations Act, the Reserve Bank of Australia annually assesses the ASX CS facilities against the Financial Stability Standards for Central Counterparties and the Financial Stability Standards for Securities Settlement Facilities, to ensure that the CS facility licensees have complied with the FSS and done all things necessary to reduce systemic risk.

CS facility licensees also have various regulatory reporting obligations both to ASIC and the RBA. This includes providing an annual report to ASIC outlining how ASX has complied with obligations for its clearing and settlement facility licences (pursuant to Section 821E of the Corporations Act) and the requirement to provide certain reports to the RBA relating to ASX CS facilities, including against ongoing compliance with the Financial Stability Standards.

Given the highly regulated environment in which CS facility licensees already operate, and the level of supervision by RBA and ASIC, ASX submits that there is no regulatory benefit in these licensees being covered by the scope of the proposed legislation. If CS facility licensees were subject to additional regulation, this would create an administrative burden which is not necessary or justified.

3. Intention of the proposed changes

The consultation paper suggests there are two key reasons to update the PSRA: the existing definitions in the PSRA may not capture new payment systems and participants, and the RBA is precluded from addressing certain matters. ASX takes the view that neither of these reasons apply to CS facility licensees.

CS facility licensees are not new payment systems or participants. Commentary in the consultation paper makes it clear that the intention is to expand the remit of the PSRA to ‘new and emerging payment systems’¹ which is consistent with Recommendation 6 of the Payment Systems Review². The Payments System Review contemplated the risks associated with new and emerging payment systems in the retail space, such as digital wallets. There is a fundamental difference in the nature of the payments systems contemplated by the Payments System Review and the consultation paper, and

¹ See page 4 of the Consultation Paper

² <https://treasury.gov.au/sites/default/files/2021-08/p2021-198587.pdf>

the currently highly-regulated clearing and settlement facilities. As explained above ASIC and the RBA have a specific mandate to regulate CS facility licensees, meaning there is already a high level of supervision of these systems.

ASX submits that the reforms to PSRA are not intended to capture CS facility licensees and as such, it should be made expressly clear that these facilities are not captured. ASX submits that it is appropriate for CS facility licensees to continue to be regulated under the current arrangements.

4. Proposed changes to definitions

The consultation paper proposes the following changes to two definitions:

- updating the 'payments system' definition to include bilateral and multilateral arrangements, with a particular focus on 'payments' and 'transfers of value';
- in relation to 'participant', the proposal covers a broader range of entities operating, participating in or administering a payments system

These definitions are very broad. While flexibility in the regime is desirable, it is important for highly regulated entities, such as CS facility licensees, to have certainty about the application of regulatory regimes. Whilst ASX understands the overriding intention of these changes is to ensure relevant stakeholders are appropriately regulated, and that these definitions are intended to be flexible and 'future-proofed', ASX is concerned that expanding the regulatory scope of the PSRA may potentially capture CS facility licensees and duplicate regulatory oversight which may cause confusion and create unnecessary costs.

We also note the interaction that the ASX CS facilities have with the Reserve Bank Information and Transfer System (RITS). RITS is used to settle payment obligations between banks and other institutions approved by the RBA. Clearing participants settle routine margin payments in respect of ASX derivatives positions and cash equity market obligations via cash transfers in Austraclear, which settle via RITS. For ASX Settlement, movement of securities in CHES between delivering and receiving accounts will only occur after receipt of a message from RITS indicating that cash has settled across exchange settlement (ES) accounts. Settlement occurs simultaneously within Austraclear and CHES after cash settlement across the ES account within RITS. Movement of securities in Austraclear will only occur once a message is received from RITS that the cash leg has settled across ES accounts. Given this interface, ASX considers that the relevant 'payment system' in this scenario is RITS.

For the reasons outlined above, ASX submits that CS facility licensees should be expressly excluded from these definitions.

5. Exemptions under the current Act

The current PSRA provides for the regulation of payment systems and purchased payment facilities. As mentioned above, we understand that the intention of the revised legislation is to expand the regulatory architecture.

We note that section 9(3) of the existing PSRA allows the RBA to declare, by legislative instrument, that the PSRA does not apply to a specified facility or class of facilities. Further, there are a number of facilities which are currently exempted. It is our view that this provision should continue to remain in the proposed legislation.

If the changes to the definitions are to be implemented as proposed, and CS facility licensees are not expressly excluded, ASX submits that it would be appropriate for CS facility licensees to be afforded an exemption in accordance with the current framework.

6. International comparisons

We have reviewed the position in other jurisdictions referred to in the consultation paper and consider some analogies can be drawn in support of ASX's submission. Section 41(2) of the *Financial Services (Banking Reform) Act 2013* (UK) expressly excludes securities settlement systems³ and systems operated by a recognised clearing house⁴ from the meaning of 'payment system'. The stated purpose of the *Financial Services (Banking Reform) Bill* (as provided

³ A 'securities settlement system' means a computer-based system, and procedures, which enable title of units of a security to be evidenced and transferred without a written instrument, and which facilitate supplementary and incidental matters.

⁴ A 'recognised clearing house' has the meaning given by section 285(1) of FSMA 2000

in Explanatory Notes to this bill) was to implement the recommendations of the Independent Commission on Banking. The stated aims of that Independent Commission had a focus on creating a more stable and competitive basis for UK banking in the longer term⁵.

In addition, we note that the *Retail Payment System Act 2022* (NZ) has a focus on retail payments. Even though clearing and settlement facility licensees are not specifically excluded from this Act, key definitions (in section 7) have a strong focus on payments in the retail space (for example, 'retail payment' means 'a payment by a consumer to a merchant for the supply of goods or services'). We consider that these definitions are unlikely to cover CS facility licensees.

It is ASX's view that the PSRA should adopt a similar approach to the UK and expressly exclude CS facility licensees.

If you have questions please contact us. We welcome the opportunity to discuss the issues in this submission in further detail.

Yours sincerely



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⁵ Independent Commission on Banking Final Report Recommendations September 2011
<https://webarchive.nationalarchives.gov.uk/ukgwa/20120827143059/http://bankingcommission.independent.gov.uk/>