



**CHARTERED SECRETARIES
AUSTRALIA**

Leaders in governance

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Manager, Financial Markets Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: CFR-Review-FMI@treasury.gov.au

Dear Treasury

***Council of Financial Regulators: Review of Financial Market
Infrastructure Regulation***

Chartered Secretaries Australia (CSA) is the independent leader in governance, risk and compliance. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency. Our Members have primary responsibility in listed companies to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules as well as developing and implementing governance frameworks in public listed companies. Our members have a thorough working knowledge of the operations of the markets, the needs of investors and the Listing Rules, as well as compliance with the Corporations Act (the Act). We have drawn on their experience in our submission.

General comments

At the time of the announced proposed merger of Singapore Stock Exchange (SGX) with ASX Limited, CSA Members were most concerned to focus on the governance arrangements that would be in place, to ensure that market integrity is retained. The joint announcement by ASX and SGX was at pains to point out that existing regulatory oversight arrangements would remain in place, with any changes to the listing rules and ASX operating rules subject to scrutiny by the Australian Securities & Investments Commission (ASIC). Both parties confirmed that the regulatory regime for the operation of the Australia market would remain the preserve of the Australian Government and its regulators.

CSA welcomes the Review of Financial Market Infrastructure Regulation (the Review) by the Council of Financial Regulators (the Council) as it addresses the issue that foreign ownership of the company ASX Limited could compromise the Australian regulatory framework. The Review notes that the existing regulatory framework surrounding Australia's financial market infrastructure (FMI) has been perceived to work well, but it has 'not had to operate in a situation where a foreign holding company, that is not subject to direct Australian supervision and oversight, has had control of any systemically significant FMI'.¹

We will confine our comments to director liability, the making of listing rules and governance arrangements in our submission.

¹ p 14

Liability of directors and others involved

The Review notes that ‘the current regulatory framework may not adequately deal with conglomerate entities that operate systemically important FMIs in Australia through subsidiaries. Currently, the sanctions can only be applied to the subsidiary licensee company rather than the parent company of the licensee, a subsidiary of the licensee, a related body corporate of the licensee, or individual directors or officers. Moreover, breach of a licence condition or direction by a licensee does not currently give rise to a civil or criminal penalty for directors, officers or other individuals involved in the contravention.’²

CSA is a founding member of the ASX Corporate Governance Council and notes that the Corporate Governance Principles and Recommendations defines governance as:³

the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations’. It encompasses the mechanisms by which companies, and those in control, are held to account.

Directors have a fiduciary duty under common law (and, if the business is incorporated under the Corporations Act, under statute) to act in the best interests of the organisation they serve. As stewards of the company, it is important that they be able to be held accountable for their oversight and decision making. It would be a bad governance outcome should the directors of the parent company of the licensee, a subsidiary of the licensee, a related body corporate of the licensee, or individual directors or officers of a FMI not be able to be held accountable should they be in breach of their duties.

However, CSA is of the view that, if a subsidiary or related body corporate of the licensee, or individual directors or officers of the subsidiary/related body corporate, are actively involved in a contravention, they should be subject to sanctions, but CSA would be very concerned with, and would definitely not support, new legislation that, if implemented, would in effect deem such companies, directors and officers to be automatically liable for a contravention by a licensee simply because they are related to the licensee in this way.

In terms of the proposed power that regulators be able to pre-approve directors of FMIs and their parent entities, while CSA is broadly supportive of this, CSA would wish to comment on the detail of any such power, to ensure transparency and efficacy in the exercise of such power. The consultation makes reference to the ‘fit and proper’ test that certain senior individuals must meet under APRA’s fit and proper prudential standards, which CSA broadly supports.

The making of Listing Rules

CSA strongly supports the Council’s view that ‘the characteristics and rigour of ASX’s listing rules, and the quality of the monitoring and enforcement of its listing rules by ASX, are critical to promoting market integrity and investor confidence in Australia’s equity capital markets’.⁴

² p 19

³ The quote comes from Justice Owen in HIH Royal Commission, The Failure of HIH Insurance Volume 1: A Corporate Collapse and Its Lessons, Commonwealth of Australia, April 2003 at page xxxiii and Justice Owen, Corporate Governance — Level upon Layer, Speech to the 13th Commonwealth Law Conference 2003, Melbourne 13-17 April 2003 at page 2.

⁴ p 27

However, CSA has serious concerns with the reform proposal that:

ASIC be given an explicit power to direct a licensed market operator to make listing rules with specified content, with the consent of the Minister, where ASIC views that the making of that rule is appropriate and proportionate for the enhancement and/or protection of market integrity. Following a direction, a licensed financial market operator would be required to make the rules, and be responsible for monitoring and enforcing compliance with them.

At present neither the Minister nor ASIC have explicit power to make or require ASX (or other market operators) to make new listing rules, if, for example, the Minister or ASIC considers it necessary to promote market integrity and investor confidence. CSA accepts that the Council is keen to ensure that, if a systemically important Australian market operator were acquired by a foreign entity, particularly by a foreign entity that maintains its own listing service with its own listing standards in a foreign jurisdiction, the incentive structure of the Australian market operator continue to develop and improve its listing rules could change. CSA also accepts that the Council is concerned about investor perceptions that such an acquisition will result in Australian listing standards coming under the influence and ultimate control of a foreign entity, which may not be perceived as maintaining the same standards as the Australian market operator.

However, providing the powers to ASIC and the Minister to introduce listing rules that provide particular protections to Australian investors and/or enhance the integrity of participating and investing in the relevant market is a very wide power indeed, and is not confined to circumstances where the FMI comes under the influence and ultimate control of a foreign entity. Indeed, the Review notes that 'ASIC and the Minister will have a much greater ability to influence the market operator even if the power is not exercised'.

CSA opposes the proposed power as set out in the Review.

Our concerns are related to the following issues:

- The power as set out is very broad and has the potential for the Minister and ASIC to give directions as to the making of listing rules without due consideration of their impact on listed entities and other stakeholders and the practical consequences that could arise.
- A lack of consultation invariably leads to unintended consequences — good intentions do not necessarily result in a good regulatory framework. To achieve the efficient operation of the market, there must be due and proper consultation on the rules of the market.

CSA Members note that in their dealings with ASX Limited, the sound knowledge of the market and of participant needs is a key factor in ensuring that the listing rules achieve a balance between commercial needs and investor protection. CSA Members further note that a regulator's role is inherently different from that of a market operator — this necessary balance between commercial needs and investor protection cannot be achieved without consultation with stakeholders.

CSA recommends that ASIC and the Minister be given the power to direct ASX or any market operator of a FMI to consult on certain matters, including the introduction of listing rules as recommended by ASIC and the Minister.

This would ensure that ASIC and the Minister would have the ability to influence the market operator, while ensuring that due and proper public consultation was undertaken with stakeholders to ensure that the impact of the proposals could be considered.

CSA also strongly opposes the two alternative approaches set out in the Review, that:

- ASIC or the Minister be given the power to make separate statutory listing rules — CSA is also of the view that requiring listed entities to comply with two sets of listing rules creates uncertainty and risks operational issues
- responsibility for setting, monitoring and enforcing all listing rules be transferred to ASIC, or another independent third party — CSA is also of the view that it is inappropriate to pursue such a significant change on market integrity or efficiency grounds.

Governance arrangements

Australia's corporate governance framework is predicated on the continuing role of the ASX Corporate Governance Council, which brings together 21 stakeholder groups, ranging from directors, CEOs, and company secretaries to retail and institutional investors. The Council has, since its inception in 2002 and the release of the first edition of the *Corporate Governance Principles and Recommendations* in 2003, played a vital role in improving disclosure and changing behaviour.

With the requirement to report against the recommendations in the Council's guidelines given force by the ASX listing rules, the principles and recommendations have seen Australian corporations come to terms with and change practices in relation to a range of governance issues. These include:

- clarity on the separation of the respective roles of the board and management and separation of the role of chairman and CEO
- non-executive director independence and board evaluation
- the role of board committees in board nominations, executive remuneration, audit and risk management
- the development of company policies on trading in securities, continuous disclosure, remuneration, shareholder communication and the standards of ethical behaviour expected of the board, senior executives and all employees, and
- the need to have board oversight of the management of material business risks.

The guidelines are not static. In 2007 a second edition was published, in 2010 the principles and recommendations were revised to include new reporting requirements on gender diversity on boards and in senior management and in 2011 the ASX Corporate Governance Council undertook an internal review and targeted consultation on the Principles and Recommendations, with a particular focus on Principle 7 on risk management and the reporting of not only financial but also non-financial information.

No stakeholder group would disagree with the claim that Australia's governance framework is fundamentally different from and better than it was eight years ago as a result of the 'if not, why not' regime that the ASX Corporate Governance Council has put in place. Investors have access to much more information which they use to judge how well the company is run. Board decision making is much more transparent. Utilising the 'if not, why not' approach allows companies to tell their story to investors, so that they have access to the thinking behind decisions.

ASX Limited currently plays an essential role in supporting the work of the Corporate Governance Council. It provides very senior people to chair the Council and assist its ongoing review of the efficacy of the guidelines in changing behaviour. The Council has the backing of ASX's compliance arm in monitoring and enforcing compliance with the relevant listing rule.

At the time of the proposed merger of ASX Limited with Singapore Exchange (SGX), one of the issues that CSA was concerned about was what would happen to Australia's corporate

governance framework, given that SGX also has a code of corporate governance in place, operating on a 'comply or explain' principle which, while similar to the 'if not why not' approach, includes key differences. We had questions as to whether the merged entity would want two codes operating or seek to amalgamate them, and who would be consulted if amalgamation was the favoured approach.

CSA recommends that ASIC and the Minister be given the power to direct ASX to consult publicly on any proposal to amalgamate or replace the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* with the corporate governance code operated by any other entity.

Furthermore, **CSA also recommends** that ASIC and the Minister have the power to direct that the ASX Corporate Governance Council's Principles and Recommendations apply across any equity market operation. In such circumstances, the Council could be encouraged to invite other market operators to be included on the Council.

In preparing this submission, CSA has drawn on the expertise of the members of our national policy committee, Legislation Review Committee. We are more than happy to discuss with you the issues highlighted in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tim Sheehy', written in a cursive style.

Tim Sheehy
CHIEF EXECUTIVE