9 February 2024

Lauren Hogan
Capital Markets Unit
Financial System Division
The Treasury, Langton Crescent
Parkes ACT 2600

By email: FMIConsultation@treasury.gov.au

Dear Lauren,

Cboe Australia (**CXA**) appreciates the opportunity to make submissions to Treasury's Consultation on Financial Market Infrastructure Reforms (**FMI Reforms**) (**the Consultation**).

CXA operates a licensed financial market that represents approximately 20% of the total average daily volume in the Australian equities market. Our focus as a market operator is to provide trusted, liquid, and resilient markets in support of a larger ecosystem that serves and benefits all investors. CXA's roots are that of an Australian industry led initiative to challenge the monopoly rent outcomes delivered by the then vertically integrated ASX trading platform and clearing monopoly, and accordingly, CXA is a strong proponent of regulatory settings that promote innovation, competition, and access.

Since 2021, CXA has been part of the Cboe Global Markets (**Cboe**) group. Cboe is a leading global FMI provider, operating equities, derivatives, FX, and crypto markets, clearing houses, and index providers across North America, Europe, and Asia-Pacific. Cboe is a strong proponent for innovation, competition, and access across the markets it participates in globally.

CXA is generally supportive of the FMI Reforms. Our hope is that the FMI Reforms will improve the clarity and effectiveness of Australia's regulatory framework and promote consistency with peer jurisdictions and global good practice.

The following sections provide CXA comments on the FMI Reforms. They are organised into overarching comments, followed by specific comments under the same headings as those used in the explanatory materials.

Overarching Comments – The need for competition

CXA is strongly of the view that a lack of competition was a critical factor in the negative outcomes of the initial CHESS replacement project, where the monopoly clearing provider's failed technology migration cost the financial industry several hundred million dollars' worth of wasted output. The failed replacement project continues to have a negative impact on Australian investors, participants, markets, and the broader financial system, while the Australian clearing environment continues to be characterised by high fees, a lack of product innovation, and outdated infrastructure. A viable competitive clearing option would prevent these outcomes. In the absence of competition, monopoly providers are incentivised towards behaviours which maximise their gain at the expense of their stakeholders. The Australian experience demonstrates that regulation alone is not sufficient to change these incentives or behaviours. In other words, competition is needed to create accountability.

In this same vein, we consider that competition will provide benefits for crisis management.

Crisis management has two main objectives, ideally achieved whilst minimising the use of public funds:

1. Preserving financial stability; and
2. Continuing the critical functions performed by CCPs.

Strong competition on an interoperable basis helps achieve these objectives. Specifically:

1. Interoperability arrangements provide clearing members with increased opportunities for netting and lead to a reduction in outstanding gross exposures in the system, thus decreasing systemic risk and resulting in a positive effect on financial stability.
2. In a competitive, interoperable environment, it is easier for clearing members to transfer their operations to another CCP. This feature is very useful during the recovery phase. If a successful recovery doesn't seem likely, clearing members can be encouraged to move their business to another CCP. As a result, the CCP in recovery can be wound down more easily as business will naturally move away in a controlled manner.
3. In resolution, the critical function of the CCP can more easily be substituted by the other interoperable CCP(s) in a timely manner. As the interoperable CCP already has operational and risk management capabilities, the time of substitution can be significantly reduced with lower operational risks. The same benefit would also apply if a bridge CCP is to be used as a resolution measure and the time to have the bridge CCP operational would be significantly reduced. In an optimal scenario, the interoperable CCP could even replace such a bridge CCP.
4. The continuance of the critical function by the interoperable CCP also helps in minimising the impact and disruption for other market participants and financial markets in general.

Fundamentally, interoperable competition allows for an easier way of substituting the critical function of a CCP in recovery or resolution in a timely manner, thereby, helping achieve the key objectives of a crisis management regime.

For this reason, we consider that the support of competition should be part of the Government's and regulators' approaches when seeking to achieve the objectives of crisis management.

Specific Comments - Establishing a crisis management regime

CXA is supportive of the establishment of a crisis management regime. Our overall impression is that the regime is comparable to similar regimes in the UK and Europe and that this was part of a deliberate effort towards globally consistent crisis management.

The powers granted to the RBA are extensive in nature and scope. In this regard, CXA has two key comments:

1. While resolution powers need to be flexible and broad to enable resolution to respond to a crisis, it is equally important for clearing participants to have some level of certainty as to how a resolution regime would operate and what the likely implications of resolution are for them. Therefore, we consider it will be important for the RBA, to the extent it can, provide information about how it would be likely to use its resolution powers in practice.
2. Similarly, we consider it is important that there is active communication and transparency between the resolution authorities and the CCP to the maximum extent possible. It is in the best interest of financial stability that the transition from the CCP's recovery tools to the resolution authorities' resolution regime occurs as smoothly as possible and, most importantly, that the measures taken by one are not counterproductive to the measures taken by the other. For this reason, communication and transparency between the CCP and the resolution authorities is fundamental, both before and during a crisis. CXA requests Government consider issuing guidance alongside the legislation to the effect that the resolution authorities should share as much of their resolution planning as is reasonably possible with CCP operators.

Specific Comments - FMI Reform – Crisis prevention (RBA powers)

CXA is supportive of the crisis prevention powers that will be given to the RBA. CXA otherwise has no comments.

Specific Comments - Enhancing and streamlining ASIC's licensing and supervisory powers

CXA is broadly supportive of enhancing and streamlining the licensing and supervisory powers. On balance, CXA considers they will improve the regulatory framework, in particular by reorganising powers among ASIC, RBA and the Minister in a more operationally efficient manner. However, we also have the following comments:

1. In relation to FMI banning orders, we can see merit in the new framework including:
    a. further explanatory text as to how this regime is intended to interact with similar obligations for market operators under the Market Integrity Rules[1].
    b. further explanatory text as to what Government considers to be not fit or proper or not competent. CXA's concern is that without clear direction, these terms are open to

[1] See ASIC Market Integrity Rules (Securities Markets) 2017, rule 9.6.1 and ASIC Market Integrity Rules (Futures Markets) 2017, rule 4.4.1.

interpretation[2] and therefore will not provide sufficient certainty for FMI providers as to what standard individuals involved in FMI must meet. We note the existing obligations for market operators under the Market Integrity Rules require individuals to be of 'good fame and character' and 'high business integrity'. It is not clear to CXA why different standards (fit and proper and competent) are used for banning orders.

   c. clarity as to whether banning orders under s853H(1)(c)(i) and s853H(1)(d)(i) require the individual to in fact be a core officer at the time that ASIC forms its belief that the individual is not fit and proper or not competent. One possible interpretation of the provisions is that this is not required[3], and the provisions therefore apply to all individuals, even if there is no need or expectation for them to operate at the level of a core officer.

2. In relation to the changes to when a financial market or CS facility is taken to be operated in this jurisdiction, we request Government and/or the regulators provide guidance as to how the materiality factors are likely to be applied in practice. CXA considers the clarification of the regulatory perimeter could help promote competition by allowing foreign providers to consider soft or limited launches in Australia without a licence before graduating to full service delivery with a licence. However, this could only occur if the materiality factors are not applied so narrowly that even the most limited connection is considered material. CXA requests Government consider providing a clear direction to the Regulators that the interest of promoting competition must be considered when deciding whether to make a declaration under s791D(2) or s820D(2).

We appreciate Treasury's proactive engagement with CXA on this matter. If you have any questions, please contact me using the details below.

Yours sincerely,

Asika Wickramasinghe | Senior Legal Counsel
Cboe Australia Pty Ltd
M. 0422 636 916
E. awickramasinghe@cboe.com

[2] Noting that ASIC is entitled to have regard to 'any other matter (it) considers relevant' under s853(K)(2)(j) when assessing whether an individual is fit and proper, and that there is no guidance around what is meant by competent.

[3] Noting that ASIC is only required to have regard to whether the individual has ever been a core officer of certain entities under s853K(2)(a), as opposed to it being a requirement for a banning order under s853H(1)(c)(i).