

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer and Minister for Financial Services

Corporations Act 2001

Competition and Consumer Act 2010

Corporations and Competition (CS Services) Instrument 2024

Part 7.3A of the *Corporations Act 2001* (the Corporations Act) provides for the regulation of clearing and settlement (CS) services. Under section 828A of the Corporations Act the Australian Securities and Investments Commission (ASIC) may make CS services rules imposing requirements dealing with the activities, conduct and governance arrangements of CS facility licensees and associated entities, in relation to CS services. However, such requirements can only be imposed in relation to services of a type covered by determination made by the Minister under section 828B of the Corporations Act.

Subsection 828B(2) of the Corporations Act provides that the Minister may, by legislative instrument, make a determination specifying one or more classes of CS services in relation to which requirements may be imposed under the CS service rules.

Part XICB of the *Competition and Consumer Act 2010* (the CCA) provides for a negotiation and arbitration regime for persons seeking access to CS services. Under Part XICB of the CCA the negotiation and arbitration regime is only open to access seekers seeking access to a declared CS service. A CS service is a declared CS service if, among other things, the CS service is covered by a Ministerial declaration made under section 153ZEF of the CCA.

Subsection 153ZEF(1) of the CCA provides that the Minister may, by legislative instrument, make a declaration specifying one or more CS services, or one or more classes of CS services, as CS services to which access may be the subject of negotiation or arbitration under Part XICB.

The purpose of the *Corporations and Competition (CS Services) Instrument 2024* (the Instrument) is to:

- determine a class of CS services in relation to which ASIC may impose CS services rules.
- declare a class of CS services to which access may be the subject of negotiation or arbitration under Part XICB of the CCA.

Subsection 828B(5) of the Corporations Act provides that, in making a determination, the Minister must have regard to certain matters in relation to the effect of the determination, including the likely:

- effect on the Australian economy, and on the efficiency, integrity, and stability of the Australian financial system;
- regulatory impact of making the determination; and

- effect on the safety, fairness and effectiveness of competition in the provision of CS services.

The Minister must consider any matters raised in advice provided by ASIC, the ACCC or the RBA (collectively, the regulators) in relation to the determination. The Minister may also have regard to any other matters that they consider relevant (for example any relevant international standards or international commitments).

Subsection 828B(6) provides that the regulators may, on their own initiative, provide advice on whether the determination should be made. They must provide this advice in response to a request from the Minister. Regulators providing advice through the CFR on potential determinations following a public consultation process could be considered a provision of advice to the Minister. This would give the regulators an opportunity to provide input in determining the scope and text of the determination. Before making the determination, the Minister must have regard to such advice.

Subsection 153ZEF(4) of the CCA provides that, in making the declaration, the Minister must have regard to the following matters:

- the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system, of making the declaration;
- the likely regulatory impact of the declaration; and
- the extent to which a provider of a CS service that will be affected by the declaration has a monopoly or significant market power over the provision of the CS service.

Subsection 153ZEF(5) provides that the ACCC must advise the Minister when requested, or may provide advice at its discretion, relating to whether the declaration should be made.

The Minister must have regard to any matters raised by the ACCC in its advice. The Minister may also have regard to any other matters that they consider relevant (for example any relevant international standards or international commitments).

Subsections 153ZEF(6) and (7) provide that ASIC and the RBA may provide advice to the ACCC without being requested or the ACCC may request advice from the ASIC and the RBA for the purposes of advising the Minister on whether the declaration should be made.

An exposure draft of the Instrument was released for public consultation between 15 January and 1 March 2024. Five submissions were received from stakeholders, including clearing and settlement service providers, licensed market operators and industry associations representing market participants such as clearing and settlement facility participants, brokers and custodians. Stakeholders generally supported the amendments. Accordingly, no changes were made to the Instrument in response to the stakeholder submissions.

In accordance with the requirements outlined above, the Minister has considered the effect of making this determination on the Australian economy and financial system and the Instrument's regulatory impact. The ACCC has (at the request of the Minister) advised the Minister on whether the Instrument should be made and the Minister considered that advice in making this instrument.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. The instrument is subject to disallowance and sunseting in accordance with the *Legislation Act 2003*. The *Legislation Act 2003* provides that legislative instruments registered after 1

January 2005, other than exempt instruments, are automatically repealed on 1 April or 1 October on or immediately following the tenth anniversary of their registration.

The Instrument commenced on the day after it is registered on the Federal Register of Legislation.

Details of the Instrument are set out in [Attachment A](#).

A statement of Compatibility with Human Rights is at [Attachment B](#).

The Office of Impact Analysis (OIA) has been consulted (OIA ref: 22-02522) and agreed that the following reports from the Council of Financial Regulators (CFR) have been certified as equivalent to an Impact Analysis:

- *Competition in Clearing Australian Cash Equities: Conclusions*, December 2012
- *Review of Competition in Clearing Australian Cash Equities: Conclusions*, June 2015
- *Safe and Effective Competition in Cash Equity Settlement in Australia: Response to Consultation*, September 2017
- *Regulatory Expectations for Conduct in Operating Cash Equity Clearing and Settlement Services in Australia*, September 2017
- *Minimum Conditions for Safe and Effective Competition in Cash Equity Clearing in Australia*, September 2017
- *Minimum Conditions for Safe and Effective Competition in Cash Equity Settlement in Australia*, September 2017

The executive summaries and recommendations contained in each report are available in Attachment 2 of the Explanatory Memorandum for the *Treasury Laws Amendment (2023 Measures No. 3) Act 2023* and can be accessed through the Australian Parliament House website. The regulatory costs for this measure is estimated to be \$0.27 million per year averaged over ten years.

Details of the *Corporations and Competition (CS Services) Instrument 2024*

Part 1 – Preliminary

Section 1 – Name

This section provides that the name of the Instrument is the *Corporations and Competition (CS Services) Instrument 2024* (the Instrument).

Section 2 – Commencement

The Instrument commenced on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

The Instrument is made under the *Corporations Act 2001* (the Corporations Act) and the *Competition and Consumer Act 2010* (the CCA).

Section 4 – Definitions

This section contains definitions of terms used in the Instrument.

A reference to **cash equity** is a reference to any financial product that is:

- a share in a body;
- an interest in a managed investment scheme or notified foreign passport fund;
- a legal or equitable right or interest in a share in a body, or an interest in a managed investment scheme or notified foreign passport fund;
- an option to acquire, by way of issue, a share in a body, an interest in a managed investment scheme or notified foreign passport fund, or a legal or equitable right in a share in a body or interest in a managed investment scheme or notified foreign passport fund; or
- a right (whether existing or future and whether contingent or not) to acquire, by way of issue, any of the above.

This definition is intended to match what industry generally considers is a financial product covered by the term ‘cash equity’.

For example, the definition is intended to capture:

- a share in a listed company (a share in a body)
- exchange traded funds (interest in a managed investment scheme)
- transferable custody receipts (equitable interest in a share in a body);
- depository interests in foreign equity securities (equitable interest in a share in a body); and
- company issued options, due to the operation of the existing definitions of derivative and security in the Corporations Act (an option to acquire, by way of issue, a share, interest or right in a managed investment scheme).

The definition is not intended to capture:

- securities based on debt instruments such as debentures or Commonwealth Government Securities (CGS) depository interests;
- derivatives, such as warrants (a derivative that is transferrable) and exchange traded options (ETOs).

Additionally, the defined term only operates with respect to financial products where there is a relevant CS service.

A reference to *CCA* in the Instrument is a reference to the *Competition and Consumer Act 2010*. A reference to *Corporations Act* in the Instrument is a reference to the *Corporations Act 2001*.

Expressions used in this Instrument have the same meaning as in the CCA and the Corporations Act.

Part 2 – CS services in relation to which ASIC may impose rules

Section 5 – Determined classes of CS services

Section 5 specifies a class of CS services in relation to which CS services rules may impose requirements. The class of CS services covered by the Instrument is a CS service relating to cash equities (being a type of financial product). The effect of this section is that ASIC may make CS services rules imposing requirements dealing with the activities, conduct and governance arrangements of CS facility licensees and associated entities, in relation to a CS service relating to cash equities.

Note that if a CS facility licensee does not provide CS services in relation to a particular financial product, even if the financial product is a financial product that is captured under the definition of ‘cash equity’, the CS services rules will not apply (as there are no CS services for requirements to be imposed on).

Part 3 – CS services to which access may be subject to negotiation or arbitration

Section 6 – Declared CS services

Section 6 declares a class of CS services to which access may be the subject of negotiations or arbitration under Part XICB of the CCA. The class of CS services covered by the Instrument is a CS service relating to cash equities. The effect of this section is that, under Part XICB, access seekers can negotiate access in relation to a CS service relating to cash equities and, where parties are unable to agree on one or more matters related to access to that CS service, the ACCC may conduct binding arbitration to resolve disputes regarding access to that CS service.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Corporations and Competition (CS Services) Instrument 2024

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Corporations and Competition (CS Services) Instrument 2024* (the Instrument) is to:

- determine a class of CS services in relation to which ASIC may impose CS services rules;
- declare a class of CS services to which access may be the subject of negotiation or arbitration under Part XICB of the CCA.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.