



Australia's Financial Market Licensing Regime: Addressing Market Evolution

ASX Submission

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Executive Summary

ASX supports the modernising of Australia's market licensing regime so it keeps pace with recent market developments, is well-placed to adapt to future developments, and ensures the continued confidence of investors and participants in our financial markets. Gaps in the market licensing regime brings into question the efficiency and fairness of our markets.

Today there are many trading venues that are operating in the same way as licensed markets but without the same regulatory oversight. ASX believes in the principle of like-for-like regulation. It is important for investor confidence and the integrity of Australian markets for dark pools to be subject to a licensing regime which provides transparency to regulators and investors.

ASX recognises it will take some time for a new licensing regime to be implemented. Moreover, licensing doesn't address the issue of market fragmentation. Therefore, ASIC needs to be pro-active to impose appropriate regulatory controls on dark pools today and should move quickly to impose a \$25,000 threshold below which trades must be executed on a licensed lit market.

Dark pools functioning as markets need to be licensed

One of the most obvious examples of where the licensing framework has not kept pace with market developments is in the changing nature of off-market trading (so-called dark execution) in equity securities, where the very nature of that business has undergone significant structural changes in the past few years. A decade ago off-market trading was typically confined to manual execution of large blocks of stock. Today off-market trading more closely resembles that conducted on licensed venues. These venues offer systematic and automated off-market trade matching for a large number of relatively small parcels of securities.

The number of crossing networks registered with ASIC has increased significantly in the past three years, from five at the end of 2009 to eighteen by the end of 2012. On average around 28% of trade value is executed in venues without pre-trade transparency, of which around 4% is conducted on markets operated under the market licensing regime – the remainder (24%) is conducted on venues regulated under the AFSL regime. The changing nature of dark execution away from block trading has been reflected in a sharp decline in average trade sizes. Just as average trade sizes in the lit market have declined, so have those executed in the dark. At present the average trade size on the lit market is between \$2,000 (Chi-X) and \$5,000 (ASX), while in dark venues (below block size) it is around \$2,000 to \$3,000.

There is no policy basis to have a different licensing model and set of regulatory controls for lit and dark venues offering broadly similar execution services to investors¹. Today ASX Centre Point, which is operated by a licensed market operator, is subjected to a significantly different regulatory regime to other dark order books that are operated by brokers. The different regulations affect the transparency of operating rules, matching algorithms, access eligibility, commercial terms, and interaction with venue operator proprietary trading flows, HFT and other trading behaviour.

AFSL licensing regime is not an adequate solution

The current reliance on AFSL licensing and exemptions to the market licensing regime is not a robust regulatory solution. There are a range of important obligations that venues regulated under the AFSL regime (such as broker operated dark pools) do not need to meet. These include the requirements to, make (and publish) operating rules to deal with prescribed matters, deal with disorderly trading or disruptions, notify ASIC of compliance issues on the market, and to publish the commercial terms and make them available equally to all users of the market. The fair, orderly and honest requirements under an AFSL are also lower than requirements placed on market operators.

In its October 2009 response to ASIC's CP116: Exempt Professional Financial Markets, ASX set out a detailed policy position on the broad framework of market licensing. That submission argued that the definition of 'financial market' in the Corporations Act remained conceptually sound and flexible enough for a case-by-case assessment of what conduct constitutes the operation of a financial market. The submission went on to propose that:

¹ A summary of the existing regulatory regime is at Appendix 1. An outline of a proposed structure for equity trading is at Appendix 2.

The default mechanism for regulating activities that meet the definition of “financial market” should be the market licensing regime, not the AFSL regime. The AFSL is primarily designed to protect retail investors. It is not intended to achieve the objectives relevant to regulation of a financial market. The more appropriate regulatory tool for professional financial markets is the market licence, which is designed to maintain market integrity and investor confidence in the efficient operation of market facilities.

ASX considers that most market licensee obligations are applicable to any market type. While the precise nature of the obligation that would apply needs to be tailored to the specific circumstances, none of the broad categories of obligations seem inappropriate to most market types as they go to good governance and the integrity of the market. This would extend to co-called ‘professional’ markets which are predominantly wholesale in nature but which trade products that are judged to be of significant economic importance. One obligation that may not be necessary for all types of markets is the need for compensation arrangements when no retail customers are involved. The following table provides an indication of how obligations may apply to different market types.

Market Obligations	AML license (ASX, Chi-X)	Dark pools - current AFSL	Dark pools – proposed AML	Professional (Wholesale)	Small Markets
Fair, orderly and transparent markets	✓	✓	✓	✓	✓
Conflicts of interest arrangements	✓	✓	✓	✓	✓
Monitor or enforce compliance	✓	✓	✓	✓	✓
Adequate resources	✓	✓	?	✓	✓
Compensation arrangements	✓	✓ ²	✓	X	X
No unacceptable control situation	✓	X	X	X	X
No disqualified individual involved in the licensee	✓	X	✓	✓	✓
Operating rules dealing with prescribed matters	✓	X	✓	✓	✓
Disallowance of operating rules	✓	X ³	X	X	X
Publication of commercial terms	✓	X	✓	X	X
Dealing with disorderly trading or disruptions	✓	X	?	✓	✓
Notify ASIC of compliance issues on market	✓	X	✓	✓	✓
Notify ASIC of self-breaches/compliance issues	✓	✓	✓	✓	✓
Provide ASIC with annual compliance reports	✓	X	✓	✓	X
Assist ASIC perform its compliance role	✓	✓	?	✓	✓

Need to ‘future proof’ the licensing regime as markets will continue to evolve

The experience in overseas jurisdictions, particularly in Europe, demonstrates that ‘hard wired’ legislative licensing frameworks soon develop anomalies and gaps.

The growth in the range of venues that perform trade execution for ASX-listed securities and technological advances which enable many entities to offer systemic trade matching and execution services that closely resemble those services offered by licensed markets, means that the current licensing framework is now out-dated. A robust licensing regime is an important regulatory control to provide transparency to regulators and investors.

The need to ‘future proof’ the licensing regime to ensure it can be flexible in dealing with future market initiatives means that, on balance, ASX supports the approach outlined in Option 1 of the paper (provide flexibility in the Act to ‘switch-off’ certain obligations when appropriate) as providing the best way forward. Attempting to codify specific business models (at a point in time) into market licensing and regulatory framework is unlikely to provide a sustainable solution over time given the dynamic nature of the industry. What is important is that the principles to be applied are clear. The Minister, within a legislative framework of clear principles, should have power to shape the licensing regime by ‘turning off’ elements of the licensing regime when appropriate.

The requirement that Australian regulators conduct consultation with a broad set of stakeholders prior to establishing the details of, and subsequent changes to, the licensing regime provides an opportunity to analyse and debate the details of the framework as it evolves. ASX has previously argued the role of Ministerial discretion is an important feature of the regulatory framework. It enables account to be taken of the public interest as well as a check to provide for outcomes suited to prevailing Australian market conditions. Markets provide a range of critical services: efficient price discovery, resource/asset allocation, and risk/systemic risk management that potentially have impacts beyond the confines of the

² Trades reported to a market operator are generally covered by the NGF compensation scheme.

³ Market operator dark pools (such as ASX’s Centre Point) are already subject to rule disallowance and that would not change.

specific market and into the broader economy. The granting of a licence to operate a market, as with licences to operate critical financial market infrastructure (such as clearing and settlement facilities) are important mechanisms for the Government to preserve the integrity and efficiency of our capital markets.

Conclusion

Detailed responses to the questions posed in the consultation are provided in Appendix 3.

ASX's submission on market licensing should be read in the context of a wider range of regulatory initiatives which, when proactively implemented, will appropriately manage the risks of a multi-market environment and the problems now being experienced in the US and European markets.

ASX's recommendations cover a package of initiatives which include: the licensing of dark pool operators, the preservation of liquidity in the lit market, the method of ASIC cost recovery, and various measures to monitor and manage order and trade proliferation. By acting on a consistent set of principles namely: transparency, pro-active regulatory action and being aware of the economic incentives which will drive market behaviour, Australia's policymakers and regulators have the opportunity to learn from and to control the undesirable outcomes that have been observed in other markets.

Appendix 1: Comparison of Regulatory Standards for Lit and Dark Venues

Type of Market	Licensed Lit Venues		Licensed Dark Venues	Unlicensed Dark Venues	
Examples	ASX Trade & PureMatch	Chi-X	ASX Centre Point	LiquidNet	Broker Internalisation (eg UBS Pin, Goldman Sachs Sigma-X, Credit Suisse Crossfinder)
Licence required	Market	Market	Market	AFSL	AFSL
Pre-trade transparency	√	√	X	X	X
Post-trade transparency	√	√	√	√	√
Minimum order size	X	X	X	X	X
Access	Open	Open	Open	Closed – Buy-side	Closed - Clients
Order matching process transparency	√	√	√	√	X
ASIC rule approval	√	√	√	X	X
ASIC assessment	√	√	√	X	X
Transparency of fees	√	√	√	X	X

Appendix 2: ASX's recommended structure for equity trading

Order size	Typical means of execution *	Measures to protect market quality	Changes to ASIC oversight
Block orders: above \$1m, \$500,000 or \$200,000 (depending on market capitalisation of relevant company)	Facilitation: <ul style="list-style-type: none"> • Block trades • Dark pools 	Allow execution away from the lit market to avoid price distortion or disorderliness. No meaningful price improvement requirement.	No change needed, unless there is systematic matching of orders, in which case there should be ASIC oversight in a similar way to lit markets.
Below block order size but above a \$25,000 order size threshold	Automated and systemic matching of orders: <ul style="list-style-type: none"> • Dark pools • Lit market 	Meaningful price improvement requirement for dark orders.	Orders executed in dark pools or lit markets should be regulated in the same way (see below).
Below a \$25,000 order size threshold	<ul style="list-style-type: none"> • Lit market 	Orders below the threshold should be executed on the lit market.	Lit markets are subject to full ASIC oversight and disclosure of rules, access arrangements and fees.

* subject to best execution rule

Appendix 3: Detailed Responses to Treasury Questions

Problem identification

Consultation Questions	ASX Comments
<p>Q1. Do you have any comments on the general form of the current legislative framework for licensing of financial markets in Australia?</p>	<ul style="list-style-type: none"> • ASX agrees that legislative framework has not kept pace with financial market developments. Technology has lowered the entry costs to market operators. The nature of off-market trading in 'dark pools' has changed significantly, from dealing with block trades to matching trades in the same manner as a licensed market. • As a result, trading which is conducted on venues that operate with the same characteristics as those that fall under the definition of a 'financial market' (Corporations Act, s767A) are not regulated as financial markets. • The current arrangements of trying to shoe-horn a range of market types into a formal, inflexible framework create regulatory gaps and anomalies that do not achieve desired public policy outcomes, including competitive neutrality between alternate trading venues. • ASX agrees that widespread use of the exemption power does not generally deliver optimal outcomes. As noted in the consultation paper one practical implication of exempting markets from the licensing regime is that there is reduced regulatory oversight that may adversely impact on investors/traders in those markets. • Further, the use of the exemption power may result in the same type of trading being subject to different regulatory standards (eg ASIC surveillance and requirements concerning transparency of rules, testing, monitoring and business continuity planning) depending upon the venue for that trading. Developing a framework that achieves the outcomes of ensuring all market types are required to satisfy a range of regulatory objectives appropriate to the activities they are undertaking is a desirable outcome. Achieving this through a single, flexible licensing regime is the most transparent and efficient framework. • The public interest test s798A(2)(g) is an important element of the framework, ensuring a wide range of (economic) factors affecting the market, participants, end investors and listed entities are taken into account by the Minister when granting a licence. • Ministerial oversight is important. As is the ability of the Minister to give directions to licence holders should they not be fulfilling their licence conditions.

Consultation Questions	ASX Comments
<p>Q2. Do you consider that there are efficiency issues that could be addressed by revising the licensing regime? If so, please provide details.</p>	<ul style="list-style-type: none"> • There has been structural change in trade execution. Off-market trading was once a largely manual process involving the negotiation of large transactions now it has changed to one that has very similar characteristics to on-market order books, being able to transact a large number, of relatively small sized parcels of stocks. This has largely removed the distinguishing features of on and off market trading. However the regulatory arrangements have not kept pace. • Market participants who operate dark pools under the ASIC MIR structure are bound by pre-trade transparency rules. However there are a range of other rules that these dark venues do not have to comply with, particularly transparency of rules, commercial terms and matching priorities. • As the CP notes there are significant differences in the obligations for AFSL and AFML holders offering systemic order matching services. The AFSL regime was not designed for the regulation of markets and hence is not an effective or efficient means of achieving that aim. • Having different regulatory standards and obligations for the same type of trading is unlikely to result in efficient regulation of that trading. It would be more efficient to have a common standard which is consistently applied. This would include enhancing the effectiveness of ASIC's regulatory powers over dark pools. Further, it would enable the supervision levy to be applied fairly across all parts of the market.
<p>Q3. Do you consider that there are market integrity or investor protection concerns that could be addressed by revising the licensing regime? If so, please provide details.</p>	<ul style="list-style-type: none"> • While the need to reform the licensing regime is clear, ASX recognises that making the required legislative and regulatory changes will take some time to bring into effect. Research has already indicated that the extent of leakage of small sized trades (below block size) already risks deterioration in the efficiency of price discovery on the lit market. For these reasons ASX believes it is important that regulators move quickly to impose a threshold (\$25,000) below which all trades should be routed to a lit market. • Confidence in equity markets would be increased where investors have greater transparency into the operations of all trade execution venues where their orders may be routed. Investors would be in a better position to understand how their broker's decisions on which venues to route to may affect the efficiency of their transactions. • Shining a light on the operational mechanics (order types, matching algorithms etc) of currently unlicensed venues will open up for public scrutiny the operations of these venues. Licensed markets currently do this through publication of their rulebooks and commercial terms – extending this to a wider range of venues will provide competitive neutrality. • Requiring participant operated alternate venues to satisfy fair, orderly and transparent policy obligations will require them to monitor trading activity in their venues - and will have a positive impact on investor protection and market efficiency. • Having the same regulatory protections for the same type of trading will ensure that investors are protected, regardless of where their orders are executed. It also ensure that ASIC has the same insight and oversight in relation to this trading. • However, for professional markets which facilitate dealing in types of financial products not available to retail investors, it may be appropriate to not apply requirements which are primarily designed to protect retail investors.

Consultation Questions	ASX Comments
<p>Q4. Do you agree that regulatory change would be desirable in order to better align Australia's market regulatory regime with overseas regimes?</p>	<ul style="list-style-type: none"> • ASX understands the aspiration is to achieve a regulatory framework that would have multiple license categories and minimal exemptions to be able to achieve mutual recognition with other regulatory regimes. If achieving this result requires that alternative markets are subjected to some degree of regulatory oversight that does not seem an unreasonable outcome. • While aligning Australia's market regulatory regime with overseas regimes is a fine aspiration, and our regime should not be totally detached from global norms, any arrangement also needs to be suited to our domestic situation. • When looking to international comparisons, Australia needs to look beyond the normal benchmarks of the developed markets of the US and Europe (highlighted in the CP), to consider our regional counterparts. As the Government's Asian Century work highlighted Australia's future lays with integrating more fully in our region. • That said, Australia should not set its regulatory arrangements just to align with other jurisdictions if that delivers outcomes that are not consistent with the specific interests and character of our markets.
<p>Q5. Do you believe that such regulatory alignment could increase the prospects of Australian trading venues and market participants being able to seek regulatory recognition in other jurisdictions?</p>	<ul style="list-style-type: none"> • When assessing regulatory equivalence the focus should be on regulatory outcomes rather than how they are achieved. Broadening Australia's market licensing regime – and in particular ensuring no gaps exist to undermine market integrity – would provide comfort to foreign regulators that Australian regulators have a robust set of regulatory controls. • As noted above, our economic future lays within the Asian region, even though two-way investment flows remain largely with the US and Europe at present. We should consider regulatory outcomes that align us with the other major markets in our region.

Overview of reform options

Consultation Questions	ASX Comments
<p>Q6. Do you consider that more flexibility in the AML regime is warranted, so that a greater number of facilities may be covered?</p>	<ul style="list-style-type: none"> • Yes, if that flexibility is able to achieve desired policy outcomes in an operationally efficient and economically effective manner.
<p>Q7. Do you have a preference between Option 1 and Option 2? If so, please provide details.</p>	<ul style="list-style-type: none"> • The important issue is that the regulators have the appropriate levers to deliver fair and efficient market outcomes – not how that framework is delivered. • There should be an arrangement that is future-proof for market innovations – this tends to favour a more flexible approach (ie. Option 1). • Experience in Europe was that they tried to hard wire definitions of markets into the legislation but it was difficult to cover all market structure so the framework needed refinements.

Consultation Questions	ASX Comments
Q8. Is there an alternative option that you think would provide a better outcome than either of those presented? If so, please explain this option.	<ul style="list-style-type: none"> • No. • Given the time it will take to make these changes, ASX remains of the view that regulators should move quickly to impose a \$25,000 threshold, below which all orders should be routed to a lit market. If not, leakage of small orders to dark execution venues will continue, to the potential detriment of the efficiency of price discovery.
Q9. Is it appropriate for ASIC to have the power to make rules in respect of licensing obligations as indicated in Option 1? What checks and balances should there be on ASIC's rule-making power? Should it be limited to matters in which default requirements in the legislation are 'switched off' or should they have the ability to make rules relating to all provisions in Part 7.2?	<ul style="list-style-type: none"> • ASIC's rule-making power should be subject to Ministerial disallowance – as the Minister would likely have a broader range of considerations when assessing rules – in particular the public interest test. • Consultation requirements which underpin the rule-making power need to reach out beyond the narrow confines of market intermediaries to ensure the views of a wide range of stakeholders with economic interests are incorporated in advice to the Minister.
Q10. If Option 1 were adopted, do you think the discretion should be operated through regulations (Option 1a) or through ASIC guidance (Option 1b)? Please provide details.	<ul style="list-style-type: none"> • The main aim is to have a clear framework of licence categories while retaining sufficient flexibility to respond to new developments. Regulations may be preferable as they would establish a clear licensing framework with transparent principles, which can still provide ASIC with a degree of flexibility as to how that framework is applied. However, if ASIC were to develop different licence categories and provide public guidance on those categories that may achieve the same end. • An important principle is that if different venues are performing the same economic function in relation to the same types of products they should be subject to the same regulatory controls.
Q11. If Option 2 were addressed, how could the limitations to flexibility found in international markets be allowed for in system design?	<ul style="list-style-type: none"> • ASX considers that Option 1 is a better approach.
Q12. Do you have any general comments in relation to the types of obligations which should or should not apply for particular entities under either option (noting that this will be consulted on in more depth at a later stage)? Please provide details.	<ul style="list-style-type: none"> • Dark pools (including internalisation) should be subject to the same requirements as licensed markets to publish their rules and procedures so that participants and investors understand how their orders are managed and trades executed. Dark pools should also be subject to the same ASIC surveillance and supervision levy, as there is a risk of misconduct on dark pools just as there is on lit markets, although the conduct may differ from that possible on a lit market. • Requirements in relation to dealing with systems testing, monitoring and business continuity planning, which apply to licensed markets, should also apply to dark pools, as these are important for customers who use those venues and the confidence in the market as a whole.

Advantages of reform

Consultation Questions	ASX Comments
<p>Q13. Do you have any comments in relation to the perceived advantages of a more flexible market licensing regime? If so, please provide details.</p>	<ul style="list-style-type: none"> • For the reasons discussed above, the advantages of a more flexible market licensing regime are as follows: <ul style="list-style-type: none"> – a more flexible regime allows all aspects of the market to be regulated and minimises the risk of regulatory gaps, which results in better investor protection; – it is more efficient to have a licensing framework which covers different parts of the market, rather than using the exemptions power and AFSL regime, which were not developed for this purpose; and – a flexible regime should be able to evolve in response to new developments in the market.

Potential drawbacks

Consultation Questions	ASX Comments
<p>Q14. Do you have any comments in relation to the potential drawbacks of the proposed licensing reform? Please provide details of any concerns you have.</p>	<ul style="list-style-type: none"> • The Options Paper notes that those who operate currently unlicensed markets may have concerns about increased regulation. • The gaps in the current regulatory framework are the result of the market evolving faster than the legislation, rather than a conscious decision that certain parts of the market should not be regulated. The flexible market licensing regime allows the legislation to catch up with market developments. Hence, the increased regulation is appropriate and justified. • The flexible nature of the proposed market licensing regime should enable regulators to impose requirements necessary to achieve regulatory aims (e.g. investor protection) without imposing inappropriate or unduly onerous requirements, which should address concerns about increased regulation.

Reform issues

Consultation Questions	ASX Comments
<p>Q15. Do you think that making HFTs (including non-market participant HFTs) directly subject to market integrity rules would assist in safeguarding market integrity? Should these rules be limited to those which relate specifically to non-market participant HFTs?</p>	<ul style="list-style-type: none"> • ASX notes that the ASIC taskforce looking at issues around HFT is due to report in the first quarter of 2013. Policy options to address any concerns arising from the growth in HFT should be considered in the context of the findings of that review. • However, it may be appropriate to ensure that ASIC has the necessary regulatory controls over such trading activity, particularly when the trading entity is not directly subject to the market integrity rules. This may be a more effective structure than the existing indirect application of the rules where the entity is not a participant of a market.

Consultation Questions	ASX Comments
	<ul style="list-style-type: none"> • Non-market participant HFTs are currently subject to the ASIC MIRs indirectly through their executing participant. This model is reliant on the executing participant effectively monitoring and controlling the activities of their clients.. • The controls over automated trading have increased in the past year, with participants required to have direct controls over pre-trade filters and being required to meet minimum standards before providing access to their automated order processing systems. The introduction of other volatility controls by market operators to reduce the risk of market disruptions flowing from aberrant automated trading has added another layer to protect market integrity.
Q16. Do you have any concerns in relation to making HFTs subject to market integrity rules? If so, please provide comments.	<ul style="list-style-type: none"> • See answer to question 15.
Q17. Do you have any comments on how HFT should be defined and how it should be measured?	<ul style="list-style-type: none"> • See answer to question 15.

Exempt markets

Consultation Questions	ASX Comments
Q18. Do you have any concerns with this proposed option? If so, please provide comments.	<ul style="list-style-type: none"> • The power to exempt a market from the licensing requirements is usually only exercised when there are no investor protection or where systemic stability issues are not relevant or can be addressed through means than other than licensing. • At present, an exemption will only be granted if the regulatory outcomes for a market or clearing and settlement facility are not relevant, are achieved without regulation under the licensing regime or where the cost of regulation required to achieve the regulatory outcomes outweighs the benefits of those outcomes (ASIC RG 172 and RG 211). The regulatory outcomes for markets and clearing and settlement facilities are significantly different, due to the different functions of those facilities. • If exemptions were to be considered at an operator level it would still be necessary for ASIC and the Minister to consider whether both the regulatory outcomes for the specific market and the clearing and settlement facility are met in an adequate way. • Further, if an operator is responsible for more than one market or clearing and settlement facility, ASIC and the Minister would need to consider whether those markets or clearing and settlement facilities are substantially similar. If not, it would be necessary to conduct a separate assessment as to whether the regulatory outcomes are dealt with in an adequate way in each case.

Annual regulatory reports

Consultation Questions	ASX Comments
Q19. Do you have any concerns with this proposed option? If so, please provide comments.	<ul style="list-style-type: none">ASX has no concerns with the proposed option.

Licence fees

Consultation Questions	ASX Comments
Q20. Do you consider the fee for a market licence in Australia needs revision? If so, please provide comments.	<ul style="list-style-type: none">Yes, see below.
Q21. Do you see cost recovery as an appropriate approach to levying licence fees? Please provide details.	<ul style="list-style-type: none">As with all aspects of cost recovery – the fee should reflect, as much as possible, the regulatory cost of assessing applications and conducting the investigations and consultations necessary for the granting of a license. Effectively cross-subsidising entry by undercharging should be frowned upon as much as creating a barrier to entry by overcharging.
Q22. Would a change in the fee level have any impact on the decision whether to operate a market in Australia? Does the current rate influence this decision?	<ul style="list-style-type: none">At current levels the license fee should have no practical impact on those seeking a licence.One of the criteria for being a market licensee is that they have 'sufficient resources to operate the market properly' so it is appropriate that they be charged a licence fee commensurate to the inherent value of the licence and the costs of their application being processed.