

2 December 2011

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

Submitted by email to: [CFR-Review-FMI@treasury.gov.au](mailto:CFR-Review-FMI@treasury.gov.au)

Dear Sir/Madam,

Thank you for the opportunity to provide comment on the Council of Financial Regulators: Review of Financial Markets Infrastructure Regulation Consultation Paper (October 2011).

## Summary

We support the comments set out in the Australian Financial Markets Association (AFMA) submission noting that we have only been able to see these in draft due to the limited time available to prepare responses. This document is intended to supplement our support for the AFMA response and add detail based on our specific situation and experience of operating a leading electronic trading platform for fixed income products through ten years and a range of market conditions.

As is generally the case with such papers, we find the consideration given to non-ASX financial markets licensees to be insufficient. We note that the concept of a systemically important FMI is intended to be introduced, and that smaller FMI facilities including those offered by Yieldbroker Pty Limited (Yieldbroker) are unlikely to meet that definition; however, we also note that some recommendations may be universally applicable (such as the step-in provisions) adding cost and complexity for little perceived benefit.

Despite the stated focus being on clearing and settlement facilities, little distinction is made in this regard in the proposals. Additionally, some (potential) requirements, particularly in relation to sanctions against officers of FMI's, could act to both deter individuals from acting in that capacity for small FMIs while also increasing management liability insurance costs for the company.

Previous legislative and regulatory efforts have tried to generalise classification of markets infrastructure and have resulted in inflexible outcomes. In this environment Australian companies cannot innovate competitively and, contrary to the objective of the proposals, greater dependency on off-shore infrastructure is an inevitable consequence. We propose that any changes be made according to highly objective and specific criteria.

We would welcome a more thorough and considered approach that explicitly excludes all non-ASX financial markets licensees from the outset, while providing tight and objective criteria against which the future application of the proposed reforms could be made if the systemic importance of the FMI changed.

## **Specific Feedback to Selected Questions**

### *Section 6: Proposals for strengthening general compliance*

#### *6.2 Pre-approval of directors of FMI's and their parents*

*4. Do you agree with the proposed power of pre-approval of directors of FMI's and their parent entities? Are their alternative approaches you consider more appropriate? If so, why?*

There are already various checks and balances on individuals appointed as directors of FMI's under the Corporations Act and regulations, and obligations on licensees to provide additional information in relation to officers of the company. The discussion provided in the consultation paper does not articulate or identify a sufficient risk or provide examples of where the current process has failed such that an additional procedural layer should be implemented.

### *Section 7: Applying sanctions to directors and officers*

In general we would caution against additional burdens such as sanctions that could act to deter talented individuals from serving on the board of company's such as Yieldbroker as this could act to stifle strategic innovation and simultaneously increase insurance costs. In our highly competitive environment, passing on increased costs not borne by international competitors would render our FMI less efficient and less attractive to participants.

### *Section 8: Proposals for step-in powers*

#### *8.1 Mechanics of step-in*

*11. Do you have comments on the proposal that either ASIC (in the case of an AML) or RBA (in the case of a CSFL) in consultation with the Treasurer could make the appointment of a statutory manager?*

We would like to see further discussion on the qualifications of a statutory manager in relation to AML holders, and particularly where the trigger is a technical one that the licensee is struggling with, how the statutory manager could potentially step-in to resolve a situation when those with a direct commercial interest in so doing are unable.

#### *8.3 In whose interests should the statutory manager act?*

*16. Do you have any comments on the proposal that the statutory manager should be obliged to operate in the best interest of overall financial system stability and/or market integrity?*

The statutory manager should act according to the license conditions and not be obligated to make subjective assessments about the priority of obligations in a crisis. Furthermore, any sudden action

against the best interests of the company and its shareholders might seriously risk destabilising an FMI already in distress.

*8.5 Scope of the step-in provisions*

*17. Do you have any comments on the proposal that all FMI's should be subject to step-in unless exempted by regulators?*

This proposal significantly over-reaches the stated intentions which are to increase confidence in systemically important infrastructure with particular regard to clearing and settlement. It is illogical that facilities which are not systemically important and do not operate clearing and settlement facilities should be subject to new provisions unnecessarily.

*Section 9: Identifying systemically important FMI's*

*18. Do you have any comments on the proposed criteria for designation of systemically important FMI's in Section 9.1.2? Are there other criteria you consider important and if so, why?*

We believe criteria should be as objective as possible and should be designed in a way that will not stifle progress and innovation. Many small niche functions are performed by a range of facility providers none of which would typically be considered systemically important but nonetheless, without careful crafting of the criteria may classify unintentionally. Specific roles performed by FMIs should be clearly identified and listed as those having systemic importance.

We look forward to receiving a more detailed proposal which addresses the points raised by AFMA and Yieldbroker.

Yours sincerely,

[by email]  
Richard Swift  
Managing Director