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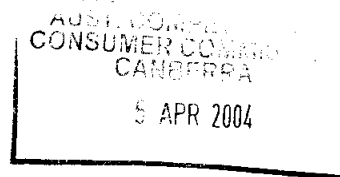
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2 April 2004

Our ref DBR:Patrick Gay
Matter no 80499574
Doc no Sydney\004293332

**Australian Stock Exchange - Section 2 of the ASX Business Rules
Authorisation Application**

Please see attached



Freehills

2 April 2004

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Mr Tim Grimwade
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Australian Competition and Consumer Commission
470 Northbourne Avenue
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By fax

Dear Mr Grimwade

Australian Stock Exchange - Section 2 of the ASX Business Rules Authorisation Application

We refer to our letter of 11 February 2004 updating you with respect to the above authorisation application.

As we indicated in that letter, Australian Stock Exchange Limited (ASX) has now completed its review of its Business Rules and has issued new rules. These rules are called the ASX Market Rules.

Having completed this review, ASX withdraws its application for authorisation dated 15 May 2003. ASX is of the view that the relevant provisions of the ASX Market Rules, which incorporate the provisions of the former Section 2 of the ASX Business Rules, do not constitute an arrangement which may have the purpose or effect of substantially lessening competition within the meaning of Section 45 of the *Trade Practices Act*. Accordingly, there is no need for authorisation. Indeed, for the reasons set out at the end of this letter, ASX believes that it is inappropriate for it to seek immunity from the Australian Competition and Consumer Commission (Commission).

The remainder of this letter sets out the background to the decision by ASX to withdraw its application.

ASX Market Rules provide a framework for a competitive market

ASX is a market operator conducting itself pursuant to/in accordance with a market license granted under Section 795B of the *Corporations Act* and variations in accordance with 796A(1). The law governing market licensees, Part 7.2,

Division 3 of the *Corporations Act*, was amended in March 2002. It was a result of these amendments that ASX undertook a review of its Business Rules. Section 792A of the *Corporations Act* requires ASX, as a market licensee, to ensure the operation of a "fair, orderly and transparent market" and to have "adequate arrangements for supervising the market".

The necessary pre-condition to the creation of a "fair, orderly and transparent market" is the setting of rules governing that market. However, while the ASX Market Rules regulate access to ASX facilities this is not evidence of an anti-competitive effect. The ASX Market Rules are pro-competitive because they establish reasonable governance rules. We note the following:

- The relevant sections of the ASX Market Rules help promote a fair and open market which allows for trading efficiency.
- The ASX Market Rules help promote competition for the provision of exchange related services.
- The creation of a transparent and efficient trading system instills confidence in the ASX exchange which, in turn, promotes liquidity within Australian capital markets allowing ASX to compete with other exchanges.

The development of the ASX Market Rules has been subject to both a formal and informal process involving the Australian Securities and Investment Commission (ASIC) which is the principal regulator of ASX activity. Going forward the ASX Market Rules will be subject to ongoing review and potential refinement by ASX in consultation with ASIC. Section 794C of the *Corporations Act* gives ASIC the power to review and regulate the ASX Market Rules. The ASX Market Rules are also subject to non-disallowance by the Minister under sections 793E and 798A of the *Corporations Act* (which allows the Minister to disallow the operating rules of a licensed market having consideration to, amongst other things, the advice of ASIC). Whilst the regulatory focus of ASIC and the Commission are different, in ensuring that the market that it regulates is fair and transparent, ASIC regulation supports a pro-competitive outcome.

Chronology of ASX's authorisation dealings with the Commission

On 1 April 1998, the Commission granted authorisation to ASX in respect of section 2 of the ASX Business Rules. This authorisation expired on 23 April 2003. Section 2 of the ASX Business Rules and the equivalent provisions in the new ASX Market Rules govern the operation of the Stock Exchange Automated Trading System (SEATS) for the trading of securities in the stock market operated by ASX. The 1998 authorisation was sought due to amendments to Section 2 of the Business Rules for which the Commission had already granted authorisation in 1992.¹

¹ The 1998 amendments to Section 2 of the ASX Business Rules accommodated the SEAT 97 Open Interface Project. Open Interface refers to the published electronic protocol and method structure which facilitates communication between computer systems. It provides the mechanisms for trading participants to enter into and report dealings in securities by sending trading messages to SEATS. The introduction of an Open Interface environment allowed trading participants to customise the dealing systems or trading terminals to suit their particular business needs.

Following the 1998 authorisation, a number of non-material amendments were made to the ASX Business Rules.

- As a result of the change in structure of ASX, brought about by demutualisation, reference to "Membership Organisations" was replaced with "Trading Participants".
- Rule 2.1A (substance now contained in Rule 5 of the ASX Market Rules) was added. It sets out the required arrangements that Trading Participants need to have for clearing and settlement of Market Transactions. If a Trading Participant is not a Clearing Participant then they need to have Clearing Arrangements in place. Such requirements promote the objective of an orderly, fair and informed market.
- Rule 2.3.2A (Rule 14.3 of ASX Market Rules) was added. It grants ASX powers to address situations in which there may not be proper communication between Trading Participants and SEATS in order to ensure the integrity and reliability of the market as well as providing a right to a hearing which is to be conducted without bias and with observance to the rules of natural justice.

These amendments were alerted to the Commission within ASX's 16 May 2003 application as described below.

On 16 May 2003, ASX lodged an application for authorisation in respect of Section 2 of the ASX Business Rules. At that time ASX advised the Commission that it was in the process of reviewing its operating rules (including Section 2 of the ASX Business Rules) in order to comply with the terms of the March 2002 amendments to the *Corporations Act*. Accordingly, ASX requested that the Commission grant interim authorisation until this review process was complete and it was able to provide the Commission with a final version of Section 2 of the ASX Business Rules. Interim authorisation was granted on 17 June 2003;

On 11 February 2004, ASX informed the Commission that it had formally lodged a copy of the ASX Market Rules with ASIC. On 12 February 2004, ASX provided the Commission with a copy of the ASX Market Rules as well as a table of concordance referencing those rules with the former ASX Business Rules.

Additions to the ASX Market Rules not included in Section 2 of the Business Rules

The ASX Market Rules contain only one substantive change in comparison to the former Section 2 of the ASX Business Rules. Former Rule 2.2.9, (the substance of which is found in Section 8 of the Market Rules), dealing with Designated Trading Representatives (DTR) and accreditation of Advisors has been amended. The Commission, in its 1998 determination, expressed the view that there should be a right of appeal in situations where an applicant is adversely affected by a regulatory decision of ASX. The Commission therefore, in respect of only Rule 2.2.9, indicated that authorisation was not to come into force until the date on which the Commission advised ASX that it was satisfied that it had amended the ASX Business Rules in light of its views as to a right of appeal. ASX has, within the ASX Market Rules, included such provisions.

- (a) Rules 8.2.2 and 8.2.8 deal with a proposed rejection of an application and proposed withdrawal of registration. They, respectively, provide that ASX is to take no action until an opportunity to appear in person or lodge a

written submission to ASX is afforded. No equivalent right existed under the former ASX Business Rules.

- (b) Rule 8.2.10 provides a right of appeal to an appeal tribunal against a decision by ASX to suspend or withdraw the registration of a DTR. This independent tribunal is to be chaired by a retired Judge or a solicitor or barrister (see Rule 28.16.3)

ASX Market Rules are not anti-competitive

ASX is of the view that Section 2 of the ASX Business Rules, as previously authorised, and the amendments referred to above as incorporated in the ASX Market Rules, do not have the purpose or effect of substantially lessening competition.

ASX notes that the 1998 determination did not identify any detriments to competition flowing from Section 2 of the ASX Business Rules. The Commission stated, within the authorisation decision, that there was public benefit "in requiring Member Organisations [now Trading Participants] to comply with appropriately determined rules and procedures and in rules which limit access to the market to suitably qualified and experienced personnel provided there are adequate appeal mechanisms in place". The Commission went on to say that it is important that the "ASX have powers to take immediate actions to protect investors and the integrity of the market and is satisfied that adequate safeguards exist to prevent ASX and Member Organisations [Trading Participants] from engaging in conduct which is detrimental to competition in the market".

The ASX Market Rules in both their purpose and operation are pro-competitive.

- By granting powers of enforcement and discipline to ASX, the ASX Market Rules ensure that the market has a strong supervisor to ensure that no market participants engage in conduct which is anti-competitive or detrimental to investors and the economy as a whole.
- The ASX Market Rules promote trading efficiency and transparency, resulting in conditions which allow ASX to compete for listings with other exchanges worldwide. They are a form of private ordering that are reasonably necessary pre-conditions to the efficient and orderly operation of the market.
- The provision of a secure and efficient trading environment also has the consequence of promoting competition for the provision of exchange related services.
- The ASX Market Rules have increased the attractiveness of ASX operations to both investors and listing companies. The resulting liquidity enables ASX to engage in greater rivalry with other exchanges.

Moving forward

ASX is confirmed in its view of the role that a "fair, orderly and transparent market" has in attracting liquidity and, by consequence thereof, maintaining a competitive position in relation to other competing exchanges worldwide. Further, since the Commission's initial authorisation in respect of Section 2 of the ASX Business Rules in 1992, ASX has developed a reputation for innovation in response to a constantly changing competitive environment while maintaining its reputation for integrity in its dealing with market participants.

In these circumstances ASX is of the view that it is no longer appropriate to suggest that components of its operational framework require competition law immunity. ASX operates in dynamic, efficient and competitive markets and desires to subject itself to regulation by those market forces coupled with the continued supervision of ASIC. Accordingly, ASX withdraws application A90872.

ASX is committed, however, to maintain a positive relationship of dialogue with the Commission and proposes to keep the Commission informed on industry developments and other relevant matters to ASX, including any future material amendments to the ASX Market Rules. To this end, should the Commission view it as helpful, ASX proposes it meet with the Commission on an annual basis to discuss these matters.

Should you wish to discuss this decision further, ASX would be pleased to meet with you. Please let us know if there is anything which ASX can do to assist the Commission in its consideration of the matters set out in this letter.

Yours faithfully
Freehills



Donald Robertson
Partner