

Application to ASIC to administer the listing rules

Melbourne, 2nd October 2020 : The Australian Securities and Investment Commission (ASIC) made a decision yesterday per the attached under regulation 7.2.16 of the Corporations Regulations for ASIC to administer the listing rules, in place of the Australian Securities Exchange (ASX).

The application was lodged with ASIC in January 2020.

ISX is considering its next steps in relation to its application, including in context of its recent shareholder resolutions.

Authorised by the Managing Director

Isignthis Ltd ACN 075 419 715 and regulation 7.2.16 of the *Corporations Regulations 2001*

Decision

The application, by Isignthis Ltd ACN 075 419 715 under regulation 7.2.16 of the *Corporations Regulations 2001*, for ASIC, instead of ASX Ltd ACN 008 624 691, to make decisions and take action regarding the matter set out in regulation 7.2.16(2)(b), is refused.

Reasons for decision

ASX Ltd's Australian market licence

1. On 8 March 2002 ASX Ltd ACN 008 624 691 (**ASX**), under s1413(2)¹, was granted a licence (**Licence**). Under s1414 the Licence is taken to have been granted under s795B. Accordingly, the Licence is an Australian market licence.
2. The Licence authorises the operation of a financial market, namely the Australian Securities Exchange, on which securities can be traded. The Licence is subject to conditions concerning clearing and settlement arrangements.
3. Under s792A(1)(a) ASX must '*to the extent that it is reasonably practicable to do so, do all things necessary to ensure that the market is a fair, orderly and transparent market*'.
4. Under s798E(1) '*The regulations may make provision in relation to the rules and procedures that are to apply in the case of conflicts, or potential conflicts, between the commercial interests of the licensee and the need for the licensee to ensure that the market operates in the way mentioned in*' s792A(1)(a).
5. Such a regulation is regulation 7.2.16². It applies if there are '*specific and significant conflicts, or potential conflicts, that would be specific and significant*' between:
 - (a) the '*commercial interests*' of ASX '*in dealing with a body (the competitor) that operates a business with which*' ASX, or its subsidiary, '*is in competition*' alone or because of a joint venture; and
 - (b) the need for ASX '*to ensure that the market operated by it operates in the way mentioned*' in s792A(1)(a)
6. Under regulation 7.2.16(2) such a body can apply to ASIC for a decision that ASIC, instead of ASX, will make decisions and take action about compliance by the body with applicable listing rules. Listing rules are rules that concern the admission and removal of entities to the financial market's official list, and the activities and conduct of those entities.

¹ A reference to a legislative provision is a reference to a provision of the *Corporations Act 2001*

² A reference to a regulation is a reference to a regulation of the *Corporations Regulations 2001*

ISX's application for decision that ASIC will regulate listing rule compliance

7. Shares (and hence securities) in Isignthis Ltd ACN 075 419 715 (ISX) trade on the financial market operated by ASX.
8. By a letter dated 31 January 2020 ISX's legal representative applied to ASIC for a regulation 7.2.16(2) decision.
9. The letter claims that in the following four ways ISX operates a business with which ASX, or its subsidiary, is in competition:

'In terms required by regulation 7.2.16(1)(a):

- ISX is in competition with ASX Limited and its subsidiary Austraclear Pty Ltd in the market for provision of DvP systems, for both OTC brokers and shortly also for licensed market operators;*
- ISX is in competition with ASX Limited to provide customer due diligence services (aka KYC) to OTC brokers, which services are an aspiration of the ASX's DLT Solution6;*
- ISX, through its joint venture with NSXA and substantial shareholding in NSX, will be in competition with ASX in the market for listing of securities issuers and the trading of their securities on an organised market; and*
- ISX, through its joint venture with NSX in ClearPay JV and substantial shareholding in NSX, will be in competition with Austraclear in the market for provision of clearing, settlement and payment systems'.*

10. By an email dated 4 March 2020 ISX's legal representative clarified the claim. The email included a three columned table. The first column sets out what is claimed as being three ways in which ISX operates a business (comprise the offering of services) with which ASX, or its subsidiary, is in competition. The second column sets out the entity offering the service and its relationship with ISX. The third column sets out the basis for the claim that ASX, or its subsidiary, is in competition. The table is as follows:

Product /service	ISX offering	ASX / Austraclear situation
Provision of DvP [Delivery versus Payment] systems and other forms of systems for clearing, settlement and related services - for market operators and OTC intermediaries	<p>ClearPay Pty Ltd, a 59% subsidiary of ISX, has offered a DvP service which has been accepted by NSXA. ISX controls ClearPay, is managing its activities and is providing its core intellectual property.</p> <p>ClearPay's offering is available for other market operators and intermediaries in Australia and internationally. Elements of that offering are also available in the services currently offered internationally by Probanx Pty Ltd, a 100% subsidiary of ISX.</p> <p>In a "lit" exchange model with T+0 transactions, ClearPay does not need any Australian licences, authorisations or registrations to provide clearing and settlement services to NSXA or any other exchange that elects to operate on that model.</p>	<p>Austraclear Pty Ltd, a 100% subsidiary of ASX Limited, offers a clearing and settlement facility that is substitutable for the ClearPay offering.</p> <p>Austraclear can (and does) offer its systems and technology to other market operators and intermediaries in Australia and internationally. In Australia Chi-X and the Australian Energy Market Operator (AEMO), among others, use Austraclear</p>

<p>Sub-registry services - for operators of exchanges, markets and trading platforms, and for intermediaries</p>	<p>DESS offered by ClearPay, sought by NSXA</p> <p>ClearPay does not need any Australian licences, authorisations or registrations to provide registry or sub-registry services.</p>	<p>CHESS, offered by ASX Limited</p>
<p>Services including ISXPay® and Paydentity™ to enhance clearing, settlement and payment systems - for operators of exchanges, markets and trading platforms, and for intermediaries</p>	<p>Currently provided in Australia by Authenticate Pty Ltd, a 100% owned subsidiary of ISX, and in the European Economic Area (EEA) through Authenticate BV, a 100% owned subsidiary of ISX. These services do not need any licences, authorisations or registrations.</p> <p>Clients include market makers, market intermediaries and financial services providers. In Australia these clients hold AFSLs and in other jurisdictions licences similar to an Australian Markets Licence or an AFSL.</p> <p>Also iSignthis eMoney Ltd, a 100% owned subsidiary of ISX, holds a licence issued by the Central Bank of Cyprus to issue eMoney accounts, IBANs SWIFT messaging and associated facilities.</p> <p>In both the EEA and Australia, ISX's 100% owned subsidiaries are members of the major international card schemes (eg Visa, Mastercard). In Australia this involves compliance with RBA requirements, which Authenticate Pty Ltd does.</p>	<p>We understand that ASX/Austraclear sub-contract such services or engage such services through a different business model, but are seeking to offer those services in the near future. Their desire to signal that they will do so underscores the competition.</p>
<p>NOTE, for all above</p>	<p>ISX controls and operates its wholly owned subsidiaries in the usual way for a corporate group, including through an integrated management structure, shared staff, shared know-how and intra-group licensing of intellectual property.</p>	

11. In summary ISX claims that it competes with ASX regarding the provision, by companies in which it holds shares, of:
 - (a) deposit and payment systems (that facilitate the transfer of financial products on payment being made);
 - (b) sub-registry services; and
 - (c) clearing, settlement and payment systems.

12. The threshold issue is: Does ISX operate a business with which ASX, or its subsidiary, is in competition? Below I find that it does not.

13. The letter referred to ISX being ‘*a potential competitor to ASX Limited and its subsidiary Austraclear Pty Ltd, and will shortly be an actual competitor in the provision of payment services*’. Regulation 7.2.16(2) applies regarding conflicts, or potential conflicts, between ‘*the commercial interests of Australian Stock Exchange Limited [now known as ASX] ... in dealing with a body (the competitor) that operates a business with which ...*’ ASX, or its subsidiary, ‘*is in competition*’ alone or because of a joint venture. The regulation, in using the words ‘*that operates*’ and ‘*is in competition*’, concerns actual competitors, not potential competitors. Accordingly, regard cannot be had to what ISX or an associate expects to do, has negotiated but has not concluded, or has applied for but has not been issued.

Does ISX operate a business with which ASX, or its subsidiary, is in competition?

ISX does not operate the business of companies in which it holds shares

14. Regulation 7.2.16(2) applies regarding conflicts, or potential conflicts, between ‘*the commercial interests of Australian Stock Exchange Limited [now known as ASX] ... in dealing with a body (the competitor) that operates a business with which ...*’ ASX, or its subsidiary, ‘*is in competition*’ alone or because of a joint venture. There is no basis for finding that because ISX holds shares in another company (relevantly ClearPay Pty Ltd, Probanx Pty Ltd, Authenticate Pty Ltd, Authenticate BV and iSignthis eMoney Ltd) it operates the business of the other company. That business is operated solely by the other company, not ISX. This is the case irrespective of whether ISX holds 100%, less than 100% but more than 50% or less than 50% of the shares. This is the case even if the other company sources from ISX management services or logistical support.
15. Such a view is consistent with the wording of s798E(1) under which regulation 7.2.16 was made. Under s798E(1) a regulation can be made when there is a conflict, or potential conflict, between ASX’s commercial interests (by virtue of its activities or the activities of a subsidiary) and its need to ensure that the Australian Securities Exchange, on which shares in ISX trade, is fair, orderly and transparent. The mischief that the section attempts to quarantine is that which could arise when it is in the ASX’s commercial interest to hamper a listed competitor. ISX is not a listed competitor, at most it holds shares in a possible competitor.
16. Accordingly ISX does not operate a business with which ASX, or its subsidiary, is in competition.

If ISX operated the business of companies in which it holds shares

17. Even if ISX operated the businesses of companies in which it holds shares (as noted above I have found that this is not the case), I am not satisfied that one or more of those businesses is a business with which ASX, or its subsidiary, is in competition.
18. Competition involves rivalry to win business. There is no material before me evidencing that there is rivalry between ISX and ASX. All that is before me are assertions of rivalry. Such material might, for instance, comprise material showing:
 - (a) the services of the business that each operates;
 - (b) that the services are being promoted to consumers (and hence are not dependant on development or licensing occurring);
 - (c) that the services are being promoted to the same consumers (and hence are not in one case being promoted to overseas consumers and in the other case to domestic consumers); and
 - (d) the features of the services are such that consumers are comparing the features and opting for one service over the other rather than opting for both services.



Graeme D. Plath
Delegate – Australian Securities and Investments Commission