Role of the ASX

Ten years after the idea was first mooted in Australia to establish a regulatory ‘licensed market operator’ and six years after it was enacted in the Financial Services Reform, there is still little understanding, even within financial markets, of the role of the ASX: is it a regulator; does it prudentially regulate brokers?

The Australian Securities Exchange’s (ASX) capacity to enforce standards is limited to the rules which the ASX itself created rather than rules imposed on it by legislation or regulators. The ASX is not a financial market ‘regulator’ as it has no dedicated power to enforce the provisions of the Corporations Act. Nor should it. The ASX is best described as a regulated entity with limited supervisory functions (see box, right).

For the objectives of the regulatory framework to be fully achieved, there needs to be a considerable co-ordination and co-operation between the ASX, regulatory agencies and the Government. This co-ordination and co-operation contributes to the occasional misunderstanding among some stakeholders as to the separate roles undertaken by supervisors, regulators and legislators. However, this has traditionally been seen as a price worth paying to maintain a regulatory framework that successfully enforces the multilateral contract structure underlying listing, trade execution, clearing and settlement services to achieve public interest goals.

While the law administered by ASIC and the rules administered by the ASX both establish minimum standards for brokers, the areas of overlap are quite small, confined to a narrow area of ASX listed products for only those financial service providers who have a direct contractual relationship with the ASX. Securities exchange rules actually pre-date legislative action as a means of regulating equity and derivative markets. However, over time governments have recognized the public policy benefits of many market standard-setting rules and have incorporated these into law. The end result is that in most developed countries, the market operator’s supervisory role has narrowed as Governments progressively assume more of the responsibility for intermediary regulation.

Listing rules

ASX does

Establish rules for the admission, expulsion and ongoing quotation of securities by listed entities.

Facilitate the release of information to the market, including material announcements, by companies, their directors or their substantial shareholders.

ASX does not

Regulate the activity of listed entities generally, e.g., regulate incorporation, directors’ duties, takeover or insolvency.

Determine what specific information is material to a listed company, or anticipate when a shareholder or director has an obligation to lodge a notice.

This is not to suggest that the functions that remain with market operators are unimportant. The ‘front line’ role of monitoring particular types of conduct by particular types of market users that have a trade execution and settlement function remains fundamental to achieve market integrity. Without this there could be no enforcement action, whether taken by a market operator or in relation to its rules or another body in relation to legislation.

Market Supervisor Role

The ASX sets rules and establishes minimum standards that define the operation of its markets. The rules are multilateral contracts between the ASX and its direct customers: listing rules, market rules and clearing and settlement rules. Because this contract structure provides the opportunity to shape the behaviour of market users, the Corporations Act sets out minimum content requirements for the rules.

The ASX monitors only those activities that are directly connected with ASX service offerings, a broker’s inside execution activities, but not its securities lending, equity swaps or other off-market activities. On this basis, the ASX can be distinguished from ASIC and APRA which are regulators with powers conferred by Government.

Thus, the ASX has no capacity to create a market-wide standard precluding investors who are not contractually bound to observe ASX rules from engaging in insider trading, market manipulation, or the spreading of false rumours. This is done by legislation.

By virtue of having established a multilateral contract with listed companies, brokers and others, the ASX has created for itself an ability to oversee the conduct of these financial market participants. Where ASX monitoring of conduct by market users reveals a breach of standards established by the ASX, rather than by law, the ASX has the power to initiate disciplinary proceedings only if the offending conduct was undertaken by an organization, such as a broker, that had entered into a contract with the ASX.

Market rules

ASX does

Establish rules for the admission, expulsion and ongoing obligations of market participants.

Monitor participant conduct that directly impacts on the market, e.g., monitor for insider trading and compliance with ASX’s client order priority rules and crossing rules.

Market rules

ASX does not

Regulate related bodies corporate, associated entities, or third-party contracts entered into by participants.

Regulate conduct by brokers, financial advisers, financial planners or any other ASX holders in relation to OTC activities including margin lending, securities lending/borrowing, etc.
In Brief

Compliance is necessary, but public trust is vital says Soutichou Kozuka.

In the last few years, cheating by manufacturers has been a major concern among Japanese consumers. In January 2008, 17 out of 24 paper manufacturers in Japan admitted they had made false representations about the percentage of recycled paper used in their products. Then, six months after admitting it had advertised broccoli chickens as natural ones, the famous Japanese restaurant in Osaka, Sembu Kichou, confessed to repeatedly offering food left untouched by one customer to the next customer. More recently, packages of rice from China were found to have been passed off as Japanese rice. It is no wonder compliance has attracted public attention. And there is no doubt that these kinds of fraud will be eradicated. However, if compliance means merely abiding by laws and regulations, it is nothing more than another name for the enforcement of regulations. In addressing this problem, the best mixture of public and private initiatives, civil and penal sanctions, as well as the brand law and soft-law schemes may be the major issue.

Sometimes, however, compliance means more than merely complying with the law. In 2010, the internet site of the chemical company Sumitomo, as the claim of the claim that is in the chemical industry. Some insurance claims were used because the insured and the insurer didn’t even realize that a payable claim existed as it was not easy to read the complicated policies. In February 2005, most of the providers of insurance services were ordered by the Financial Services Agency to improve their operations.

If compliance means merely abiding by laws and regulations, it is nothing more than another name for the enforcement of regulations. As a result, the public became distrustful about insurance and this was reflected in the decline in sales of insurance products in both life and non-life insurance sectors.

THE PERCEPTION OF FAIRNESS

The regulation of insider trading has long been an issue. While some commentators argue that allowing insider trading will make the capital market more efficient, regulators in major economies are not convinced and enforcement appears more stringent than before. This may be better understood when we take the element of trust in the market into consideration.

Regulation is not a panacea for all problems. Take, for example, the issue of sub-prime loans and the costly exercise of rating security products. Even without such improper practices the problem could still have taken place, as strict rating does not remove risks but only makes them visible. If the major investment banks did not purchase prime-rated products, they might not have been acquired by other investors.

In order for the market to function satisfactorily, proper regulation is necessary but not sufficient. It is necessary in the sense that it is barriers, allowing others, the trust of the public in the market. The bottom line is that we have to bear in mind that we discuss regulatory issues.

Soutichou Kozuka is Professor of Law, University of Tokyo, Japan.

This excerpt was previously published in the Financial Times on 7 October 2018.

For more about this issue and the broader context, see
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**CORPORATE RESPONSIBILITY**

Expanding the limits

Efforts to create an international system for corporate responsibility should now be concentrated on the drafting of yet more rules and standards, but on the strengthening of existing international institutions.

Alice de Jonge’s paper (of which this is a brief summary) first outlines the problems with using standards that are generally not enforceable within national courts to make global corporations accountable. It is argued that at least some of these standards could be overcome by strengthening existing international institutions. Four such institutional structures are examined: the existing regional human rights bodies, the International Criminal Court (ICC), the International Labor Organization (ILO) institutions and an expanded International Court of Justice (ICJ).

It is increasingly apparent that there is a need for greater clarity at the international level on the extent to which transnational corporations (TNCs) should be held responsible for protecting, respecting and promoting human rights.

The idea of corporate responsibility is to be given meaning, then a common

Similarly, it is proposed that allowing the work of international human rights tribunals to include scrutinizing the activities of TNCs, may be somewhat idealistic in the face of political and resource constraints, but that does not mean they should not be tried.

What might be more immediately feasible is to expand the jurisdiction of the ICC in cases of grievous abuses of human rights and by courts not just natural persons, but legal (corporate) persons as well.

Dr Alice de Jonge is a lecturer in the Department of Business Law and Regulation, University of Sydney.

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“Directors should be punished for acting in their own interests”

Margin loan abuses show existing regulations don’t work.