March 2019

Ms Mavis Tan

ASX Limited

Via email: mavis.tan@asx.com.au

Dear Ms Tan,

ASX Listing Rules – Response to Consultation, November 2018

On behalf of the Australian Council of Superannuation Investors (ACSI), we are pleased to make this submission in response to the ASX's consultation released on 28 November 2018 on Simplifying, Clarifying and Enhancing the Integrity and Efficiency of the ASX Listing Rules.

ACSI makes this submission on behalf of its members, 39 asset owners and large institutional investors, who together invest over $1.5 trillion. A significant proportion of our members' assets are invested in the Australian equity market and we therefore support the maintenance of appropriate governance standards and investor protections within the ASX Listing Rules.

Overall, ACSI is supportive of ASX's objective of increasing the integrity and efficiency of the Listing Rules.

Before commenting on the specific questions in the consultation, we would like to raise four points, the first two on topics addressed in this consultation and latter two on broader areas, where we would urge ASX to strengthen the Listing Rules for the benefit of market participants:

- **Employee incentives purchased on-market:** while changes have been proposed to Listing Rule 10.14, we note that the 'on-market loophole' that allows entities to avoid seeking securityholder approval for equity incentive schemes not been addressed. The ASX's policy that underpins Listing Rule 10.14 is that 'directors and other closely connected parties are likely to be in a position to influence both the terms of the scheme and the number of securities issued… the harm it seeks to protect against is that the directors or other closely connected parties will exercise this influence to favour themselves at the expense of the entity.'

  Given these overriding principles, we see no reason for newly issued securities and securities purchased on-market to receive separate treatment. We also highlight that market practice has changed and it is now very common for companies to routinely seek approval for grants to be satisfied through on-market purchases as a matter of good governance. The Listing Rules are nwo lagging behind the market practice of well governed companies.

- **Underwriting fees disclosure:** We note that despite ASX's goal to "achieve consistent disclosure of the key features of underwriting agreements", the prototype for Appendix 3B does not require disclosure for placements and other non-pro rata capital raisings.
  We strongly believe that these changes should apply equally to all forms of capital raising, particularly placements. Placements are less likely than any other capital raising mechanism to achieve an equitable outcome for existing shareholders, and given their shorter execution time and complexity, should have lower underwriting risk (and therefore cost).

It is completely incongruent for there be a lower disclosure requirement for placements than for rights issues. Without this disclosure, market participants have no way of knowing whether underwriting for placements is cost-effective in Australia.

- **Reverse takeovers:** We would like to reiterate our concerns from our submission to the Reverse Takeovers consultation in April 2017.

  Specifically, we remain concerned by the proposed 100% dilution threshold which is out of step with investors protections that exist in many other markets. We see an ongoing risk that the amended Listing Rules will be viewed as an anomaly and that global investors view the new rules as significantly weaker than comparable international exchanges.

  We note that international markets with lower dilution thresholds, and therefore stronger investor protections, maintain very active markets for corporate control.

- **Application by ASX of discretion within Chapter 11:** We have concerns with the manner and the transparency with which Chapter 11 of the Listing Rules is currently being applied.

  Last November questions were raised with how ASX approached the application of Chapter 11 with respect to the proposed sale of AMP Life as announced on 25 October 2018.

  Given the wide discretion and judgment involved, there is scope for ASX to increase its transparency with respect to notifications from companies in accordance to Chapter 11, decisions on its application by ASX and how discretion was applied – particularly application of the "rule of thumb" in Guidance Note 12.

  More broadly, this case also highlights the need for ASX to remain transparent and accountable on how it applies the Listing Rules more generally given the potential for perception of tension between being a commercial market exchange operator and, simultaneously, an enforcer of market integrity rules.

  We are not questioning whether ASX is using its discretion appropriately, but suggesting that greater transparency can promote market confidence.

We acknowledge that the latter two points are outside the scope of this consultation and unlikely to be addressed at this stage. Therefore, we would ask ASX undertake further consultation on these topics as soon as practicable.

Our responses to the specific questions in the consultation are presented in the Appendix below. I trust that our comments are of assistance to the Consultation and please contact me should you require any further information on ACSI's position.

As the representatives of long-term investors, we strongly support your work to maintain appropriate governance standards and investor protections within the ASX Listing Rules.

Yours sincerely,

Louise Davidson

Chief Executive Officer

Appendix: Responses to specific consultation questions

Please note we have provided responses to ASX's questions (in blue) where we consider our views to be relevant.

We have also provided our view where there was no specific question raised. For these, we reference the relevant sub-headings from the consultation paper (in black) in the left column.

Consultation question	ACSI response
Disclosure of closing dates for the receipt of director nominations: ASX is keen to receive feedback on the changes to rule 3.13.1 proposed above. Do stakeholders agree that listed entities should disclose the closing date for the receipt of director nominations to the market? Will this requirement be burdensome to comply with? Might there be any unintended consequences if these changes are adopted?	We support the proposal that listed entities disclose the closing date of the receipt of director nominations. Our view is that the resolutions considered at annual general meetings are a significant way for the voice of investors to be heard and considered. The closing date for the receipt of director nominations is generally mandated by a company's constitution, and while that date is often able to be calculated from publicly available information, we agree with the additional transparency promoted by the proposed amendments to the rule. We see no significant compliance burden, given we would expect that companies would be monitoring the date for director nominations. In addition, as companies are required to make an announcement of the AGM date, it would be straightforward to include the closing date for director nomination in that announcement. In addition, we would support a requirement for the closing date for shareholder resolutions to be included in a Notice of Meeting for an upcoming AGM. While the Corporations Act sets out the circumstances and time frame in which a company must put a shareholder resolution to shareholders, there would be value in companies notifying the relevant dates for shareholder resolutions to be considered at that meeting at the same time the AGM date is disclosed.

Consultation question	ACSI response
ASX is keen to receive feedback on the changes to rule 3.13.2 proposed above. Are they appropriate, in terms of their reach and content? Will they be burdensome to comply with? Might there be any unintended consequences if they are adopted?	We support the proposed changes and don't see and compliance burden or unintended consequences. It would be useful for ASX to prescribe a standard table for voting disclosure. Most companies use standardised tables, which are clearer than where a table is not used. We would like to make three additional proposals: • There is currently no requirement to disclose the outcome of resolutions where the proxy deadline has passed but the resolution is not put to the meeting. Our view is that there should be mandatory disclosure of proxy outcomes for which the resolution was not withdrawn prior to the proxy deadline. In these cases, most shareholders (and practically all institutional shareholders) have given their complete collective view on the resolution. Also, as a matter of good governance, every ASX200 company that received shareholder resolutions in 2018 disclosed the outcome of the advisory resolution(s), none of which were formally put to the meeting. This shows that market practice has changed, and the Listing Rules should align. • Where show of hands is used to pass a resolution, companies should attach a short explanation of why a poll was not required. Again, this aligns with market best practice whereby show of hands is now being used only in an ever-decreasing minority of ASX200 companies. International investors are also strongly opposed to show of hands, on the basis it disenfranchises them and reduces confidence. (Additional details on these points here.) This change would also support and reinforce the new ASX Corporate Governance Council principle 6.1: *A listed entity should ensure that all substantive resolutions at a meeting of security holders are decided by a poll rather than by a show of hands.* • There have been cases where proxies suggested a remuneration 'strike' would occur but show of hands was used to avoid a strike. ASX should mandate a poll in these circumstances.

Disclosure of underwriting agreements: ASX is keen to receive feedback on the changes to the disclosures required in relation to underwriting arrangements proposed above. Are they appropriate, in terms of their reach and content? Will they be burdensome to comply with? Might there be any unintended consequences if they are adopted?	We note that despite ASX's goal to "achieve consistent disclosure of the key features of underwriting agreements", the prototype for Appendix 3B does not require disclosure for placements. As noted in our general comments above, we strongly believe that these changes should apply equally to all forms of capital raising, particularly placements. Placements are less likely than any other capital raising mechanism to achieve an equitable outcome for existing shareholders, and given their shorter execution time and complexity, should have lower underwriting risk (and therefore cost). It is completely incongruent for there be a lower disclosure requirement for placements than for rights issues. We raised this issue publicly in our 2014 research Underwriting of Rights Issues. Without this disclosure, market participants have no way of knowing whether underwriting for placements is cost-effective in Australia. We otherwise support the proposed changes but make the following additional proposals. Regarding "the fee or commission payable", we have seen cases where only the underwriting fee and not the management fee is disclosed. The management fee forms part of the true costs of the underwriting and should be disclosed. Therefore, we propose disclosure of both the underwriting fee and the management fee, where the sum of these is the total cost to the company for the transaction or engagement. Additionally, we propose the following additional disclosure requirements (either within or outside the Appendix 3B form): • How the board oversaw the capital-raising process. • How the capital raised was priced. • Why the form of capital raising (for example, rights issue or placement) was chosen. • Details of any sub-underwriting arrangements including differences in fees paid to sub-underwriters. • Once the raising is completed, disclosure of the proportion that was ultimately allocated to the underwriters. (On this, we note the alleged cartel case regarding ANZ's 2015 raising and believe this disclosure would avoid similar situations.) For placements, given their potential to adversely affect existing shareholders, there should be the following additional disclosure requirements: • Companies should disclose the proportion of the placement that went to existing shareholders up to their pro rata entitlement.* • There should be disclosure of the shareholders who received an allocation materially above their pro rata entitlement and the multiple of their entitlement they received. A materiality threshold may be reasonable: for example, it could apply only to shareholders who are allocated more than 3 per cent

Consultation question	ACSI response
	of the total placement and get more than (one times) their pro rata entitlement. (It would not be necessary to disclose their total shareholding, consistent with existing substantial shareholder rules.) *As an example, if there were two existing shareholders owning half of the company each and 70% of the placement was allocated equally to these shareholders, and the rest to new shareholders, the proportion would be 70%. Or, if one of the shareholders received the full allocation and the other got nothing, then the proportion would be 50%.
Voting by employee incentive schemes: ASX is keen to receive feedback on the voting restrictions proposed in new rule 14.10 for securities held by or for an employee incentive scheme. Are they appropriate, in terms of their reach and content? Will they be burdensome to comply with? Might there be any unintended consequences if they are adopted?	We support this change and agree that "if securities are held by or for an employee incentive scheme and they haven't been allocated to a participant in the scheme who is exercising the right to vote the securities, the likelihood is that the board or management of the entity will have some influence in how they are voted". It is inappropriate for the company to vote these securities. They should only be voted if they have vested and are under the control of the executive or director, not the company, subject to the usual voting exclusion provisions.
3.4. The additional 10% placement capacity in rule 7.1A	We acknowledge ASX's comments regarding dilution and repeat our comments above regarding additional disclosures for placements: • Companies should disclose the proportion of the placement that went to existing shareholders up to their pro rata entitlement. • There should be disclosure of the shareholders who received an allocation materially above their pro rata entitlement and the multiple of their entitlement they received.
3.5. Issues of equity securities without security holder approval	We support the addition to exception 13 under rule 7.2 that requires disclosure of "the maximum number of equity securities proposed to be issued under the scheme" and the clarification that the exception does not apply if it exceeds this maximum or is on materially different terms. Finally, we oppose the new rule 10.12 exception 12, whereby future potential related parties do not need shareholder approval. This exception can allow companies to subvert the intent of Chapter 10 by making issuances immediately before they formally become related parties.
3.5. Issues of equity securities without security holder approval	We oppose exception 8 to rule 7.9 whereby during a takeover, issuances can be made on a non-pro rata basis with the approval of the acquirer. This allows the board and acquirer to dilute the shareholdings of those opposed to the transaction by placing securities to supportive shareholders. There is no compelling need to have this exception.

Consultation question	ACSI response
Employee incentive schemes: ASX is keen to receive feedback on the changes to rule 10.15 proposed above. Are they appropriate, in terms of their reach and content? Will they be burdensome to comply with? Might there be any unintended consequences if they are adopted?	We support the requirement that "the relevant director's current total remuneration package is also disclosed".
6.6. Censures	We support the proposal on censures as a way of improving compliance with the Listing Rules.
7.2. Employee incentive scheme issuances	We support the proposal under this heading, although if ASX decides to allow a "short letter or announcement" to satisfy the requirements, there should be clear guidance on what should be disclosed. At absolute minimum we would expect disclosures to: • specify the number of securities that were issued and total currently on issue; • list any KMP that were issued securities; and • cross-reference to the Annual Report or other disclosure where the incentive scheme to which it relates is outlined.
7.3. Listing rule 7.1 and 7.1A placement capacities	We support these changes.
7.6. Substantial holders under rule 10.1.3	We encourage ASX to retain the two-tiered test of a current substantial (i.e. 10%) shareholder *or* a substantial shareholder in the last 6 months. We emphasise that the language in the existing and proposed draft is "*or*" not *"and*", which means approval should be sought in either circumstance. We also note the except under rule 10.3 for cash issuances. This is inappropriate and should be removed because it allows a substantial shareholder to be placed securities without approval from other shareholders.
8. General drafting improvements	We support the use of the gender-neutral term "chair" instead of "chairman".
ASX is keen to receive feedback on this proposed guidance. Do stakeholders agree with the guidance? Will complying with the guidance be burdensome? Might there be any unintended consequences if ASX adopts the guidance?	Regarding Guidance Note 12, please refer to our comments on the application by ASX of discretion within Chapter 11 above.

Consultation question	ACSI response
GN 24 Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence: ASX would welcome feedback on the policy position above, the appropriateness of the waivers referred to in sections 8.2 – 8.4 of GN 24 and whether there are any other specific cases where ASX should consider granting a waiver of rule 10.1.	We support the principle and strongly agree that waivers should not routinely be granted.
GN 25 Issues of Equity Securities to Persons in a Position of Influence: ASX would welcome feedback on the policy position above and whether there are any specific cases where ASX should consider granting a waiver of rule 10.11.	We support the principle and strongly agree that waivers should not routinely be granted.
GN 25 Issues of Equity Securities to Persons in a Position of Influence: ASX would also welcome feedback on the policy positions above and whether there are any specific cases where ASX should consider granting a waiver of rule 10.14.	We reiterate our comments above regarding the on-market exception for employee incentive schemes.
GN 25 Issues of Equity Securities to Persons in a Position of Influence: ASX would also welcome feedback on the policy positions above and whether there are any specific cases where ASX should consider granting a waiver of rule 10.14.	We propose that shareholder approval should be required in all cases regarding a relative. Our primary concern is where grants are made to relatives on different terms (whether in quantum or structure) to the employee incentive scheme as generally applied. In these cases, clearly the company cannot "satisfy itself that the relative is not an associate of the director". We are aware of companies not seeking approval in these circumstances and relying on a statutory declaration, thereby subverting the intent of these rules. Even where companies have relatives employed on standard employment terms, approval should be sought. An explanation that the grant is on standard employment terms will mean approval is uncontentious.
GN 33 Removal of Entities from the ASX Official List: ASX would welcome feedback on the proposed changes to GN 33.	We support shortening the timeframes for removal as proposed.

Consultation question	ACSI response
Accompanying documents: ASX is keen to receive feedback on the contents of the proto-type Appendix 2A, 3B and 4A forms included in Annexures K, L and M respectively, including in particular the requirement mentioned above for any entity relying on its placement capacity under rule 7.1 or 7.1A to make an issue of equity securities without security holder approval to complete the applicable worksheet and send it to ASX. Will this requirement be burdensome to comply with? Might there be any unintended consequences if it is adopted?	We would like to make three proposals: • We support the use of worksheets to determine placement capacity under Listing Rules 7.1 and 7.1A. We suggest these worksheets are publicly disclosed as part of companies' Appendix 3B disclosures. This will enable investors to separately analyse and reinforce ASX's enforcement of these rules. • We reiterate our previous comments regarding disclosure of underwriting for placements in Appendix 3B. • We oppose the inclusion of the following under the definition of employee incentive scheme: "A scheme can be an employee incentive scheme of the purposes of the Listing Rules even if there is only one employee or nonexecutive director participating in the scheme". This could invite companies to inappropriately issue securities under the guise of an employee incentive scheme when they should get approval under Chapter 10.