

28 February 2019

ASX Limited
PO Box H224
Australia Square NSW 1215
Attention: Mavis Tan

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

Dear Ms Tan

Consultation paper on simplifying, clarifying and enhancing the integrity and efficiency of the ASX listing rules

Thank you for the opportunity to provide a submission to the ASX in relation to the proposed amendments to the listing rules.

The Australian Institute of Company Directors (**AICD**) has a membership of more than 43,000 including directors and senior leaders from business, government and the not-for-profit sectors. We aim to be the independent and trusted voice of governance, and to build the capability of a community of leaders for the benefit of society.

The AICD commends the ASX for a comprehensive and thorough consultation paper, and its aim to simplify and clarify aspects of the listing rules. We appreciate the work that has gone into the process.

We further note that many of the proposals are directed at improving the quality of new listings, including through enhanced reporting requirements. We support this objective.

Given the focus of the AICD, our response concentrates on a limited number of specific questions posed in the consultation paper that relate to broader governance issues. Our responses to these questions are set out in **Annexure A** to this submission. A key area of concern flagged in our submission relates to the proposed compliance powers set out in listing rule 18.8.

If you would like to discuss any aspect of this submission, please contact Sally Linwood, Senior Policy Adviser, at slinwood@aicd.com.au.

Yours sincerely



LOUISE PETSCHLER

General Manager, Advocacy

ANNEXURE A

1. Disclosure of closing dates for the receipt of director nominations - fixing issues with the drafting of rule 3.13.1.

We note that listing rule 3.13.1 is directed at ensuring that the market is given at least 5 business days' notice of the closing date for the receipt of nominations from persons wishing to be considered for election as a director, but that it currently only requires a listed entity to disclose the intended date of the meeting.

We agree that the rule should be amended to specifically require listed entities to disclose the closing date for the receipt of director nominations.

We also agree with the ASX that the consequences of failing to give such notice should not include invalidation of the meeting (or the election of any directors at that meeting). This would be a disproportionate outcome for what, as the ASX points out, is likely to be a simple administrative oversight. To avoid any ambiguity, we agree that the rule should be amended to state that the failure to give notice does not invalidate the relevant meeting or the election of any director at the meeting.

2. Disclosure of voting results at meetings of securityholders

We note that listing rule 3.13.2 currently provides that an entity must tell ASX the outcome in respect of each resolution to be put to a meeting of security holders immediately after the meeting has been held.

We understand that the rule's lack of specificity has led to listed companies adopting inconsistent approaches to disclosing the outcomes of resolutions, and that this is unhelpful for investors and other market participants.

We also understand that the information required to be disclosed under the proposed new rule 3.13.2 is typically provided by share registries and should not create an undue disclosure burden for listed entities.

Accordingly, we support the proposed changes to listing rule 3.13.2.

3. Good fame and character – expanding the 'good fame and character' requirement

The AICD strongly supports the extension of the 'good fame and character' requirement in the conditions for admission as an ASX Listing (rule 1.1 condition 20) to cover an entity's CEO or proposed CEO, as well as its directors and proposed directors.

We note that this extension will only apply in a limited number of circumstances where the CEO or proposed CEO will not sit on the board.

4. Persons responsible for communication with ASX on listing rule issues

It is important that persons responsible for communication with ASX on listing rule issues have a strong understanding of the content and operation of the listing rules.

Accordingly, we support in-principle the proposed requirement to introduce an education and examination process along the lines proposed in the consultation paper (including the provision of a free online course by the ASX).

We suggest that providing additional clarity around timeframes may assist people in understanding their obligations under this rule. We understand based on the current drafting that persons appointed to be responsible for communication with ASX in relation to listing rule matters must have completed the assessment process *prior* to their appointment. The ASX may wish to consider allowing people to complete the process within a short time period after their appointment to ensure that appointments are not unduly delayed.

If the ASX does not include a 'window' within which the process can be completed, some flexibility will be required in the application of this rule to allow people who have not undertaken the assessment process to step into the role with limited notice.

5. Voting by employee incentive schemes

The AICD supports the proposed new restriction on voting by employee incentive schemes.

We understand that it is already common practice (and, in our view, a matter of good governance) for trustees not to vote unallocated trust property held in employee share scheme trusts for the reasons identified in the consultation paper. In any event, entities that rely on ASIC Class Order [CO 14/1000] will already be subject to a requirement that if the trustee is the listed body or an associate of the body, the trustee does not, at its own discretion, exercise any voting rights attaching to any of the underlying eligible products that it holds on trust.

We also understand that it should be a straightforward matter to identify the relevant shares (either because they are 'ring fenced' if the registry is the trustee, or because a separate record would be required to be maintained if the registry is not the trustee), so it should not be overly burdensome to comply with the new requirement.

6. Employee incentive schemes – rationalising rules 10.15 and 10.15A

Overall, we support the rationalisation of listing rules 10.15 and 10.15A.

However, we query the need for companies to disclose a director's (typically in the context of these rules, a CEO's) total remuneration package in the relevant notice of meeting.

Given the remuneration reporting requirements already in place are comprehensive, we suggest a cross-reference to the listed entity's remuneration report should be sufficient.

We also note that the rule only requires approval for *issues* of securities rather than for securities that are being acquired on-market, which suggests that the primary purpose of the rule is to address dilution. We are concerned that the proposed new requirement will create inconsistency in terms of the level of disclosures made by listed companies, given not all companies will be required to comply with it.

If entities are required to disclose 'total remuneration packages' in notices of meetings, it may be useful to include some additional guidance about the scope of the disclosure. For example, assuming the disclosure is prospective, are target or maximum STI opportunities disclosed? Is the figure disclosed determined based on face value of equity, or accounting value?

7. Standard forms

We note that ASX is proposing to remove a number of standard forms from the appendices to the listing rules and make them available on ASX Online, with a view to facilitating ASX being able to make changes to those forms from time to time without having to go through the formal rule change process prescribed in the Corporations Act.

Under proposed new rule 19.8B, ASX will not be able to amend or replace any of these forms without first giving at least 14 days' notice to ASIC and to the market.

While we support measures to enhance efficiencies in relation to standard ASX forms, we suggest that ASX be required to give a longer period of notice (for example, 30 days) to ASIC and the market before amending or replacing any of these forms.

We are aware that many companies prepare forms in advance of lodgement, and that the shorter timeframe may cause a level of confusion, and additional work for company secretarial teams.

8. Amendments to rule 18.8 – new compliance powers

We note that the ASX is proposing to amend listing rule 18.8 to list specific examples of the types of requirements the ASX may impose on a listed entity to ensure compliance with the listing rules, including requirements:

- to give specified information to ASX for release to the market;
- to update, correct or retract information previously released to the market;
- not to enter into or perform an agreement or transaction;
- to cancel or reverse an agreement or transaction;
- to seek the approval of the holders of its ordinary securities to an agreement or transaction;
- to include specified information in a notice of meeting proposing a resolution under the listing rules;
- to update, correct or retract any information in a notice of meeting proposing a resolution under the listing rules;
- to impose a holding lock on specified securities;
- to enforce a provision in its constitution required under the listing rules;
- to enforce a provision in a deed or any other legal document required to be entered into by the entity under the listing rules;
- to introduce or update a compliance policy or process;
- to engage an independent expert to review its compliance policies and processes and to release to the market the findings of, and any changes the entity proposes to make to its compliance policies and processes in response to, the review; and
- to cause specified officers or employees to undertake a compliance education program.

The AICD is cognisant, and supportive, of the need for ASX to be able effectively enforce the listing rules. We also agree that it would be beneficial to articulate the extent of the ASX's compliance powers, both to promote certainty, and to clarify that the ASX has the ability to rely on a range of powers (beyond suspending securities from quotation or de-listing) that may allow it to achieve more effective and appropriate compliance outcomes.

However, we are concerned that several of the new powers are extensive and appear to go beyond the scope of a market operator's traditional authority. Several – for example, the requirement not to enter into or perform an agreement or transaction, or to cancel or reverse an agreement or transaction - impact an entity's underlying business and, in many cases, third party legal rights.

We note that the ASX has advised that it holds the view that it already has the relevant powers under the current rule 18.8. However, we are aware that there are differing legal views. We encourage the ASX to further consider the broader legal framework, having regard to advice from legal experts, before proceeding with the amendments.

At a minimum, it is critical that due process is followed (and is seen to be followed). In this regard, we note that the Listing Rules are enforceable against listed entities and their associates under the Corporations Act (through sections 793C and 1101B). In particular, ASX can make an application to the Court on contravention of the Listing Rules and the Court may make such order, or orders, as it thinks fit provided the Court is satisfied that the order would not unfairly prejudice any person. We consider that it would be preferable for ASX to seek a court order in relation to matters that impact third party legal rights.

However, we acknowledge that court processes can be costly and time-consuming. As an alternative, we are of the view that at a minimum an ASX appeals process (along the lines of the mechanism that existed prior to 2015) should be re-established to provide a clear framework for the exercise of the relevant powers, and a mechanism for the relevant listed entity to appeal the decision.

In the interests of market certainty, guidance as to how and in what circumstances such powers would be exercised (including, potentially, the circumstances in which the ASX has already exercised them) would also be essential.

9. New rule 18.8A – censure power

The AICD is supportive of the ASX having a power to formally censure a listed entity that breaches the listing rules, or a condition imposed under the listing rules, and to publish the censure and the reasons for it to the market, consistent with other jurisdictions.

It may be useful for a note to be included on the circumstances in which this power will be used (including, for example an acknowledgement that the power will only be used in egregious circumstances where the relevant listed entity has not co-operated or engaged with ASX to address the issue, and where there have been repeated breaches).

As with the compliance powers discussed above, it is important that due process is followed. If an appeals mechanism is re-established, it should also cover the proposed new censure power (similar to approaches in, for example, London and Hong Kong).

10. Substantial holders under rule 10.1.3

We understand that the proposed amendment to the definition of substantial holder is not intended to create any substantive changes, as rule 10.1.3 already requires securityholder approval for acquisitions or disposals to any '10% holders'.

However, the term 'substantial holder' is also used in:

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- rule 4.10.4, which requires entities to disclose substantial shareholders (as disclosed in substantial shareholding notices given to the entity under the Corporations Act) in their annual report; and
- rule 15.14, which provides that a trust which has provisions in its constitution relating to the acquisition of units above a limit of substantial holdings must not have any sanctions or penalties in the constitution which entitle the responsible entity or any other party to enforce the provisions.

Accordingly, we are concerned that the amendment to the definition may have unintended flow-on effects and suggest that the ASX track this through.