14 March 2019

ASX Limited
PO Box H224
Australia Square NSW 1215

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

Dear Ms Tan

Simplifying, clarifying and enhancing the integrity and efficiency of the ASX Listing Rules

Governance Institute of Australia (Governance Institute) is the only independent professional association with a sole focus on whole-of-organisation governance. Our education, support and networking opportunities for directors, company secretaries, governance professionals and risk managers are unrivalled.

Our members have primary responsibility within listed entities for developing governance policies, ensuring compliance with the Australian Securities Exchange (ASX) Listing Rules and supporting the board on all governance matters. Their familiarity with the practical aspects of compliance with the Listing Rules and contemporary market practice has informed the comments in this submission.

Governance Institute welcomes the opportunity to comment on the proposed amendments.

We support ASX's proposal to simplify and enhance the integrity and efficiency of the Listing Rules. Our detailed comments and recommendations on items of most interest to our members are contained in the enclosed table. We have commented on proposed changes which we support and have also highlighted items where we have concerns as to the burden imposed by the proposed changes and the unintended consequences which they may create.

Our members are particularly concerned by proposed Listing Rule 18.8 and we have provided details of this issue in the table.

We have provided our feedback on the proposal to require persons responsible for communicating with ASX on the Listing Rules to have completed an approved listing rule compliance course. We note that we have written to ASX separately about whether Governance Institute's Listing Rules Compliance course which is currently offered can be accredited as training under the new requirements.

We also would like to raise the implementation date of 1 July 2019 with ASX. While the overall impact of the proposed changes is not major, the volume of changes is significant and will require entities to review their processes to ensure compliance with these new requirements. Accordingly, Governance Institute recommends that the implementation date be delayed by 6 months to 1 January 2020. ASX may of course consider encouraging entities to adopt the relevant changes at an earlier date, where practicable.

Yours sincerely

Megan Motto

CEO
Governance Institute of Australia

Governance Institute comments on suggested amendments to the Listing Rules

Current Draft	Practical issues/Comments
1.Improving market disclosures and other market integrity measures	
Quarterly reporting Introducing new rule 4.7C requiring start-up entities that currently lodge an Appendix 4C quarterly cash flow report with ASX under rule 4.7B to also lodge a quarterly activities report with ASX	We agree that this will provide a more robust disclosure framework for start-up entities and give them a vehicle to communicate developments in their business to the market on a regular basis. In our members' experience some entities after listing have failed to meet investors' expectations concerning the communication of information about their activities.
Quarterly reporting Requiring the quarterly activity reports of rule 4.7B quarterly reporters under the new Rue 4.7C….to require the quarterly activity reports of mining exploration entities and oil and gas exploration entities.. to include ….a comparison of its actual expenditure since the date of its admission to the official list against any expenditure estimated in the 'use of funds' statement and an explanation of any material variance	We agree with this suggested amendment. We consider that this makes sense to the market and to investors as it will mean that start up entities will be required to monitor cash closely and fulfil their promises to investors.
Quarterly reporting Requiring a description of and an explanation for, any payments to a related party included in its quarterly cash flow report.	We agree with this suggested amendment. We support clear disclosure of related party payments.
Disclosure by listed investment entities of their NTA backing	We agree with the amendments to LR 4.12 which require the NTA to be released without delay and support improved disclosure of paid and unpaid management and performance fees. With respect to the proposed amendment to rule 4.10.20, we consider it has the potential to significantly increase the amount of information provided with no real benefit to shareholders. It is our understanding that that ASX will expand the definition of derivative investments to remove any ambiguity and we support this clarification.
Disclosure of closing dates for the receipt of director nominations LR 3.13.1	We agree with the amendment that clarifies that failure to give notice of the date of a meeting under the rule does not invalidate the meeting or election of directors at the meeting. We consider the requirement to advise of the date of closing of nominations for election of a director at least 5 business days before creates a level playing field for disclosure.
Disclosure of voting results at meetings of security holders LR 3.13.2	We query the addition of these items concerning the outcome of the AGM. Most of these disclosures are required by the Corporations Act and we consider that it is unnecessary to duplicate them. The requirements contained in 3.13.2 (e) (iv) and (v) exceed those under the Corporations Act and we consider that their disclosure is unnecessary and burdensome. While we generally are in support of a requirement to disclose, in relation to resolutions proposed but not put to the meeting, details of that resolution including an explanation of why it was not put to the meeting, we question the utility of that requirement where resolutions are withdrawn for reasons of procedural irregularity. There can also be any number of reasons why resolutions are withdrawn and providing this detail adds disclosure but may increase complexity. In our members' experience it is not universal market practice to regard those who attend the AGM and do not vote as abstaining. Accordingly, we recommend removal of the footnote.
Disclosure of underwriting agreements	We support this amendment on the basis of improving transparency.
Good fame and character	We support this amendment.

Current Draft	Practical issues/Comments
Persons responsible for communication with ASX on listing rules issues	Our members consider that it is up to the entity to ensure that it has appropriately qualified and skilled staff to communicate with the ASX. We understand however that ASX has experienced issues with communicating with companies with unqualified staff. We therefore understand the intention behind the proposed amendment. Our support for an online course and exam would be subject to current staff being grandfathered and that an appropriate period of time be provided to allow entities to train their staff to sit the exam. We consider a period of 3 months to be appropriate. If qualified people leave the organisation, a listed entity may end up with no one to communicate with ASX. Therefore, a grace period will be needed to enable the entity to train a new staff member to the point where they can successfully sit the exam. We query what consequences will be applied to entities which don't have a suitably qualified person – will they be prevented from communicating with ASX?
Voting by employee incentive schemes LR 14.10	We support this rule which seeks to prohibit an employee share trustee from voting unallocated shares in the trust. We consider that this is currently considered good market practice. A similar exclusion is contained in the ASIC Share Scheme Class Order (CO 14/1000) and a register of unallocated shares must already be maintained by a Trustee.
Market announcements LR 15.5	We note that proposed LR 15.5 (a) requires a document given by ASX to an entity to either be on letterhead or sent with a covering letter on letterhead and we support the availability of these alternatives. We acknowledge that the new 15.5 clarifies the distinction between ASX's expectations for documents that are to be released to market, and other documents sent to ASX that are not for release to market. For documents not to be released to market, we accept that 15.5(a),(b) and (c) should apply. For documents that are to be released to market, we support that (a), (b) and (d) should apply. However, some of our members are of the view that they should have the option of not including (c) due the fact that the release may have been authorised by the full Board or by a Disclosure Committee, and to include the name and title of an authorising officer is not always appropriate. For some (eg smaller) entities without a Disclosure Committee, (c) and (d) are likely to be the same person, such as, MD or CFO, and so there will be one party at least identified as the contact person for enquiries. Members have queried if, when lodging the Annual Report as a standalone document (especially those who lodge the audited annual report some weeks later than the year end financials release), ASX would prefer it to be accompanied by a cover letter in order to meet the letterhead obligation of 15.5?
Distribution schedules LR 3.10.5 (b)	We query the purpose of this LR given that the information it requires to be disclosed will also be provided in new Appendix 2A. We seek clarification of the drafting of LR 3.10.3A and B which is currently confusing.
2. Making the rules simpler and easier to follow	
Announcing issues of securities and seeking their quotation	Splitting into Appendix 2A and Appendix 3B will cause some initial confusion initially as to timing and enhanced disclosure but we support this change.
Definition of working capital	We support this change
The additional 10% placement capacity in rule 7.1A	We consider that the changes to LR7.1A in general make sense. LR 7.1A is a very burdensome rule for listed entities and we support ASX's proposal to simplify it.

Current Draft	Practical issues/Comments
LR 7.1A	We agree with ASX that the ability for entities to make an issue under their additional 10% placement capacity in rule 7.1A for non-cash consideration is seldom used and creates significant compliance issues. We agree that removing it makes sense. We suggest that ASX implement a solution within ASX online to track LR7.1/LR7.1A capacity which pre-populates the listing rule 7.1 and 7.1A capacity, rather than relying on listed entities to calculate separately. We consider that there is still a lack of understanding how to properly calculate and fill out the disclosure.
Issues of equity securities without security holder approval	We do not agree with the amendment to LR 10.2 which classifies an asset as substantial if its value is 5% or more of the equity interests of the entity **in ASX's opinion**. We consider those three words to be superfluous and recommend that LR 10.2 remain unchanged. We do not consider that ASX should be the sole determiner of this. ASX can already deem an asset to be substantial under the current wording. The addition of those words could also suggest that an entity which conducts its own calculations to determine whether an asset is valued at 5% or more is required to obtain ASX's opinion each time it undertakes a relevant transaction. We recommend that rather than adding the words 'in ASX's opinion' in LR 10.2 ASX add a clarification at the end of the LR that ASX has the power to determine if the asset is substantial in its opinion. If there are circumstances in which ASX is of the view that it should be consulted for its opinion in advance, this should be clarified in the LR or in a footnote.
Notices of meeting LR 14.1A	We query the proposal to require companies to summarise what will occur if security holders give, or do not give, that approval. We consider this a burdensome requirement for commonplace resolutions, such as appointment of directors and approval for increased in NED remuneration where the implications are straightforward. The important issue should be that of materiality and we would not support this being applied as a blanket rule for all resolutions. We recommend that the LR be limited to unusual or complex resolutions that are material.
Employee incentive schemes LR 10.10 LR 10.14	We support the efforts made to rationalise the rules dealing with the approval of issues to directors and their associates under employee incentive schemes. We support the change to LR 10.13 which will enable an entity to disclose the price at which securities are to be issued as a formula. This will be helpful where the price cannot be determined as the issue of securities occurs on a date in the future and will preclude the company from having to seek a waiver from the ASX. We support the amendments to LR 10.14 which provides that shareholder approval ceases to be valid if there is a material change to the scheme. We consider that this is prevailing market practice.
Employee incentive schemes LR 10.15.3 directors total remuneration package	LR 10.15.3 will require the notice of meeting to disclose the details and amount of the director's current total remuneration package.

Current Draft	Practical issues/Comments
	We question what ASX is seeking to achieve with this amendment. If we understood the issue that ASX is seeking to address we would be in a better position to respond to this item. Historically the purpose of obtaining shareholder approval for new issues to directors and their associates is to give shareholders an opportunity to vote on the dilutionary effect of an issue, not remuneration. This is supported by the fact that shareholder approval is not required for the allocation of securities purchased on-market to directors or their associates (refer LR 10.16. We assume that new LR 10.15.3 applies to new issues to directors and not on market purchases, however we seek clarification of that point. Our concerns are that the information concerning the director's current total remuneration package is included in detail in the remuneration report which a shareholder would have with them at the relevant meeting. The remuneration report is audited. Remuneration is complex and is capable of losing meaning when summarised. Further, the insertion of remuneration disclosure appears to confuse the intent of this rule. We do not support duplicating the disclosure of this information. We consider it preferable for the notice of meeting to state that the information can be found in the remuneration report. Such an amendment is only appropriate if the information is not otherwise contained in the remuneration report (which may be the case, for example, for a foreign company). We consider the remuneration report is the most appropriate place for these details to be disclosed.
LR 10.15.5	We repeat the comments which we made in relation to the proposed amendments to LR 10.15.3. The proposed in this LR is contained in the remuneration report. We recommend that this information should only be included in the notice of meeting if it is not already contained in the remuneration report.
LR 10.15.9	We support this amendment however consider that attaching a loan agreement to a notice of meeting to be impractical.
LR 10.15.11	We support the disclosure in the notice of meeting but consider that the second bullet point to 10.15.11 requires refinement. A person could become entitled to participate in a scheme after a resolution is approved, and the company could resolve to grant that person shares purchased on market. This grant does not require approval by members as it is not a 'new issue'. However, this LR would not allow that to occur and maybe confusing as to how it operates with LR 10.16. Currently there is no approval required for grants to directors that are not a 'new issue' (although some companies voluntarily seek this approval – see LR 10.16).
Voting exclusions	We support the intention of the proposed amendment.
Notifying cancellations or expiry of securities	Our members consider that the practice of notifying cancellations or expiry of securities is still not dealt with by ASX in a clear manner. Some practitioners choose to lodge an Appendix 3B and then put in the description 'cancellation' or 'expiry'. We understand that the correct procedure from ASX's perspective is to lodge an ASX announcement detailing the expiry or cancellation and outlining the complete capital structure following the event. An appendix 3B is not the appropriate form as the entity is not issuing new securities or applying for a quotation of securities.

Current Draft	Practical issues/Comments
	We recommend that ASX create a separate Appendix from the Appendix 3B so that this information can be captured or alternatively, provide a new rule/guidance clarifying the disclosure that is required in the event of cancellation/expiry of securities. We also recommend that ASX confirm the timing of this disclosure obligation as our members report mixed practices in the market. For example, some entities advise the market quarterly of the lapse of performance rights following employee terminations. ASX has previously confirmed this approach (subject to the information not being market sensitive), but other entities use different timing.
3. Efficiency measures	
Escrow	We note the new requirement in LR 15.12 for an entity's constitution to contain certain matters. Affected entity's which do not currently have a provision in their constitution which will satisfy this requirement will need to be grandfathered pending changes being made to their constitution.
Notification by profit test entities of continuing profits	We have no comment on this item.
Agreements for admission and quotation	We support the separation of these forms from the relevant listing/quotation agreements and the ability for these forms to be completed through ASX Online (subject to our comments as regards standard forms below).
Eliminating the need to apply for a number of standard waivers	We support the efficiency measure proposed by ASX to eliminate the need for a number of standard waivers.
Standard forms	As a general rule, we support removing a number of standard forms from the appendices to the listing rules and making them available on ASX online and encourage ASX to introduce efficiency measures to form design where possible. We encourage ASX to take into account the following issues which our members have identified, when designing forms for completion online: a. the online Dividend/Distribution form has been expanded from a quarter of a page to four complicated pages and does not improve the information provided to the market. We consider that this form should be much simpler b. If components of a form do not apply to an entity's circumstances, a smart form should only require the entity to complete the parts that do apply c. Some Appendix 3Y forms contain a lot of information about directors' interests. A significant time-saving advantage of the existing WORD form,is the ability to copy over details from the previous form. It is then only necessary to make minor changes to the form to update it. It would be helpful in the design of an online form if information from the previous online form lodged by the entity could be cut and pasted into the new online form as the opening holding for a particular director. Alternatively, the online form could ask for details of what has changed since the last form and the required fields could be automatically populated. d. If an online form requires large amounts of material to be entered manually from scratch each time, the form is a step backwards. In this case, we would recommend that the online form be offered only as an alternative option to the existing format. We do not support the process of changing forms proposed in LR 19.8B. We consider that any changes to forms should be subject to the same consultation process as changes to the Listing Rules and the Appendices. Should LR 19.8B remain in its current form, our members consider that a longer period of notice is required for material changes to online forms. Our members suggest a notice period of at least 1

Current Draft	Practical issues/Comments
	month, and preferably more near half year and full year ends. A 14 day notice period of change will not be sufficient for material changes. Our members can foresee situations where draft appendices are sent to boards in a board pack for approval that are not consistent with the form available online on the day of submission. Surprises and holdups on the busy year-end upload day are never welcome.
4. Updating the timetable for corporate actions	
Dividends and distributions	LR 1.10.1 – LR 3.21 has been added to the list of listing rules which a debt issuer must comply with. LR3.21 deals with dividends and distributions which are not relevant to holders of debt securities so this LR should be removed from the list. We note that the LR shortens the date currently in section 1 of Appendix 6A to issuing and applying for quotation of securities issued under a dividend or distribution plan to 5 business days after the dividend or distribution payment date. Companies that purchase securities on market, particularly those with low liquidity or daily purchase limits, may not be able to complete and settle the purchase and allocate the securities to investors within the proposed timeframe. Accordingly, we recommend that the proposed LR distinguish between companies issuing new securities to fulfil their DRP and those purchasing on market. Entities purchasing on market will require a longer time frame.
Interest payment dates LR 3.22	We consider that new LR 3.22 has been too broadly drafted and may capture all decisions to pay or not pay interest on all debt securities. We assume that it is only meant to capture debt securities which are quoted on ASX. Financial institutions and banks pay interest almost every day on one debt security or another - almost all of which have nothing to do with ASX. This LR will need to be reworded to clarify this point.
Option expiry notices	We support this proposed change which will eliminate the need for a standard waiver.
Non-court approved reorganisations of capital	We support the inclusion of new timetables specifically for splits/consolidations, cash returns of capital and returns of capital by way of in specie distribution rather than one generic timetable for non-court approved reorganisations of capital.
Court-approved reorganisation of capital	We support the inclusion of a new timetable specifically for mergers or takeovers via court approved schemes of arrangement rather than one generic timetable for court approved reorganisations of capital.
Equal access buy backs	The time in which a Form 484 must be lodged with ASIC is governed by the Corporations Act. We recommend that the Form 484 regarding the cancellation of securities pursuant to an equal access buy-back, should be lodged with ASX promptly after it is lodged with ASIC (similar to LR3.8A). There is no need for the LR to stipulate when the form must be lodged with ASIC.
Security purchase plans	We do not support changing the timelines from the original 5 and 7 business days after the SPP closing date. Our members' experience is that the proposed timelines of 3 and 5 business days are too tight for entities with large shareholder bases and complex offers.
5. Monitoring and enforcing compliance with the listing rules	
Conditional no-action letters LR 18.5	LR 18.5 should be amended to require the conditions which ASX imposes under the LR to be reasonable.
Powers and discretions	LR 18.5A should be amended to require the conditions which ASX can impose to be reasonable.

Current Draft	Practical issues/Comments
LR 18.5A	
Requests for information LR 18.7	We oppose the new requirement in 18.7 that information, documents or explanations be verified under oath. This exceeds the requirements of the Corporations Act and is unnecessary.
Compliance requirements LR 18.8	We note that ASX proposes to delete LR 10.9. We are concerned about the breadth of proposed LR 18.8. We consider that at the very least ASX should be subject to a requirement to act reasonably when exercising these powers. Our members are particularly concerned about the powers in LR 18.8 (c) and (d) and whether they are legally possible. Any direction of ASX to an entity not to perform an agreement may expose that entity to legal liability for breach of contract. Our members also query the term 'reverse an agreement or transaction'. How does ASX propose an entity reverse a transaction which has been performed? We also concerned about the broad reaching nature of the actions contained in proposed LR 18.8 (k), (l) and (m). These are powers usually exercised by a regulator such as ASIC. We consider that they send a confused message to the market. We point to LR 18.7 which contains provisions requiring ASX to provide notice of its actions to an entity as well as an ability for an entity to raise issues with ASX if it believes that information given to ASX comes within the exception to LR 3.1. We consider that LR 18.8 should contain similar provisions which enables an entity to raise issues with ASX concerning the reasonableness of ASX's proposed actions or challenge ASX's interpretation of the Listing Rules.
Censures LR 18.8A	We support this amendment provided that it is provided in a measured way and is reserved for severe breaches or particularly egregious conduct. We would not agree with ASX using this power for everyday breaches. We recommend that the drafting note to this amendment (which states that ASX only expects to exercise this power where the breach is an egregious one and warrants public censure) be incorporated into the LR or into guidance
6. Correcting gaps or errors in the listing rules	
Placement capacities LR 7.1 and 7.1A	The proposed change to LR7.2 exception 13 will require that entities disclose the maximum number of securities proposed to be issued under the employee incentive scheme in either the disclosure document or notice of meeting as relevant. Given the maximum number of securities to be issued pursuant to the scheme is likely to be unknown at the time these documents are published, it would be helpful if ASX provided some guidance as to how the maximum should be determined. This does not appear to be addressed by the new Guidance Note 21
Ratifying an agreement to issue securities	We support the proposed change to allow agreements to issue securities to be ratified by shareholders (in addition to actual issues).
Agreements to acquire or dispose of substantial assets LR 10.1	We repeat the comments which we made regarding LR 10.2. We consider that the use of the defined term 'substantial holder' (10% holder), which has a different definition to the commonly understood Corporations Act definition of substantial holder (5%) will cause confusion.
Exceptions to LR 10.1	**Stapled entities**

Current Draft	Practical issues/Comments
	Guidance Note 24 recognises that stapling arrangements for stapled groups typically ensure that security holders have the same proportionate interest in each of the stapled entities comprising the group. GN24 also recognises that a transfer within the stapled group will have no impact on the proportionate economic interest of each securityholder and therefore the risk that LR10.1 is seeking to address will not be present. However, rather than including an exception in LR10.3 for transactions within a stapled group, GN24 notes that ASX would be likely to look favourably on a LR10.1 waiver application in these circumstances. We consider that an additional exception in LR10.3 for transfers within a stapled group is appropriate. In addition, GN24 notes generally that ASX will only grant waivers from LR10.1 in exceptional circumstances. There are cases where a stapled group/listed trust may transact with another external party or fund where the transaction is caught by LR10.1 by virtue of the counterparty having a trustee/manager/responsible entity that is a related body corporate of the listed entity when there is no prospect of that other party being able to influence an outcome to the detriment of the listed entity. Shareholder approval in these circumstances could be costly, time consuming and detrimental to a listed entity's commercial prospects and shareholder interests. The existing GN24 acknowledges that a waiver from LR10.1 may be appropriate in these circumstances. We consider it appropriate for the new GN24 to retain this acknowledgement.
Warranties LR	We have no comment on this item.
8. New and amended guidance	
GN 33 Removal of entities from the ASX official list	We caution ASX against prescribing circumstances where delisting will be unacceptable where the board is acting in the best interests of shareholders. We consider that each delisting application should be made on its own merits.
Other GN changes	We note that ASX will release updated guidance notes containing consequential changes at the once the rule changes are finalised.
9. Accompanying documents	
	We consider that ASX should be required to notify the entity immediately if it releases information about that entity to a third party.
Appendix 3B	We don't agree with question 388 which requires an entity to provide a worksheet evidencing compliance with LR 7.1 for an ordinary placement. It is an entity's responsibility to comply with LR 7.1. It should not have to confirm compliance with ASX each time.
Additional issues Should a resolution to approve a voluntary de-listing be an ordinary or a special resolution?	We support imposing a requirement for a special resolution on a voluntary de-listing. We consider that allowing ASX discretion on whether the resolution will be a voluntary or special resolution will result in too much uncertainty. Where ASX has concerns, it can use its powers to impose a voting exclusion (as contemplated in the revised GN 33).