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Mavis Tan

By Email Only: mavis.tan@asx.com.au

Dear Mavis

SUBMISSION ON THE PROPOSED AMENDMENTS TO ASX LISTING RULES AND GUIDANCE NOTES

Maddocks is pleased to be given this opportunity to make this submission in response to the ASX Consultation Paper – *Simplifying, clarifying and enhancing the integrity and efficiency of the ASX listing rules* (**Consultation Paper**) and the proposed amendments to the ASX Listing Rules and ASX Guidance Notes released by the ASX on 28 November 2018.

Maddocks supports ASX's efforts to simplify, clarify and enhance the integrity and efficiency of the ASX Listing Rules and appreciates the work undertaken by ASX to prepare the revised ASX Listing Rules and Guidance Notes.

Our submissions on the ASX Listing Rule and ASX Guidance Note amendments are set out in the attached table. We would be pleased to participate in any further consultation or discussions in relation to our submissions or the Consultation Paper more generally.

Please let us know if you would like to discuss any of the information in our submissions.

Yours sincerely

Catherine Merity
Partner

Rosamond Sayer
Special Counsel

Encl.

Current Rule	Proposed Change	Submission
Enhanced disclosure in Notices of Meetings		
Listing Rules 7.3, 7.3A and 7.5 set out requirements for an entity to disclose information in a notice of meeting seeking a resolution to approve an issue of securities under rules 7.1, 7.1A and 7.4. These Listing Rule requirements provide that the notice of meeting must include the names of the persons to whom the entity will issue the securities or the basis upon which those persons will be identified or selected.	New Guidance Note 21: *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules* includes proposed new guidance on these requirements. The proposed new guidance provides that where there is a placement of 10 or fewer persons, ASX would generally expect the entity to name those persons in the notice of meeting rather than describe the basis on which they were identified or selected.	The *Corporations Act 2001* (Cth) (**Corporations Act**) has a well-established regime for the disclosure of substantial holdings which is triggered once an investor (together with its associates) acquires an interest in 5% or more of the voting power in a listed company. ASIC Regulatory Guide 5: *Relevant interests and substantial holding notices* states that this requirement to disclose details of substantial holdings in listed entities is designed to ensure that investors have access to timely information about the identity, interests and dealings of persons who may be in a position of influence or control the destiny of an entity. ASX's proposed new guidance means that even if an investor acquires shares in a listed company and is not a substantial holder under the Corporations Act regime, the Company is still required to disclose details of the investor in the notice of meeting required for ASX Listing Rule purposes. That is, ASX is imposing an additional requirement above and beyond the substantial holder regime in the Corporations Act. If such investors are not substantial holders, it is hard to see the benefit this information will provide to shareholders who are being asked to approve an issue of securities, given such an investor is not considered by the Australian Securities and Investments Commission (ASIC) to be the type of holder that warrants disclosure of further details to the market under the substantial holding regime of the Corporations Act. If these investors are substantial holders, this information is available on the ASX announcement platform in any event via substantial holder notices. Not only does this proposed new guidance have no additional benefit to existing shareholders who are being asked to approve an issue of securities, but this may cause some confusion for such shareholders who may think that

		naming these investors in the notice of meeting imports further significance to these investors than would otherwise be the case. Further to this, we anticipate that this will not be welcomed by certain institutional and sophisticated investors who remain below the substantial holding level for disclosure and seek to preserve confidentiality. Feedback we have received from certain capital raising advisers indicates that this would likely negatively impact the decision of certain institutional and sophisticated investors to invest in listed companies where shareholder approval is required, as this would prevent them from being able to invest in the company on a confidential basis where they are not substantial holders. Given the above, we submit the ASX should reconsider whether this new guidance in Guidance Note 21 is necessary given the existing substantial holder regime under the Corporations Act. In our view, we see no additional benefits to existing shareholders who are being asked to approve an issue of securities, yet potential significant detriment to a listed company and its ability to raise further capital.

Additional escrow requirements for shares underlying CDIs and other certificated securities

ASX will generally impose mandatory escrow on some or all of the existing security holders of an entity seeking to list under the 'assets test' that is not able to demonstrate an acceptable track record of profitability or revenue. This is designed to prevent those security holders from selling down shortly after listing and unfairly profiting from the IPO. Each security holder that is subject to ASX escrow is required to sign a formal escrow deed.	Maddocks welcomes the significant changes the ASX has made to its escrow regime in order to streamline the regime and substantially reduce the administrative burden for applicants seeking to list on ASX and for ASX. ASX has proposed a two-tier approach to escrow under which only significant holders (such as related parties, promoters, substantial holders and service providers) will be required to sign a formal escrow agreement. For less significant holders, ASX will permit entities to instead rely on a provision in their constitution containing the restrictions on	**Shares underlying CDIs** Under new Guidance Note 11, it appears that in relation to a foreign entity applying for admission and quotation of CDIs, that restricted CDIs (which are quoted securities) would be subject to less stringent administrative requirements than their underlying restricted shares (which are unquoted securities). We note that it is not entirely clear or consistent throughout the ASX Listing Rules and Guidance Notes as to whether shares underlying CDIs are considered quoted or unquoted securities. Based on ASX's new guidance, restricted CDIs would require a holding lock whereas restricted shares require the following in relation to share certificates: • a statement on the certificate for the securities that they are restricted securities under the ASX Listing Rules and are not able to be

	transfer and the imposition of a holding lock on their securities. This is further reinforced by additional requirements that restricted securities must be kept: • in the case of securities quoted on ASX, on an issuer sponsored sub-register with a holding lock applied to them; and • in the case of securities not quoted on ASX, on a certificated sub-register with the certificate for the security held in escrow by a bank or recognised trustee. In relation to securities not quoted on ASX, we also refer to section 5.6 of new Guidance Note 11: *Restricted Securities and* Voluntary *Escrow* which provides that if an entity has any restricted securities on issue that are not in the same class as quoted securities, it must for the duration of the applicable restrictions: • enter and keep the restricted securities on its certificated sub-register; • identify in its certificated sub-register the fact that the securities are restricted securities; • state on the certificate for the securities that they are restricted securities under the ASX Listing Rules and are not able to be transferred or otherwise disposed of by the holder except in accordance with those rules;	transferred or otherwise disposed of by the holder except in accordance with those rules; and • provide to ASX an undertaking in writing from a bank or recognised trustee to hold the certificate for the securities in escrow and not to deliver it up to any party until the expiry of those restrictions. In the context of a foreign company seeking admission and quotation of CDIs, it is often the case that existing shareholders will continue to hold their restricted securities as shares on the foreign register rather than having such shares transmuted to CDIs and held on the Australian register. Given this, a large number of restricted securities at the time of IPO are likely to be held as shares rather than CDIs. This would be the case regardless of whether they are significant holders (related parties etc) or otherwise. As the underlying shares are technically “unquoted” securities (see comments above), under the additional requirements in new Guidance Note 11, this means all share certificates for these underlying shares would need to be located, held by a bank or trustee and such certificates updated with a statement that they are restricted securities. We think this is an unintended consequence of these additional requirements in new Guidance Note 11. We expect these additional requirements were likely intended to apply to an Australian listed entity with quoted fully paid ordinary shares and a few unquoted securities like options on issue. In these circumstances, the administrative requirements in relation to certificates for unquoted restricted securities would be less burdensome. However, for foreign entities which may have a large number of holders of underlying unquoted restricted shares, we think these unintended administrative consequences are overly onerous for the company and its shareholders and contrary to ASX’s intention to streamline and substantially reduce the administrative burden of the escrow provisions for the less significant holders. Further to this, the requirement to deliver certificates for unquoted restricted securities to be held in escrow exposes the company to greenmail from security holders who refuse to deliver their share certificates, as is the case with shareholders refusing to sign ASX escrow agreements, which was one of the concerns that we understand ASX was trying to alleviate under the new two tier regime.

	• provide to ASX an undertaking in writing from a bank or recognised trustee to hold the certificate for the securities in escrow and not to deliver it up to any party until the expiry of those restrictions; and • not register a transfer of, or acknowledge any other disposal of, the restricted securities.	We submit that ASX should provide some further commentary in ASX Guidance Note 11 to confirm whether (a) the shares underlying CDIs are "quoted securities" and subject to the same requirements as CDIs under section 5.6 of the Guidance Note, or (b) dot points 3 and 4 of the additional requirements for unquoted securities in section 5.6 do not apply to shares underlying CDIs. **Other certificated securities** These concerns apply not only to the underlying shares of foreign companies but also to other certificated securities such as options or performance rights. The requirement to deliver certificates for unquoted restricted securities (such as options and performance rights) to be held in escrow, means the administrative burden of obtaining signed escrow deeds has been replaced with another administrative burden of obtaining certificates for these securities from security holders and placing these in escrow. Also, this exposes the company to additional greenmail opportunities from these security holders who are now required, but may refuse, to deliver the certificates for their securities. We submit that these are similarly unintended consequences of ASX's additional requirements in relation to unquoted restricted securities and submit ASX should reconsider whether these additional requirements in relation to certificates for unquoted restricted securities are necessary in light of these consequences.

Mandatory escrow on conversion of convertible notes

Unrelated seed capitalists who have paid a cash amount of less than 80% of the IPO price will be subject to ASX mandatory restrictions for 12 months from the date of issue, subject to the cash formula, and will be required to enter into a mandatory escrow deed.	Maddocks supports the addition of section 10.7 of new Guidance Note 11: *Restricted Securities and Voluntary Escrow* which specifically deals with unrelated seed capitalists who convert their convertible securities or cash advances to fully paid ordinary securities prior to IPO.	We believe there are some further changes ASX could sensibly make to its new Guidance Note 11 to further reduce the burden of the escrow requirements while still maintaining the integrity of ASX's escrow regime. **More certainty in relation to shares issued on conversion of principal component of convertible notes** We suggest that for further clarity for all parties involved in an IPO, and given ASX is of the view that its proposed new guidance on conversion of

	New Guidance Note 11 provides that where a seed capitalist who is not a related party or promoter subscribed cash for a convertible security and subsequently converts that security into fully paid ordinary securities prior to the entity's admission, ASX will consider exercising its discretion so that the escrow period runs for 12 months from the date they were issued the convertible security rather than for 12 months from the date they were issued the ordinary securities upon conversion. ASX notes that this treatment acknowledges that the seed capitalist contributed their capital when they subscribed for the convertible security and not when the convertible security or debt was converted into fully paid ordinary securities. ASX further states that, "*It upholds the principle of the escrow regime that seed capitalists who are not related parties or promoters should be subject to escrow only for a period of 12 months from when they contributed their capital.*" We further note that ASX's proposed new guidance merely confirms ASX's customary position it has taken to date in relation to convertible notes.	convertible notes is in line with the principles of its escrow regime, ASX should confirm in its new guidance that "*the escrow period runs for 12 months from the date they were issued the convertible security rather than for 12 months from the date they were issued the ordinary securities upon conversion*" rather than stating "ASX will consider exercising its discretion." By stating that "ASX will consider exercising its discretion" this means that applicants will need to obtain a confirmation from ASX that it will in fact apply this meaning to the shares issued on conversion of convertible notes. Given the above, we recommend ASX delete the words "*ASX will consider exercising its discretion*" and replacing this with "*ASX confirms its view*" or "*ASX deems*". **Shares issued on conversion of interest** Section 10.7 of Guidance Note 11 is silent on the treatment of interest on conversion of convertible notes. However, we note section 7.3 of Guidance Note 11 (which sets out the types of securities to which the cash formula applies) provides that ASX will not treat a debt for equity swap involving any other type of debt apart from a cash advance as qualifying for cash formula. This includes equity issued to pay interest owing on a debt (including interest owing on a convertible security). This means that ordinary shares issued on conversion of the interest component of convertible notes to unrelated seed capitalists will be subject to 12 months escrow from the date of conversion of interest (ie. the date of issue of shares, not the date of issue of the convertible security) and will not be subject to the cash formula. In our experience, we have found this leads to unnecessary and excessive administrative burden and costs, as shareholders (sometimes up to 100 or more) who were otherwise not subject to any mandatory escrow as they were issued convertible notes more than 12 months before the IPO at a price not less than 80% of the issue price, are now all required to enter into a mandatory escrow deeds (or under new ASX Guidance Note 11, provided with a restriction notice) for an extremely small and insignificant number of ordinary shares that were issued in relation to their interest component of convertible notes.

		Even with the notice regime, this is a huge administrative burden for the company with little benefit to investors post listing given the insignificant aggregate number of interest related shares that will be locked up. We submit that ASX consider exempting such shares issued on conversion of the interest component of convertible notes from ASX mandatory escrow restrictions, provided each parcel of interest shares does not exceed a reasonable maximum threshold value. Alternatively, we submit that cash formula relief should apply to such interest payments. If the convertible notes were structured so that interest was paid in cash during the term of the notes and the noteholder then elected to use the cash to subscribe for shares at the conversion price (ie. say 80% of the IPO price) shortly prior to listing, the cash formula would apply and these shares would not be escrowed. In contrast, if interest accumulates rather than being paid out during the term and is then converted into shares on conversion of the convertible notes, ASX does not treat the interest as cash and these shares are escrowed for 12 months with no cash formula. We see no reason for this distinction and why the shares issued on conversion of the interest component of convertible notes are not treated as being issued for cash.

Monthly reporting of number of CDIs

-	New ASX Listing Rule 4.11 requires entities that have CDIs issued over their quoted securities to notify ASX of the number of CDIs on issue on a monthly basis. This notification will be made via a new Appendix 4A. The Consultation Paper states, "Currently, ASX imposes a condition at admission for such entities that they lodge an Appendix 3B on a monthly basis showing changes in the number of CDIs on issue over that month. ASX then uses that information to	We submit that this new Listing Rule requirement should only relate to dual listed entities and that new Listing Rule 4.11 be updated to reflect this. To support this, we refer to section 2.9 of Guidance Note 15 (Dual listed foreign entities), which notes that ASX will usually grant a waiver to dual listed foreign entities (ie. that have a primary listing on an overseas exchange and has CDIs on ASX to facilitate the holding and transfer of its ASX-quoted securities) to allow it to pay ASX listing fees only on the portion of its securities represented as CDIs (ie. the Australian component of its register rather than the full register). A condition to the waiver is that the dual listed entity must lodge an Appendix 3B on a monthly basis showing the net movement of CDIs.

	determine if additional quotation fees should be paid by the entity."	This is not the case for foreign entities applying for admission as a standard listing and that have ASX as their primary listing venue. In these circumstances, prior to listing, these entities are required to pay a listing fee that relates to the total number of CDIs on issue (as if all underlying shares were held as CDIs). This is because CDIs can be freely transmuted to shares and vice versa. Given this, ASX's rationale that it requires the number of CDIs in a monthly Appendix 3B (or new 4A) does not apply to foreign companies with a primary listing on ASX as, unlike dual listed entities, the company has already paid the total listing fees for all CDIs (as if shares were held as CDIs) prior to listing (ie. ASX does not require this information to calculate any additional quotation fees that should be paid). As such, we submit that new Listing Rule 4.11 be amended to clarify that this rule only applies to dual listed entities that have CDIs issued over quoted securities on the ASX.