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Australia's property industry
Creating for Generations

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Ms Mavis Tan
ASX limited
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By email

Dear Mavis

ASX Listing Rules

The Property Council would like to thank the ASX for the opportunity to provide comment on the public consultation, *Simplifying, clarifying and enhancing the integrity and efficiency of the ASX listing rules.*

The Property Council of Australia champions the industry that employs 1.2 million Australians and shapes the future of our communities and cities. Property Council members invest in, design, build and manage places that matter to Australians: our homes, retirement villages, shopping centres, office buildings, industrial areas, education, research and health precincts, tourism and hospitality venues and more.

The Property Council supports the ASX's efforts to enhance the current listing rules. We agree with the ASX's intent to simplify the process by which waivers are provided. The Property Council agrees that the current system is too long, too onerous and too complicated.

Critically, however under the current proposed amendments to ASX Listing Rule 10.1 and the associated definitions in Chapter 19 of the ASX Listing Rules, as well as the proposed new Guidance Note 24 property, specifically stapled entities, stand to be fundamentally disadvantaged.

As most property groups that are listed on the ASX are structured as trusts, and often operate as internally managed stapled groups, the proposed changes to LR 10.1 and New GN 24 will have a direct impact on these entities. If implemented in their current form, the proposed changes will restrict the ability of these entities to undertake commercial transactions, even where those transactions do not raise the policy concerns that LR 10.1 is seeking to address.

Industry have identified four categories of transactions involving listed trusts that we submit should be recognised in New GN 24, or in the Listing Rules themselves, as transactions to which LR 10.1 should not apply, or for which a waiver may be granted in certain circumstances.

Our submission relates principally to the statements that are made in New GN 24 regarding the ASX's approach to granting waivers from LR 10.1 going forward. Listed trusts, including internally managed groups, have historically relied on waivers from LR 10.1 to enable them to undertake certain transactions that would otherwise be captured by LR 10.1. In the current version of GN 24

(***Existing GN 24***) the ASX states (at paragraph 25) that, in relation to listed trusts, *'in situations…where the responsible entity (**RE**) can demonstrate that neither it nor its related party on the other side of a substantial asset transaction derives any direct financial benefit (whether as unitholders of the listed trust or shareholders/unitholders of the related party, or by way of extra fees generated for either of them as a result of the transaction), ASX may consider giving the listed entity a waiver'.*

By contrast, in New GN 24 (at paragraph 6.1) the ASX recognises that LR 10.1 potentially has a wider application to listed trusts than listed companies, yet goes on to say that:

> *'… ASX will only waive the central requirement for security holders to approve the acquisition or disposal of a significant asset involving a 10.1 party in exceptional circumstances, where it is clear to ASX that the harm LR 10.1 seeks to protect against is not present. The onus is firmly on the entity seeing the waiver to establish this to ASX's satisfaction.*
> *Hence, to receive such a waiver, an entity must establish to ASX's satisfaction that there is no reasonable prospect of the counterparty, either itself or through its connections to the board or a substantial holder (or, in the case of a listed trust, to the RE of the trust) influencing the terms of the transaction to favour themselves at the expense of the entity. The bar in this regard is high.'*

It is useful to set out the policy objectives of LR 10.1 and the types of transactions that are intended to be captured by the rule.

1 Policy objectives of LR 10.1

Broadly speaking, LR 10.1 requires a listed entity (in the case of a trust, the RE of the trust) to ensure that neither the entity, nor any of its 'child entities', acquires a 'substantial asset' from, or disposes of a 'substantial asset' to, its 'related parties', 'child entities' and certain other persons specified in LR 10.1, without the approval of the holders of the entity's ordinary securities. There is a list of exemptions set out in LR 10.3, including transactions between the entity and a wholly-owned 'child entity' and transactions between wholly-owned 'child entities'.

The explanatory note at the beginning of Chapter 10 of the Listing Rules states that the purpose of the chapter is to deal with transactions between a listed entity and persons in a position to influence the entity. New GN 24 articulates very clearly the policy underpinning LR 10.1:

> *'The policy that underpins LR 10.1 starts from the premise that a 10.1 party is likely to be in a position to influence whether the entity acquires a substantial asset from them, or disposes of a substantial asset to them, as well as the terms on which the acquisition or disposal takes place. The harm it seems to protect against is that the 10.1 party will exercise that influence to favour themselves at the expense of the entity.*
> *To address the potential conflicts involved and to minimise the risk of this harm occurring, LR 10.1 displaces the general rule that the board of directors (or in the case of a listed trust, the RE) is responsible for managing the business of the entity to the exclusion of its security holders and requires the transaction to be approved by the holders of ordinary securities in the entity…'*

An obvious example of where LR 10.1 applies is a transaction between a listed company (or RE of a listed trust) and a director or substantial securityholder of the company (or RE / listed trust). The

objective of the rule is to minimise the risk of harm to securityholders arising from transactions with persons who are in a position to influence the listed entity.

New GN 24 also clarifies that LR 10.1 operates side-by-side with Chapter 2E of the *Corporations Act 2001* (Cth) (the ***Act***), which regulates related party transactions. But the two regimes are different in scope and do not completely overlap. For example, unlike Chapter 2E, there is no exception to LR 10.1 for transactions that are on arm's length terms.

The application of LR 10.1 to listed trusts has historically been challenging because many of the relevant definitions have not accommodated trust structures. The Property Council welcomes the proposed changes to some of these definitions that clarify how the definitions are intended to apply to trusts. Nevertheless, the difficulties in applying LR 10.1 to listed trusts remain because the trust and its RE are treated as separate entities for the purposes of LR 10.1, and therefore a broader range of transactions is potentially captured by LR 10.1, when compared to listed companies.

In the case of internally managed stapled groups (which include most of the A-REITs listed on the ASX), LR 10.1 has presented even greater challenges. This is because, although internally managed stapled groups include a listed trust, from a governance perspective there is no separation between the ownership of the trust and the ownership of its RE – the security holders own the units in the trust as well as the shares in the RE (or in the RE's parent company). Despite this, LR 10.1 continues to treat the trust and its RE as separate entities.

The next section outlines the four types of transactions involving listed trusts where, it is submitted, there are strong grounds for LR 10.1 not to apply.

2 Transactions involving listed trusts

2.1 Intra-staple transfers

The most obvious situation where it has been widely recognised that the protections afforded by LR 10.1 are unnecessary relates to transfers of assets between entities comprising a stapled group, including transfers between wholly-owned entities of the stapled group.

Both Existing GN 24 (paragraphs 26 – 28) and New GN 24 (at paragraph 8.2) recognise that, because the stapling arrangements for stapled entities ensure that security holders have the same proportionate interest in each of the stapled entities, a transfer of an asset from one stapled entity to another stapled entity in the same group will have no impact on the proportionate economic interest of each securityholder in that asset. Such transactions do not represent any leakage of value outside the stapled group. Accordingly, the risk that LR 10.1 is intended to address will not be present.

ASX has indicated in New GN 24 that it will 'look favourably upon an application for a waiver of [LR 10.1] to allow an asset to be transferred [within a stapled group] without security holder approval'.

Recommendation: That this exception be included in LR 10.3, rather than require stapled groups to seek an individual waiver at the time they are first established, or each time an intra-staple transfer occurs. This would also have the benefit of the waiver applying to all stapled groups in a consistent manner.

2.2 Transactions involving internally managed stapled groups

A succinct description of an internally managed stapled group is provided on the ASX website:

Stapled securities … provide investors with exposure to a funds management and/or a property development company, as well as a real estate portfolio. A share in a stapled securities fund usually consists of one trust unit and one share in the funds management company. These securities are 'stapled' and cannot be traded separately. The trust holds the portfolio of assets, while the related company carries out the fund's management functions and/or manages any development opportunities.

Internally managed groups often establish and operate externally managed funds, usually unlisted wholesale funds, that are managed by a wholly-owned subsidiary of the stapled group (typically a subsidiary of the stapled company). The ultimate securityholders of the stapled group therefore have an interest in the real estate assets held by the 'trust' side of the stapled group and in the management fees derived from the 'company' side of the stapled group from managing other funds.

There can be commercial instances where a stapled group (in particular the stapled trust) holds a portfolio of property assets, which it sells to other funds that are operated and managed by subsidiaries of the stapled group in order to release capital for other investments and expand its funds management platform and generate funds management fees (ultimately for the benefit of the security holders of the stapled group). In this situation, if the assets being transferred represent a 'significant asset' (as defined) of the stapled group, then LR 10.1 will apply to that transaction because it involves the disposal of a 'substantial asset' from a listed entity (being the stapled trust) to a 'related party' of the stapled trust (being the trustee/manager of the other fund, which would be a related body corporate of the RE of the stapled trust). There is no recognition in LR 10.1 (or the exceptions in LR 10.3) that the stapled trust and the trustee/manager of the other fund both form part of a single economic entity that is ultimately owned by the same stapled securityholders.

It is clear that transactions of this nature do not involve the listed trust contracting with a person who is capable of influencing the RE in a way that favours that person to the detriment of the security holders of the stapled group. Both the seller (the listed trust) and the acquirer (the trustee/manager of the other fund) are owned by the stapled securityholders and, therefore, any benefit derived by either party as a result of the transaction will ultimately be for the benefit of the stapled securityholders. This type of transaction involving an internally managed stapled group does not give rise to the kind of harm against which LR 10.1 is protecting.

This assumes, of course, that there are no other related parties of the trust (other than members of the stapled group) that could stand to gain a financial benefit from the transaction – for example, no directors of the RE who are unitholders of the acquirer trust. Similarly, there may be other types of substantial asset transactions involving internally managed stapled groups that *could* present a risk of detriment to securityholders – for example, a transaction between a stapled trust / company and a director of the RE or company, or a substantial holder of the stapled group, would be examples where LR 10.1 should properly apply.

However, where the transaction involves only entities that comprise, or are wholly-owned by, the stapled group, and no related party of the trust (that is not a member of the stapled group) on the other side of the transaction derives any direct financial benefit, we submit that there is no policy basis for LR 10.1 to apply.

Historically, the ASX has recognised the unique features of internally managed stapled groups and has often granted waivers from LR 10.1 to permit transactions of the kind described above.

The Property Council is concerned that the statements in New GN 24 (extracted above) suggest that the ASX will no longer be prepared to grant waivers from LR 10.1 for these types of transactions involving members of internally-managed stapled groups, or that there will be uncertainty as to whether a waiver will be granted or security holder approval will be required (thereby adding cost and delay to transaction timetables and the risk to the transaction adversely affecting the pricing of asset sales to the detriment of the stapled security holders).

Recommendation: In the case of transactions involving members of internally managed stapled groups, the reason there is no risk of the counterparty influencing the RE to favour that counterparty at the expense of the listed entity is a structural one – that is, the counterparty and the RE are both members of the stapled group that is owned by the same security holders. On that basis, it would be appropriate (and helpful) for this to be recognised specifically in New GN 24 as an example of where a waiver will be granted, provided the RE can demonstrate that no related party of the trust (other than related parties forming part of the stapled group) will derive any direct financial benefit from the transaction.

Alternatively, this scenario could be added in the listing rules themselves as an express exception to LR 10.1, which would remove the time, cost and uncertainty involved in applying for a waiver from LR 10.1 for each relevant transaction. An express exception would of course be preferable because it would help avoid the risk of inadvertent breach of LR 10.1 where stapled entities might, understandably, not appreciate that LR.10.1 applied in such a situation.

2.3 Transactions involving externally-managed listed trusts

The Property Council recognises that externally-managed listed trusts are not in the same position as internally managed stapled groups, because the RE of the listed trust is not ultimately owned by the security holders who hold units in the trust. The RE is owned by an external party and, if there is a transfer of a substantial asset from the listed trust to a related party of the RE (e.g. the parent company of the RE), there is risk of harm occurring to security holders. For example, if the parent company of the RE wishes to transfer a substantial asset of the listed trust to another fund that it manages because it will derive higher management fees, or because it will be a unitholder in that fund and therefore derive an interest in the asset, that is the type of harm that LR 10.1 seeks to protect against. Unlike an internally managed stapled group, the unitholders of an externally managed listed trust would not ultimately benefit from the management fees or distributions earned by the related party of the RE.

Nevertheless, there may be circumstances where there is no such benefit being derived by the counterparty to a transaction by a listed trust, and no detriment to security holders in the listed trust. For example, there may be no more favourable fee arrangements; an independent expert's report may have been obtained by the RE of the listed trust; the listed trust's intention to sell the assets to another fund managed by the RE or a related body corporate of the RE may have been disclosed to investors in the initial PDS for the fund[1]. As noted above, Existing GN 24 recognises that there may be circumstances where a waiver from LR 10.1 may be granted to the RE of a listed trust, if it can demonstrate that neither it nor a related party derives any direct financial benefit from the transaction. New GN 24 requires the RE of the listed trust to demonstrate that 'there is no reasonable prospect of the counterparty…influencing the terms of the transaction to favour

[1] That is, disclosed but not the subject of a formal agreement as required by LR 10.3.

themselves at the expense of the entity', and ASX acknowledges that 'the bar in this regard is high'.

Recommendation: It would be helpful if New GN 24 provided some guidance (along the lines of what is currently contained in Existing GN 24) on the circumstances in which the ASX would be open to granting a waiver for a significant asset transaction involving an externally managed listed trust. The same issue does not arise for companies, because the LR 10.1 tests do not apply to two separate entities (being the RE and the trust) in the way they apply to trusts.

2.4 Transfers to sub-trusts

The proposed drafting changes to the definitions used in LR 10.1 will make it clear that a transfer of a substantial asset to a controlled sub-trust of a listed trust will be subject to LR 10.1, unless the sub-trust is wholly-owned by the listed trust.

This is because LR 10.1 applies to a disposal of a substantial asset from a listed entity to a 'child entity' of the listed entity.

As a general comment (and this applies in relation to both listed trusts and listed companies), it is not entirely clear how a 'child entity' could be in a position to influence its parent entity. However, we recognise that this is not new and is also reflected in the existing version of LR 10.1.
Leaving that observation to one side, the definition of 'child entity' is proposed to be amended in a way that will make it clear that a 'child entity', in relation to a trust, means a trust that is controlled by the RE of the listed trust in its capacity as RE. Currently, the definition of 'child entity', in relation to a trust, means a subsidiary, or entity controlled by, the RE. It is therefore unclear under the existing rule whether a transfer of a substantial asset from a listed trust to a controlled (but not wholly-owned) sub-trust of the listed trust would trigger the operation of LR 10.1.

The Property Council submits that a transfer of assets to a controlled sub-trust should not require security holder approval under LR 10.1 unless the transaction will result in any of the listed trust's related parties (other than those forming part of a stapled group) deriving a direct financial benefit. For example, LR 10.1 may still be required if a director of the RE was a minority unitholder in the sub-trust or if a related body corporate of the RE was the trustee of the sub-trust and earned higher fees in that capacity.

Recommendation: That it be recognised, either as an exception to LR 10.1 in LR 10.3, or in New GN 24, that there may be situations where a transfer of substantial assets to a controlled (but not wholly-owned) sub-trust of the listed trust may not require security holder approval under LR 10.1. This scenario would also apply to transfers of assets by listed companies to their controlled (but not wholly-owned) subsidiaries. At the very least, we think it would be helpful to the industry if New GN 24 provided some guidance as to the policy objectives that the 'child entity' limb (in LR 10.1.) is seeking to achieve.

3 Definitions relevant to LR 10.1 and listed trusts

We have also identified a small number of minor drafting points, which are set out in the table below.

Definition	Source	Comment
'Associate'	Chapter 19	In the text below paragraph (d), we think the words '… and includes, in the case of a trust, the responsible entity of the trust' should be changed to: 'and includes, in the case of a trust, the trustee of the trust acting in that capacity'.
'Child entity'	Chapter 19	In the text below paragraph (b), same comment as above. Also, the change to the definition of 'child entity' as it applies to listed trusts means that LR 3.16.4 will not apply to subsidiaries of the RE (which does not seem to be intended). A similar issue arises in LR 14.11.1 (LR 10.19 in last row of table).
'Substantial asset'	LR 10.2 and GN 24 (paragraph 3.2)	The test for determining whether an asset is a 'substantial asset' is whether the value of the asset is 5% or more of 'the equity interests of the entity, as set out in the latest accounts given to ASX under the listing rules'. It would be helpful if ASX could confirm in New GN 24 that, in relation to stapled groups, this means the consolidated accounts of the stapled group (which we believe is the intention).
'asset'	New GN 24 (paragraphs 3.1 and 8.4)	ASX has stated that an asset includes 'loans and other receivables'. It would be helpful for ASX to clarify its policy on loans. For example, in the case of a listed entity lending funds to a related party, this would constitute a non-current asset and therefore, by making a loan, is this intended to be considered an acquisition of an asset? Could the ASX also confirm in New GN 24 that an unsecured loan, of itself, would not amount to a disposal of an asset?

We would welcome the opportunity to meet with you to discussion our submission further. Please contact Collin Jennings on (02) 9033 1979 or myself on (02) 9033 1929.

Yours sincerely

Belinda Ngo
Executive Director, Capital Markets.