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Attention: Diane Lewis
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By email: regulatorypolicy@asx.com.au

Dear Diane

ASX Consultation Paper dated 12 May 2016
Submission by Whittens

Whittens & McKeough Pty Ltd (**Whittens**) is an independent Sydney-based law firm specialising in small-cap ASX-listed public company work. We are the principal legal adviser to over 30 ASX-listed companies operating across a wide range of sectors. In addition to providing legal advice, we also provide company secretarial services to over a dozen ASX-listed companies. Our legal advisory and company secretarial services include the provision of corporate governance and regulatory compliance services to our ASX-listed clients.

This submission is a response to ASX's Consultation Paper: "Updating ASX's admission for listed entities" (**Consultation Paper**).

General overview

Although we understand the importance of maintaining an orderly and transparent market, we do not believe the role of the market operator and regulator should be to curtail entrepreneurial activity and innovation. We submit that the net effect of the proposed listing rule changes may have that undesirable effect on Australian capital markets.

Australia's venture capital industry is relatively small. For decades Australian companies have (in effect) undertaken 'listed' venture capital risk investment through the mining exploration industry. This was facilitated by the ASX through the junior mining exploration industry. Many large commodity resources were discovered through the deployment of capital this way and Australia's mining industry has become a linchpin of our economy. Investors understood, and we submit, still understand, that an investment of this nature involved a high degree of risk. These risks are disclosed (via the prospectus) and investors have the option to invest or not. This has worked efficiently for some time with billions of dollars raised for exploration companies.

As the mining industry has slowed, this listed venture capital industry has metamorphosed into funding other nascent sectors of the economy such as technology and bio-technology. These sectors represent an enormous growth potential for the Australian economy however, these

sectors are in need of venture capital, and funding. If the ASX proceeds with the proposed changes to the Listing Rules, in particular raising the Net Tangible Asset test and amending the 'spread test' we submit that the facilitation of capital raising will be hindered.

Our concerns are as follows:

1. **Larger amounts at risk**: by increasing the marketable parcel test ASX is forcing companies to take larger amounts of capital from investors, in the context of a company without a track record of profitability. Effectively the ASX is forcing investors to 'risk more'. Place that in the context where many investors use self-managed super funds to facilitate listed venture capital investments the proposed rule change seems illogical and out of step with market reality. Certainly this cannot be the intention of the proposed rule change that investors will now be risking more.

2. **Reduced retail participation**: by increasing the minimum marketable parcel size from $2,000 to $5,000, ASX may be putting new investments out of reach for many ordinary Australian investors. While such a change is unlikely impact institutional investors it will certainly impact retail investments in new ASX-listings.

3. **More capital and companies now unregulated**: If the ASX proceeds with these proposed changes, smaller companies that do not meet the new ASX requirement will be raising capital without the investor protection afforded by the continuous disclosure regime. For example, a $15m market cap company with $4m in cash which would have previously been admitted to ASX will no longer able to be quoted under the new rules. As a consequence, its investors will not have the benefit of regular reporting, announcements of director trading, related party approvals (excepting that the Corporations Act offers some limited protections), audited accounts, quarterly cash-flows etc. Investors will have less transparency and protection. More capital will be raised in an unregulated environment.

Whittens specific responses to the Consultation Paper

Consultation questions and answers
1. Do you support the introduction of a 20% minimum free float requirement? If not, why not and would you support a different minimum free float requirement?
Whittens response If a company that wishes to undertake a public offering does not meet the requirements some of its shareholders will have to divest their holdings as part of the IPO process. This forced sell down may not be in the best interests of the Company and its shareholders as a whole. Provided there is sufficient liquidity to create a market (which the ASX has always determined based on its current discretion) then no threshold should be unilaterally imposed. The ASX has operated very efficiently without such a requirement to date and we see no reason for its imposition.
2. Do you have any comments on the proposed definitions of "free float" and "non-affiliated security holder" for the purpose of the proposed minimum free float requirement? Do you see any issues with excluding shares that are subject to voluntary escrow from the definition of "free float"?

Whittens response

We submit that the definition should not include securities which are subject to voluntary escrow. Voluntary escrow is a contractual relationship created between the Company and the security holder and should not be excluded from the free float calculations.

Often the purpose of the voluntary escrow arrangements is to provide other investors with confidence that key strategic shareholders and/or members of management are prohibited from selling in the short-term therefore focusing their interests on ensuring long-term growth in value. By excluding these escrowed shares from the 'free float' calculations, there will be pressure to reduce the quantum and length of voluntary escrow arrangements. This will cause less alignment between existing shareholders and new investors. We submit that this is deleterious for the market as a whole.

In relation to the definition of "non-affiliated" shareholders, Whittens has no objection to the proposed definition but seeks greater guidance on how and when the ASX will exercise its discretion this will be of great assistance as the definition appears to be deliberately ambiguous and open to differing interpretation and discretionary application.

3. Do you support the proposed changes to the spread test? If not, what element or elements of the changes do you not support, and what are your reasons?

Whittens response

Whittens does not support the proposed increase of the marketable parcel size to $5000 for a party to be eligible for spread. As stated in the overview, we feel that this will disenfranchise retail investors, will not facilitate capital raisings and will force more capital to be raised in an unregulated market. This increase will have the effect of reducing the quantum of capital raised overall and reducing the quantum of capital raised on ASX. Furthermore, the reduction of the total number of minimum security holders to 200 could have the unintended effect of decreasing liquidity. Companies that have a smaller numbers of shareholders typically experience smaller trading volumes.

At present the spread requirements force a minimum of $600,000 to be raised (300x$2000). We submit that adjusting the minimum parcel requirements to a more reasonable level (such as $3000) would facilitate greater retail participation and would therefore be more appropriate. We also note that it would keep the minimum capital raising the same as the current $600,000 requirement.

4. Do you support the increase in the last year's profit element of the profit test? If not, please provide your reasons.

No comments. Whittens has no objection to this change.

5. Do you support the increase in the net tangible assets and market capitalisation elements of the assets test? If not, please provide your reasons.

Whittens response

Whittens does not support this change. Our response is largely based on our desire, from an economic point of view, to see more capital raised for ideas and innovation in this country. As referred to earlier, we submit that this change will mean that small capital raisings will be undertaken in an unlisted environment or will simply not proceed at all. We believe that the continuous disclosure regime and the ASX market assists in ensuring transparency and reporting to shareholders. If the thresholds are increased more capital will be raised for smaller companies outside of the ASX environment where investors are not afforded the protection of the ASX Listing Rules.

6. Do you think it is appropriate to extend the minimum requirement for $1.5 million working capital after deducting the first year's budgeted administration costs and costs of acquiring any assets (to the extent that those costs will be met out of working capital) to all entities admitted under the assets test? If not, please provide your reasons.

No comments. Whittens has no objection to this change.

7. Do you think it is appropriate to maintain a fixed minimum $1.5 million working capital requirement in addition to a requirement for the entity admitted under the assets test to make a statement that it has sufficient working capital to meet its stated objectives? If you think the fixed working capital requirement should be a different amount, please tell us the amount and explain why.

Whittens is supportive of this change as it is imperative that all companies that achieve listing must have sufficient working capital and we view this as a positive step.

8. Do you support the proposed requirement for entities admitted under the assets test to provide 3 full financial years of audited accounts, unless ASX approves otherwise? If not, please provide your reasons and describe what, if any, alternative approach you consider should be taken by ASX in order to meet the objectives of the proposed change.

Whittens response

Provided the ASX exercises its discretion in a reasonable and commercial way, to allow, in certain circumstances companies which apply for quotation to come to the market with less than 3 full financial years of audited accounts them Whittens does not oppose this change as it brings the listing rules in line with ASIC regulatory guidance.

9. ASX has proposed that it will generally accept less than 3 years of audited accounts for an assets test entity (or an entity or business to be acquired by the entity) only in the circumstances where ASIC will accept less than 3 full years of accounts in a disclosure document, as explained in Part F of ASIC Regulatory Guide 228 (RG 228).

Simultaneously with the release of this consultation paper, ASIC has released a consultation paper seeking comments on proposed changes to RG 228 setting out these circumstances.

Are there additional circumstances where you consider ASX should be prepared to accept less than 3 years of audited accounts to those outlined in ASIC's consultation paper on RG 228?

Whittens response

There are a number of other circumstances, not currently referred to in ASIC Consultation Paper 257 which need to be separately recognised by both ASIC and ASX whereby reduced financial disclosure should be permitted.

These are:

Acquisitions where assets are being acquired: Often as part of an IPO or backdoor listing, assets will be acquired from a vendor to operate a business. Such assets may be selectively purchased from an operating entity in a situation whereby the acquirer chooses not to purchase certain assets. In these circumstances auditing the vendor entity can be misleading and may be irrelevant, as not all of the assets of the vendor entity are being acquired.

Fast growing and evolving businesses: A number of companies seeking quotation via an IPO or backdoor listing are fast moving and evolving businesses, in particular technology companies. In these circumstances the historical accounts of three (3) years prior often bear no resemblance to the business seeking quotation in terms of its cash-flows, sales and assets. Often the business model has evolved and may have substantially changed. In these circumstances forcing an entity to audit the third year is an unnecessary cost and does not enhance market disclosure. In fact, to present those accounts (because they are so far removed from the current business and its operations) can be misleading.

10. ASX has also proposed that it will only accept the types of modified opinion, emphasis of matter or other matter paragraph in accounts lodged with a listing application that ASIC will accept in a disclosure document, as explained in Part F of RG 228. Are there additional types of modified opinion, emphasis of matter or other matter paragraph that you consider ASX should be prepared to accept to those outlined in ASIC's consultation paper on RG 228?

Whittens response

No comment

11. Do you agree with the list of overseas home exchanges proposed in section 2.1 of Guidance Note 4 (ie the main boards of Deutsche Börse, EuroNext (Amsterdam), EuroNext (Brussels), EuroNext (Paris), HKSE, JSE, LSE, SGX, TSE (Tokyo), TSX (Toronto), NASDAQ, NYSE and NZX) as being ones generally acceptable for an ASX Foreign Exempt listing? Are there any of these exchanges you would delete from this list? Are there any other exchanges you would add to this list?

Whittens response

No comment

12. Do you agree with the introduction of a further window for admission for ASX Foreign Exempt listings allowing them to be admitted to ASX if their market capitalisation is at least $2,000 million? If not, what threshold (if any) do you think would be appropriate?
Whittens response We support this proposed amendment.
13. Are there any specific issues or concerns that you can identify that would result from ASX removing the current requirements for foreign entities listed on ASX to maintain certificated registers in Australia?
Whittens response No comment
14. Do you believe the transition date of 1 September 2016 that ASX proposes for the introduction of the new admission rules is appropriate? If you think it should be sooner or later, please explain why?
Whittens response We submit that this proposed date of 1 September 2016 should be 1 January 2017. These changes are significant and have been foreshadowed and communicated quickly. As ASX will appreciate IPO's and backdoor listings are projects which take time, often in excess of 6 months. From the release of the consultation paper until 1 September 2016 is only approximately 6 months. This means that limited time is available to restructure the transaction (which may not be possible) and existing transactions may be in jeopardy because of the condensed timeframe.
15. Do you have any other comments on the issues discussed in this paper or the proposed listing rule and Guidance Note changes?
Whittens response We have no further comments.

Yours faithfully
WHITTENS

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