Law Council
OF AUSTRALIA

Business Law Section

15 December 2025

Mr Andrew Campion
General Manager, Investment Products and Strategy
ASX Limited
39 Martin Place
SYDNEY NSW 2000

By email: Andrew.campion@asx.com.au

Dear Mr Campion

Shareholder approval of dilutive acquisitions and changes in admission status

1. This submission has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) in response to the public consultation released by Australian Securities Exchange (**ASX**) on 20 October 2025 on shareholder approval requirements under the ASX Listing Rules (the **Consultation**).

2. While the Committee is aware of the significant media attention and debate that has been generated by James Hardie Industries Plc's acquisition of AZEK Company Inc, including investor pronouncements seeking significant changes to the shareholder approval requirements for the issuance of shares under a regulated takeover or merger, the Committee does not support the proposal to reduce the existing effective limit of 100% for much the same reasons outlined by the Committee in its submission dated 15 December 2015 in relation to "reverse takeovers". In our view:

    - The regulatory benefits (in terms of investor protection or otherwise) are likely to be very limited. A shareholder veto may not always be in a company's best interests. While a board has a duty to act in the best interests of the company as a whole, shareholders can vote selfishly in their own personal interests. That may mean a company that wished to pursue a value-adding transaction in what the board considered to be in the company's best interests, could have that transaction vetoed by a strategic shareholder for reasons that do not necessarily reflect the best interests of all shareholders.

    - The costs and inefficiencies, including the additional burden imposed on ASX-listed entities and the consequential detrimental impact to the attractiveness of Australia's public markets, that would result from any change are likely to be substantial.

- The board of directors, given their statutory and general law duties to act in good faith in the best interests of the company as a whole and with reasonable care, is the appropriate organ of the company to decide whether to pursue a scrip-based acquisition and should be given sufficient scope to do so without the need to obtain shareholder approval. Otherwise, there is a real risk that some transactions would not proceed or would only proceed on terms less favourable to the bidder reflecting the uncertainties associated with a requirement for shareholder approval.

3. The Committee submits that the 2017 amendments to the ASX Listing Rules, which brought into effect the "reverse takeover" limitation to exceptions 6 and 7, are widely understood and accepted in the market (having been part of the ASX Listing Rules since 1996) and that the status quo should be maintained without any further change.

4. Stability and certainty of rules matters, and change should not be made without persuasive policy reasons that go beyond a single transaction. The arguments for changing exceptions 6 and 7 based on comparisons with other market rules should not be viewed in isolation. They should be considered as part of the governance and regulatory burden imposed on ASX-listed entities and their boards, as well as the broader regulatory framework and factors specific to Australia's public markets. Implementing the proposed changes would increase the governance and compliance burden on ASX-listed entities. This comes amid an evolution and growth in private markets that is challenging the attractiveness and sustainability of public markets. The Australian Securities and Investments Commission (**ASIC**) has recognised this new dynamic in capital markets and noted its concern with the decline in publicly listed companies.[1] ASIC has also acknowledged the challenge of ensuring public markets remain attractive for listing and staying listed, and recognised a similar issue globally.[2] In our submission, the ASX proposed changes risk further compromising the competitiveness and efficiency of Australia's public markets.

5. Reducing the "reverse takeover" limit risks the following:

   - **transactions may not proceed**—the board may unilaterally elect their company out from entering the market for corporate control due to the requirements to seek shareholder approval. Potential productivity gains from merger transactions may be lost;

   - **delay and uncertainty may give private market participants the upper hand**—the target may be more interested in negotiating with a private market bidder without these constraints that cause delay and uncertainty. Also, a bidder may be required to offer more attractive terms including additional deal protection mechanisms as mentioned below to overcome these impediments. This comes at a time when the activity, size and influence (both financial and otherwise) of private-market participants in public markets has increased;

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1 See ASIC Discussion Paper: "Australia's evolving capital markets: A discussion paper on the dynamics between public and private markets" (2025), p. 8.

2 See ASIC Report 823: "Advancing Australia's evolving capital markets: Discussion paper response report" (2025), p. 8.

- **the process itself may improve a competing bidder's position**—the board will be required to provide information material for its shareholders to decide whether to approve the proposed transaction, and that could be harnessed by competing bidders in the market for corporate control;

- **higher execution risk and corresponding break fee**—the target may insist on a higher lawful reverse break fee to be paid if the listed bidder's shareholders vote against the resolution;[3] and

- **structuring may occur to avoid barriers, which may lead to sub-optimal results (including greater leverage)**—the board may opt to offer less scrip and incur additional debt (including debt-to-equity bridges) than might otherwise have been considered optimal in the interests of overcoming these barriers and securing the acquisition of the target.

6. The Committee believes the competitiveness of Australia's public markets should be fostered and that that objective far outweighs any benefits likely to be achieved by the proposed reduction of the limit for dilutive acquisitions.

7. Consistent with the above reasons, the Committee also submits that the status quo should be maintained in respect of the following issues raised in the Consultation:

    - shareholder approval for a dual listed company to change to ASX Foreign Exempt Listing status;
    - shareholder approval for a dual listed company to delist from ASX; and
    - shareholder approval for significant changes to the nature or scale of a listed company's activities.

8. However, in the case of those dual listed companies changing to ASX Foreign Exempt Listing status, the Committee asks ASX to consider updating its guidance to assist companies in obtaining ASX consent to change its admission category in this way.

9. If any change is made to the shareholder approval requirements for either dilutive acquisitions or changes in admission status, we are cognisant of the commitment made by ASX on page 6 of the Consultation:

    > *If the consultation process results in support for proposals by ASX to change the ASX Listing Rules, we will conduct a further public consultation on those specific proposals, with an exposure draft of the proposed amendments.*

10. The Committee would appreciate a further public consultation on any changes to the ASX Listing Rules or guidance arising from the Consultation.

11. Annexed to this letter is the Committee's responses to the specific questions set out in the Consultation.

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[3] The requirement for shareholder approval also runs contrary to the principles underlying section 629 of the *Corporations Act 2001* (Cth) which prohibits conditions within the control of the bidder.

12. For further information or if you would like to discuss any aspect of this submission, please contact Philippa Stone, Chair of the Committee on +612 9225 5303 or philippa.stone@hsfkramer.com; or Robert Sultan on +613 8686 6571 or robert.sultan@nortonrosefulbright.com; or Charles Nugent-Young on +612 9330 8353 or charles.nugentyoung@nortonrosefulbright.com.

Yours sincerely

Adrian Varrasso
Chair, Business Law Section

Committee's responses to the specific questions set out in the Consultation

Consultation Questions	Response
Shareholder approval for a dual listed company to change to ASX Foreign Exempt Listing status	
Should security holder approval be required for a change in admission category from ASX Listing to ASX Foreign Exempt Listing?	No. We do not support the implementation of a mandated shareholder requirement for a dual listed company to change to ASX Foreign Exempt Listing status. This is for the reasons articulated in our cover letter, particularly the need to ensure the competitiveness of Australia's public markets. In our submission, ASX should avoid imposing additional regulatory burdens unless there is a persuasive reason to do so, and we do not see a persuasive reason in these circumstances. Shareholders have the existing comfort that for an entity to be admitted as an ASX Foreign Exempt Listing, its overseas home exchange must be acceptable to ASX. Further, as ASX notes, where a company changes its listing to an ASX Foreign Exempt Listing, a shareholder who does not support that change can sell their securities on either ASX or the foreign exchange. In our submission, the current regime whereby the consent of ASX is required for a dual listed company to change its listing status also provides sufficient protection to security holders and the flexibility for ASX to require shareholder approval in certain limited circumstances. In that regard, the Committee would encourage ASX to consider updating its guidance to assist companies in obtaining ASX consent to change its admission status. This could helpfully include guidance on the circumstances in which its consent may be subject to conditions and examples of what conditions may be imposed including shareholder approval on any application by a dual listed company to change its listing status. For example, ASX may require shareholder approval

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	where the foreign listing of the dual listed company is not on a principal exchange in a developed market.
Are there any significant unintended consequences or other risks that this change raises that have not been considered in this consultation paper? If so, are there ways that these risks may be satisfactorily addressed while still proceeding with the proposed change	Yes. The Consultation suggests that companies can simply leverage their annual general meeting to seek to pass a resolution at no additional cost. Each resolution has direct and indirect costs for the board and the company, which includes dedicating time and resources to explain why it believes a particular course of action would be in the best interests of the dual listed company.
Shareholder approval for a dual listed company to delist from ASX	
Should security holder approval be required for a voluntary delisting by a dual listed entity from ASX?	No. We do not support the implementation of a mandated shareholder requirement for a voluntary delisting by a dual listed entity from ASX. This is for the reasons articulated in our cover letter, particularly the need to ensure the competitiveness of Australia's public markets. In particular, foreign companies may be dissuaded from listing on ASX if there are regulatory impediments to the cessation of that listing when the board has determined that it is not in the best interests of the company to maintain that listing. ASX's guidance already provides that ASX will require approval as a condition of its consent to a voluntary delisting if the company's ordinary securities are not, and will not be, readily able to be traded on another exchange. In our view, this protection afforded to shareholders is adequate. In our submission, rather than having an ASX Listing Rule which mandates the need for security holder approval in the case of a voluntary delisting, the current regime requiring the consent of ASX should be maintained thereby allowing flexibility

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	of the conditions that may need to be met in order to effect a voluntary delisting. For example, where the Australian security holders only represent a relatively small minority of all security holders, the requirement for shareholder approval does not seem warranted to delist from ASX.
If security holder approval is required, should this apply only to a dual listed entity that was first listed on ASX, but not to an entity that was listed on a foreign exchange before listing on ASX?	Yes, it is important that any proposed change does not reduce the attractiveness of listing, and staying listed, on ASX. The same principle as part of ASX guidance could also be applied in relation to a change in listing status. It should be recognized that the impediments that made it difficult for Australian security holders to trade on foreign exchanges have been substantially eroded.
If security holder approval is required, should this be by ordinary resolution? Should a special resolution rather than an ordinary resolution continue to be required if the entity's ordinary securities are not readily able to be traded on another exchange?	If security holder approval is required, then we submit it should generally only be by ordinary resolution consistent with the overwhelming majority of approvals required under the ASX Listing Rules. Once again, by maintaining the requirement to obtain the consent of ASX to effect a delisting, there is an opportunity to impose conditions that are apposite to the circumstances of the delisting including a requirement for shareholder approval. The conditions which ASX may impose on a delisting could be specified in appropriate guidance, including whether there are, in limited circumstances, the need for a special resolution.
Are there any significant unintended consequences or other risks that this change raises that have not been considered in this consultation paper? If so, are there ways that these risks may be satisfactorily addressed while still proceeding with the proposed change?	Yes. The Consultation does not recognise the direct and indirect costs for the board and the company in having to seek shareholder approval.

Consultation Questions	Response
Shareholder approval for issues of shares under a regulated takeover or merger	
Should the current limit on issues of securities without approval under exceptions 6 and 7 in Listing Rule 7.2 be reduced?	No. Apart from the changes in 2017, the current exceptions have been in operation since 1996 without, until recently, real controversy. We do not support the proposal to reduce the existing effective limit of 100%. The Committee submits that the 2017 amendments to the ASX Listing Rules, which brought into effect the "reverse takeover" limitation to exceptions 6 and 7, have become widely understood and accepted in the market and that the status quo should be maintained without any further change. As noted in our cover letter, there is value in the stability and certainty of these ASX Listing Rules.
If the limit is reduced, should this be to 75%, 50%, 25% or another amount?	If there must be a reduction, the Committee submits that the limit should be 50% and should only apply to S&P/ASX 100 companies and no others. Exceptions 6 and 7 should otherwise continue to apply for entities outside the S&P/ASX 100. However, the Committee further submits that if the S&P/ASX 100 entities are subject to a reduced limit of 50%, they should be able to obtain the benefit of exceptions 6 and 7 in their current form on the basis of a disapplication process having been met at a prior AGM or other general meeting (i.e. the process disapplies the 50% limit and reverts to the "reverse takeover" limit). The disapplication process could be subject to conditions. This disapplication process could be similar in form to the pre-emption regime in the United Kingdom, which enables disapplication authorities to be passed at annual general meetings and those can operate on a rolling three-year

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	timeframe.[4] This requirement to renew a shareholder resolution could also follow the template of the proportional takeover resolution process based on section 648D of the *Corporations Act 2001* (Cth).
Should the current limit (the reverse takeover limit) be kept for entities outside the S&P/ASX 300 and with no more than $300 million market capitalisation (the same group of entities as for Listing Rule 7.1A)?	Yes, for the reasons articulated in our cover letter. However, the Committee submits that the current form of exceptions 6 and 7 should continue to apply to all entities outside the S&P/ASX 100. For those entities outside the S&P/ASX 100, scrip-for-scrip transactions—including mergers—provide an important pathway for inorganic growth and the achievement of scale and competitiveness on a global basis.
Do you think that reducing the limit on issues of securities without approval under exceptions 6 and 7 in Listing Rule 7.2 would make it more difficult for listed bidders to compete in and execute takeovers and mergers? If so, what problems would it create?	Yes, for the reasons articulated in our cover letter. In a competitive process, the imposition of conditions can come at a cost either by disadvantaging the bidder (compared to a bidder with fewer conditions) or by requiring additional deal protection mechanisms (e.g. break fees) or a higher price to warrant the target taking greater risk of non-completion.
What do you think may be the direct and indirect costs of the introduction of a lower limit on issues under exceptions 6 and 7? Would these costs be outweighed by the potential benefits?	The direct costs of preparing and holding a shareholder meeting can be significant. These can include collection of proxies, appointing scrutineers and the bidder being required to prepare a Notice of Meeting setting out all information for its shareholders to decide whether or not to approve the proposed transaction.[5] This duty to disclose requires dedication of significant time and resources to explain why the board believes the transaction would be in the best interests of the bidder's shareholders, which would need to be managed at the same time the bidder was seeking to persuade the target board

[4] See sections 549-571 of the *Companies Act 2006* (UK) and the Statement of Principles for disapplying pre-emption rights published by the Pre-Emption Group.

[5] See *ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626; (2007) 25 ACLC 399; [2007] NSWSC 270 at [14]-[22].

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	and shareholders to accept its offer. ASX need only look at the disclosures made to shareholders on a demerger, reverse takeover or an approval under ASX Listing Rule 10.1 to appreciate the cost and complexities of the shareholder approval process. As ASX note in Guidance Note 12 (paragraph 3.1, page 19): *"The imposition by ASX of a requirement that a commercial transaction otherwise within the authority of the directors must be submitted to security holders for approval will invariably introduce additional transaction costs, as well as delays and uncertainties that add risk to the transaction. In some cases, it could even threaten the transaction's viability or success. For ASX to unilaterally impose these added costs and risks could well be contrary to the interests of the entity and its security holders."* Such information could also be harnessed by competing bidders (including investors) in the market for corporate control. This requirement would present significant direct and indirect costs that would outweigh the purported benefits.
Do you think that exceptions 6 and 7 should be strictly limited to issues under takeovers and mergers conducted under Australian law, with no waivers provided to extend them to takeovers and mergers conducted under the laws of foreign jurisdictions?	No. The objective that Australia's public markets are to remain competitive includes ASX-listed companies having the flexibility to acquire both local targets and targets in other jurisdictions. The Committee supports the current regime where foreign takeovers and mergers in jurisdictions having an appropriate regulatory setting are granted a waiver from those exceptions. Policy changes which are likely to have significant consequences should not be made in response to a particular deal—in this case, James Hardie Industries Plc's acquisition of

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	AZEK Company Inc. Separately, ASX should continue its current practice to grant a waiver for trust schemes such that they are treated as schemes of arrangement for the purpose of exceptions 6 and 7, and any changes to exceptions 6 and 7 should not unfairly impact listed trusts.
Are there any other significant unintended consequences or other risks that this change raises that have not been considered in this consultation paper? If so, are there ways that these risks may be satisfactorily addressed while still proceeding with the proposed change?	No. We also do not consider that the risks identified in the Consultation, or as highlighted above, can be satisfactorily addressed by proceeding with the proposed change.
Shareholder approval for significant changes to the nature or scale of a listed company's activities	
Could Listing Rule 11.1 be changed to require security holder approval for significant acquisitions?	No. No coherent basis for changing ASX Listing Rule 11 has been articulated. Significant acquisitions (and divestments) are important and legitimate strategic options available for listed entities and boards. In particular, the Productivity Commission has recognised that mergers can enhance productivity by better allocating resources (provided the market remains competitive).[6] In contrast, further restrictions on listed entities' strategic options would not, in our submission, be productivity enhancing. Despite our willingness to accept the 2017 amendments that have been adopted by the market and should be maintained for that reason, we remain of the fundamental view that takeovers

[6] See Productivity Commission, "5-year Productivity Inquiry: A competitive, dynamic and sustainable future" (2023), Volume 3, page 15.

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	should remain the responsibility of the board of directors. This rests on directors' statutory and general law duties to act in the best interests of the company as a whole. The essence of directors' roles, responsibilities and accountability was captured in the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 (Cth): *"Directors are subject to both the general common law and a range of statutory duties (e.g. approving company financial statements, signing a prospectus). Directors have a contractual relationship with the company and a fiduciary relationship with shareholders. The Law codifies common law duties of loyalty and care. It also requires directors to exercise their powers in good faith and in the best interests of the company. A breach of requirements imposed under the Law may result in civil and/or criminal liability for directors."*[7] The scope of directors' duties has been confirmed in several significant judgments since. Furthermore, directors are subject to a comparatively robust set of shareholder rights under the *Corporations Act 2001* (Cth).[8] For example, shareholders with at least 5% of votes can: • remove directors by resolution in accordance with section 203D; • requisition the directors to call a general meeting in accordance with section 249D;

[7] Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 (Cth) at [2.8].

[8] See, for example, Mitchell et al, 'Shareholder Protection in Australia: Institutional Configurations and Regulatory Evolution' (2014) 38(1) *Melbourne University Law Review* 68 – 118, which summarises the empirical research supporting the position that the level of protection afforded to shareholders in Australia is high (as compared, in particular, to the United Kingdom and Untied States).

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	• call a general meeting in accordance with section 249F; • notify the company of a resolution proposed to be moved at a general meeting in accordance with section 249N; and • request distribution of a member statement in accordance with section 249P. Additionally, shareholders can work collaboratively to: • determine board composition by majority; and • engage the "two-strikes" rule pursuant to sections 250U to 250Y, whereby a listed company is required to hold a spill vote of the board of directors if the company's remuneration report receives more than 25% votes of "no" for two consecutive years. Where directors have exercised their powers for the improper purpose of diluting the ownership interest of a shareholder, minority shareholders also have personal remedies against the company.[9] Finally, and most importantly, shareholders also have options to adjust their investment in a listed entity if they are unhappy with the strategic direction of a company. ASX's free float requirements underpin market liquidity which provides a strong practical degree of protection and choice for investors.

[9] *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* [2024] UKPC 36; *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1988) 6 ACLC 1160; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126; *Ngurli Ltd v McCann* (1953) 90 CLR 425.

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	It is this architecture that ensures the board can be trusted to make critical decisions on behalf of the company, including shareholders, though the Committee recognizes that foreign listed companies may be subject to different legislative requirements. For this reason, the Committee does not support any changes to ASX Listing Rule 11.1 or ASX Guidance Note 12 (which articulates the main circumstances in which ASX will apply ASX Listing Rules 11.1.2 and 11.1.3). This aspect of the ASX Listing Rules and corresponding guidance is functioning without any concern to the Committee. ASX should avoid imposing additional regulatory burdens unless there is a persuasive reason to do so, and we do not see a persuasive reason in these circumstances.