Company Matters.

1 March 2019

Mavis Tan
ASX Limited
PO Box H224
Australia Square NSW 1215

By email: Mavis Tan (mavis.tan@asx.com.au)

**Public Consultation: Simplifying, clarifying and enhancing the integrity and efficiency of the ASX listing rules**

Company Matters Pty Limited (**Company Matters**) welcomes the opportunity to provide feedback on ASX Limited's (**ASX**) proposed ASX listing rule amendments, new and updated guidance notes and listing rule forms.

We commend ASX's approach to continually evolve the listing rules so they remain contemporary and address emerging compliance issues.

We generally support ASX's proposed amendments set out in the Consultation Draft, however we have highlighted some areas for ASX's consideration.

Company Matters is uniquely placed to provide feedback on how the proposed changes will impact listed entities across a wide spectrum, from S&P/ASX 20 entities to micro-caps.

By way of background, Company Matters is the consulting arm of ASX-listed Link Administration Holdings Limited (ASX: LNK) and was established in 2006 as an incorporated legal practice, to bridge the gap between the public company secretarial service providers and M&A focused corporate law firms. Company Matters' specialised service offering is unique – focusing on prevailing governance and company secretarial matters within a boutique law firm structure.

Company Matters is currently a team of 18 practitioners and assists over 400 clients per annum across a range of capacities from statutory company secretary, independent governance consultant, external counsel, chief financial officer and director.

Within its client base, and as at the date of this letter, a Company Matters practitioner is the:

- statutory appointed secretary and/or ASX rule 12.6 appointed representative for over 20 ASX listed entities
- statutory appointed company secretary of a further 110 Australian incorporated, non-listed ASX entities, many of which are subsidiaries or joint ventures of large ASX listed entities.

In addition, Company Matters provides consultancy and "white-label" company secretary services (including attending Board and Board Committee meetings) to a large number of ASX listed entities, ranging from S&P/ASX 20 to small-caps, across a range of industries and sectors.

**In 2018, Company Matters:**

- assisted over **400 clients**, from **S&P/ASX 20** entities to **small caps**, **joint ventures** and **not for profits**, across a range of capacities from statutory company secretary, independent governance consultant, external counsel, chief financial officer and director
- attended over **1,200 Board and Committee Meetings**, predominantly for ASX listed entities
- attended over **65 members' meetings**, were involved with more than **11 secondary capital raisings**, and prepared over **70 notices of members' meetings**
- released over **1,500 ASX announcements**
- supported a number of clients in navigating their first year as listed entities
- undertook several secondments for S&P/ASX 50 clients
- conducted a number of **Board Performance Evaluations** and **governance reviews** and worked closely with the Directors to enhance Board performance and provide technical and practical improvement plans

We welcome the opportunity to discuss our views further.

Yours sincerely

**Company Matters**

Company Matters.

| | |
|---|---|
| **General Comments** | We are broadly supportive of the proposed amendments however we note the volume of change is significant and we are mindful of the time it will take for entities and advisers to consider and adapt their processes to meet the requirements of the new amendments.<br><br>We encourage ASX to ensure that there is appropriate time prior to 1 July 2019 for the market to digest the changes and to prepare for the changes; noting that:<br>• a number of the proposed changes impact commonly used listing rules<br>• there are certain changes that will also require entities to implement new procedures to ensure they comply with the new amendments.<br><br>Further to this, there has been significant changes to the ASX Corporate Governance Council's Principles and Recommendations and the combined volume of changes will result in an additional burden placed on ASX listed entities, especially for small-caps where resources are limited, so we encourage ASX to ensure there is sufficient time for entities to prepare for the changes.<br><br>We also note there are a number of proposed changes that are inconsistent with the Corporations Act 2001 (Cth) (**Corporations Act**). We understand that approximately 10% of ASX listed entities are incorporated in jurisdictions outside Australia and are not required to comply with a substantial part of the Corporations Act. However, where possible, we would suggest that consideration be given to aligning the listing rules and Corporations Act requirements to assist Australian entities in complying with the applicable rules. |
| **Improving market disclosures and other market integrity measures** | |
| **Disclosure by listed investment entities of their NTA backing** | The proposed amendment to rule 4.12 to impose an immediate disclosure requirement could be challenging from a practical perspective.<br><br>For some entities, a number of parties are often involved in calculating the monthly NTA backing for an entity. This includes custodians (who commonly prepare the data), administrators (who calculate NTA backing), investment managers (who review) and the Board. Requiring entities to disclose their NTA backing as soon as the information is available may cause issues, as there are multiple parties contributing to the process resulting in a number of verification levels, and the process is often dependent on a custodian agreement.<br><br>Often listed investment entities accompany the release of their monthly NTA with an update regarding |

| | |
|---|---|
| | the performance of the portfolio which takes time to review and verify – this may be what causes the delays in release of the NTA for some entities. It should be noted that some entities release daily or weekly NTAs, so the actual calculation can be done reasonably quickly if appropriate processes (including approval processes) are in place, however, meaningful commentary, which often accompanies a monthly update, can be more time consuming to collate, review and approve.<br><br>We expect that listed investment entities will need to establish formal processes to ensure that the information is released as soon as it is "available"; specifically once it has been reviewed, verified and approved by the Board. |
| **Disclosure of closing dates for the receipt of director nominations** | We agree that rule 3.13.1 is on occasion inadvertently overlooked by entities and welcome ASX's confirmation that non-compliance with this listing rule does not invalidate the meeting or the election of any director at the meeting.<br><br>However, we are not generally supportive of the proposed amendment to require an entity to disclose the closing dates for receipt of director nominations for the following reasons:<br>• the proposed amendment could result in an increase to nominations that are frivolous and facetious, resulting in increased costs to the entity (and ultimately security holders), and unnecessary additional work for the entity<br>• in our experience, if a person is considering nominating as a director (usually if there is an agitating security holder), there is already correspondence occurring between the parties and adding the closing date for nominations is not going to assist the process<br>• the disclosure of the closing dates for the receipt of director nominations is unlikely to be of benefit to most security holders – if a security holder did wish to nominate as a director, they are free to do so and should be able to determine the process without relying on the ASX platform for this information. If a person is seriously considering nominating as a director of an entity they are able to determine the closing date for nominations and the process by reviewing the entity's constitution and, assuming the entity has complied with rule 3.13.1, the date of the upcoming security holder meeting. |
| **Disclosure of voting results at meetings of security holders** | In our view, the proposed amendments to rules 3.13.2(e)(iv) and (v) will add little value to the majority of security holders and will require some share registries to change their processes in order to meet these new obligations.<br><br>Currently, most of the larger share registries provide entities with a summary of meeting results in compliance with 251AA of the Corporations Act. The information required under the proposed new rules 3.13.2(e)(iv) and (v) differs from the information required by section 251AA of the Corporations Act in relation to the split between the Chair and other persons appointed as proxy. In our view, the additional information required adds little value and is a burdensome addition which is inconsistent with the Corporations Act requirements. |

| | |
|---|---|
| | From a practical perspective, as rule 3.13.2 is also an immediate disclosure obligation, the additional amendments to rule 3.13.2 will likely result in extended turn-around times for meeting results to be disclosed to the market because additional manual work from the company secretary will be required to tailor the results following the meeting.<br><br>From a process perspective, we generally prepare for our clients a cover announcement prior to the meeting, and following the meeting receive the final reports from the share registry which are consolidated and announced to ASX as promptly as possible.<br><br>This ensures that results are delivered to the market promptly and without delay (noting that rule 3.13.2 requires the results of the meeting to be released to ASX immediately after the meeting has been held).<br><br>We further note changes that would require entities to report in a fixed format, rather than in an entity's chosen format (on the basis that the information provided to security holders is complete and clear), will generate additional work for entities and is overly prescriptive. |
| **Voting by employee incentive schemes** | We are supportive of the changes proposed by rule 14.10 relating to employee incentive scheme voting. These changes are unlikely to have a significant impact on our clients as they primarily rely on ASIC Class Order 14/1000 (**Class Order 14/1000**), which is consistent with the proposed listing rules changes regarding voting of unallocated securities.<br><br>Overall we support this amendment and consider that the new listing rule will clarify voting requirements of employee incentive schemes for foreign entities, and create consistency with existing Australian legislation. |
| **Market announcements** | This proposed amendment requires clarification. If the amendment is intended to mean that all announcements must include a cover letter with the body of the announcement to follow, then we consider this requirement outdated and unnecessary.<br><br>Any change that requires additional pages to be lodged adds no value in our view and will require security holders to review additional pages which are unnecessary.<br><br>If ASX wishes entities to include a contact person for all announcements (or other key information), the requirement should be clarified and not required to be included in a separate cover page. Regarding forms prescribed by ASX or other law, if specific information is required, it should be included in the prescribed form (or law) – there is no need for a separate cover page. |

| Making the rules simpler and easier to follow | |
|---|---|
| **Announcing issues of securities and seeking their quotation** | We note the new changes proposed by ASX in relation to announcing issues and seeking quotation of securities and we are generally supportive of the changes.<br><br>In addition to these changes, we note that there has been inconsistency in the market regarding disclosure requirements for issues of securities under employee incentive schemes, specifically performance rights and we welcome clarification from ASX on this matter.<br><br>We suggest that ASX provide clarification for issues of performance rights, which is consistent with existing guidance provided in Guidance Note 19, which notes that both a "performance option" and a "performance right" is regarded by ASX as an "equity security". ASX also notes in Guidance Note 19 that most performance rights are regarded by ASX as options under and for the purposes of the listing rules.<br><br>Rule 3.10.5 provides that an entity must immediately tell ASX if an issue of securities is made. A security in our view would include a performance right. However, there is market inconsistency in our view in the application of this rule, in that some entities which issue performance rights on a regular basis do not announce each issue (e.g. recruitment of new executives).<br><br>We also note that the requirements proposed in new rule 3.10.3A relating to issues made under an employee incentive scheme may be manageable for smaller entities which do not regularly issue employee incentive awards, however larger entities which regularly issue performance rights (e.g. to new hires) may have difficulty complying with this rule. |
| **Chess Depositary Interests (CDIs)** | We recognise the rationale for a specialised form for CDIs and agree that the Appendix 3B is not an appropriate form to disclose such changes.<br><br>Overall we support this new rule; in addition we suggest that ASX clearly outline the reporting periods and requirements for submission of CDI statements, such as how issued capital for the month will be calculated, for example will this be as at the last trading day of the month?<br><br>Clear guidance surrounding the application of this rule is necessary and we would encourage ASX to provide guidance in respect to completing the required forms, as for some of our clients the number of CDIs changes on a daily basis. |
| **The additional 10% placement capacity in rule 7.1A** | We note the proposed changes in relation to rule 7.1A and agree with simplifying the rule.<br><br>We suggest ASX consider allowing eligible entities to seek security holder approval for rule 7.1A at an extraordinary general meeting rather than limiting the use of this listing rule, by only allowing such |

| | |
|---|---|
| | resolutions to be proposed at annual general meetings. |
| **Issues of equity securities without security holder approval** | We note the proposed changes to the exceptions for rules 7.1 and 7.1A.<br><br>We are not supportive of the proposed changes to rule 7.2, exception 13, which will require entities to disclose the maximum number of equity securities proposed to be issued under a scheme as this may limit entities, due to the difficultly of determining such numbers three years in advance. In any event, grandfathering provisions should be introduced to clarify that entities which have met the current requirements of the rule should be permitted to continue to rely on the exception until the expiration for the applicable three year period.<br><br>We note that when Directors approve the issue of securities under an employee incentive scheme, they must at all times act in the best interests of the Company and consider whether the remuneration is reasonable.1<br><br>In addition, entities which rely on Class Order 14/1000 are also limited by the conditions of relief – specifically, the listed entity must, at the time of making the offer, have reasonable grounds to believe that the number of underlying eligible products that have been or may be issued under the offer, when aggregated with offers made under Australian Securities & Investments Commission relief in the previous three years, will not exceed 5% of the issued capital of the listed body.<br><br>We consider this change unnecessary and burdensome on the entity, which with security holder approval should be free to determine the number of employee incentive securities to issue at any stage during the three year approval period, having regard to the circumstances of the entity at that time.<br><br>Additionally, for our ASX listed foreign incorporated entities, equity incentive plans in foreign jurisdictions are commonly used as part of an employee's overall remuneration package and include issues of equity on appointment, bonus and on promotion so the quantity would be largely dependent on the recruitment process which would be difficult to ascertain three years in advance.<br><br>We support the material change condition of exception 13, which is consistent with our current practice when applying this rule.<br><br>We consider it market practice to seek new approval under the current rule 7.2, exception 9, if there are material changes to the plan as outlined to security holders in the notice of meeting or prospectus/product disclosure statement (as applicable) and welcome this confirmation from ASX. |

[1] Australian entities must comply with sections 181 and 211 of the Corporations Act.

| | |
|---|---|
| **Employee incentive schemes** | We support the proposed amendment to merge rules 10.15 and 10.15A.<br><br>We do not support the amendment to disclose the relevant director's current total remuneration package in the notice of meeting – for Australian incorporated entities, this information is available in entity's remuneration report.<br><br>Requiring this information to be summarised in the notice of meeting is unnecessary for Australian incorporated entities as the information is readily available and adds additional complexity to the notice of meeting.<br><br>Often an executive director's package will be comprised of fixed remuneration and at risk remuneration in the form of a short term incentive and long term incentive and will not necessarily be able to be described succinctly in the notice of meeting, but should be read as a whole with the remuneration report of the entity. Adding this information to the notice is unnecessarily complicated and distracts from the key approvals being sought. |
| **Voting exclusions** | We note the proposed amendments to the list of voting exclusions in rule 14.11.1. In particular, we note the proposal to include a separate voting exclusion for rule 7.1A.<br><br>Generally, in our experience, entities seeking security holder approval for additional capacity under rule 7.1A are not aware of persons likely to be issued securities under 7.1A at the time the notice of meeting is finalised/the resolution is considered and voted on, and seek approval to allow for greater flexibility when raising capital. |
| **Updating the timetables for corporate actions** | |
| **Dividends and distributions** | We note the proposed changes to section 1 of Appendix 6A.<br><br>We recommend that ASX clarify that this is in relation to the issue of new securities only as we query whether 5 business days provides adequate time for entities which acquire shares on market to allocate to security holders under a dividend or distribution plan; as opposed to issuing new securities.<br><br>In particular, such entities are unaware of the final number of securities to be issued under a dividend or distribution plan until at least one business day following the record date (and later in the timetable depending on the dividend or distribution plan pricing period). This issue is heightened for entities with illiquid stock and low trading volumes. |

| Correcting gaps or errors in the listing rules | |
|---|---|
| **Voting exclusions** | We encourage ASX to consider the Corporations Act requirements when finalising the voting exclusion amendments.<br><br>There is already considerable disconnect between the Corporations Act and listing rule requirements regarding remuneration related resolutions, which from a practical perspective makes remuneration related voting exclusions difficult to administer. For example, votes on rules 10.14, 10.17 and 10.19 (for Australian incorporated entities) generally require voting exclusions to be applied under both the listing rules and Corporations Act.<br><br>In addition to the listing rule prohibitions, section 250BD of the Corporations Act provides that a vote must not be cast on resolutions connected directly or indirectly with the remuneration of a member of the "key management personnel"[2] (**KMP**) as a proxy by:<br><br>• a member of the KMP; or<br>• a closely related party of the KMP,<br><br>unless it is cast as proxy for a person entitled to vote in accordance with their directions.<br><br>However, the Corporations Act provides that this restriction on voting undirected proxies does not apply to the chair of the meeting if the proxy appointment expressly authorises the chair of the meeting to exercise undirected proxies even if the resolution is connected, directly or indirectly, with the remuneration of the KMP.<br><br>There are other practical differences between the listing rule and Corporations Act voting exclusions, which makes it difficult administer, specifically:<br><br>• rule 14.11 prohibits voting "in favour of" and the Corporations Act prohibits voting "in any capacity"<br>• rule 14.11 prohibits voting by the named person/parties and their "associates"; whereas the remuneration related voting exclusions in the Corporations Act exclude "key management personnel" and their "closely connected parties" |

[2] As defined in section 9 of the Corporations Act.

| **Accompanying documents** | |
|---|---|
| **Accompanying documents** | We note the proposed changes to the Appendix 3B and introduction of Appendix 2A.<br><br>In line with these changes, we support ASX's proposal to clarify the requirements relating to Annexure 1 of the current Appendix 3B.<br><br>In our view, there is confusion in the market regarding the requirement to completing Annexure 1 when issuing securities under rule 7.1. In our view, it is clear on the current Appendix 3B that Annexure 1 is only required to be completed by entities which have approval under 7.1A. However, there appears to be some confusion about this position.<br><br>We note the proposed changes will assist to clarify the current disclosure requirements for entities using their 7.1 and 7.1A placement capacity. |