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By Email

Dear Ms Tan

HOAT Submissions on proposed amendments to ASX Listing Rules

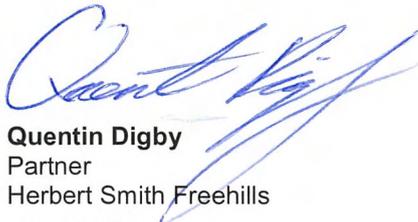
This submission is made by the Head Office Advisory Team at Herbert Smith Freehills in response to the public consultation paper titled 'Simplifying, clarifying and enhancing the integrity and efficiency of the ASX listing rules' and the proposed changes to the ASX listing rules released by the ASX on 28 November 2018.

The proposed changes to the listing rules are extensive and our submissions are focused on issues relevant to corporate governance, executive remuneration and market disclosure. Our submissions are set out in the table at Attachment 1.

Given the volume of changes, it might be useful for stakeholders if ASX undertakes to review the implementation of the new listing rules after 6 or 12 months and invite submissions to correct unintended consequences or matters that are not workable in practice.

If you have any questions or comments on our submissions, please do not hesitate to contact us.

Yours sincerely



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Submissions in response to ASX public consultation paper

Issue	Reference	Submission
1. Announcing issues of securities and seeking their quotation	Amended LRs 2.7, 2.8, 3.10.3 New LRs 3.10.3A, 3.10.3B, 3.10.3C Appendix 3B New Appendix 2A	<p>The proposed changes to the process for announcing issues of securities under an employee incentive scheme may not operate as intended to eliminate confusion amongst market participants about whether a disclosure needs to be made in relation to some forms of incentives, such as rights that could be settled by allocating shares or cash.</p> <p>The introduction of non-standard disclosure of issues of securities in the context of an employee incentive scheme could potentially create even more disparity in market practice, given there will be no prescribed form of disclosure. Listed entities may benefit from further guidance from ASX as to what should be included in the disclosure relating to issues under employee incentive schemes, to ensure consistency in approach.</p> <p>The revised approach may also prevent interested parties from being able to track outstanding unquoted issues in the periods between annual reports, as without the Appendix 3B in its current form, there is no longer any requirement to disclose cumulative totals (recognising that current market practice is relatively mixed anyway).</p>
2. Proposed changes to restrictions on issuing securities to persons in a position of influence	Amended LRs 10.11 – 10.15 New GN 25	<p>The traditional focus of ASX with respect to issues of securities has been the potential dilution of the share capital of an entity and the potential consequences for shareholders. It is unclear why ASX wishes to continue to expand the disclosure requirements and the overall policy behind listing rules 10.11 to 10.15 dealing with director benefits other than to follow “political” leads. There is now extensive legislation dealing with executive remuneration and disclosures and for ASX to now add to the complexity and inconsistency with additional requirements of marginal, if any, benefit is unhelpful.</p> <p>We note that directors are already subject to fiduciary duties that operate to constrain them from agreeing to provide benefits to anyone on unreasonable terms. Furthermore, where the issue of securities is to a related party, there are longstanding protections in the Corporations Act that must be complied with. These, combined with the current requirement to seek shareholder approval under the listing rules have to date operated effectively to protect shareholders.</p> <p>The rationale behind ASX’s proposed shift in policy is unclear, particularly bearing in mind that listed companies</p>

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		<p>are already subject to significant scrutiny in relation to any and all remuneration of key management personnel in the existing remuneration report disclosure requirements, which require disclosure in a form that complies with the Accounting Standards and which stakeholders expect to be in line with the disclosure of other listed entities of similar size and market capitalisation.</p> <p>Accordingly, we do not support the proposal to include the following additional requirements in the notice of meeting under listing rule 10.15:</p> <p>a) <i>The proposed requirement under listing rule 10.15.3 to include details (including the amount) of the director's current total remuneration package:</i> This requirement would unnecessarily duplicate the disclosures which are already required in the remuneration report disclosures. Further, it is unclear how 'total remuneration' is defined or how it should be calculated for the purposes of disclosure in the notice of meeting and given the complexity of such disclosures under the existing regime, the proposed amendment under listing rule 10.15 is likely to be a burdensome requirement for entities to comply with. The proposed change does not clearly align with the proposed intention of the public consultation to simplify and clarify the listing rules and will likely result in a wide divergence of disclosures amongst listed entities.</p> <p>b) <i>The proposed statement under listing rule 10.15.11 regarding additional details to be included in the entity's annual report:</i> It is not clear why this statement, which is currently only relevant to notices of meeting under existing rule 10.15A, should be extended to all approvals under listing rule 10.14. This requirement could be inadvertently overlooked in practice.</p>
3.	Voting exclusions Amended LR 14.11	<p>The proposed changes to listing rule 14.11 may create confusion as to the interaction between the rule and the relevant laws on voting exclusions under the Corporations Act (including, but not limited to, section 250C).</p> <p>There is some inconsistency between the proposed changes (which refer to 'directions given to the proxy or attorney to <u>vote in favour</u> of the resolution') and the wording of section 250C (which refers to an appointment which '<u>specifies the way they are to vote</u> on the resolution'). The proposed wording in listing rule 14.11 is also inconsistent with the requirements and exclusions in sections 250BD and 250R(4) of the Corporations Act.</p>
4.	Eliminating the need to apply for a number of standard waivers Various	<p>We understand the reasoning for removing the need for entities to apply for standard waivers and support this proposal in principle. However, we would like to understand why all standard waivers should not ultimately be reflected in changes to the listing rules? The risk is that otherwise, over time, a complex set of 'standard waivers' will sit beside the actual rules.</p>

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5. Responses to clarificatory drafting changes	1. Amended LR 3.10.7	1. Listing rule 3.10.7 should be amended to clarify that it applies to quoted convertible securities given that the amendments to listing rules 15.1.5 and 15.1.6 make it clear that the intent of these rules is to capture quoted securities.
	2. Amended LR 3.19A.2A	2. We understand the rationale behind amending the wording of the notes to rule 3.19.2A to clarify confusion as to the timing of lodgement of Appendix 3Ys in relation to on-market purchases, however the proposed wording does not fully clarified the issue. The amendment could be expressed as ' <i>executed on-market (rather than the date of settlement)</i> ', which may assist in achieving the desired clarity (suggested additional wording in underline).
6. Disclosure of agreement to underwrite dividend or distribution plan	New LR 3.10.9	Any requirement which requires disclosure of DRP underwriting arrangements should be limited to circumstances where the Board has actually determined that a particular dividend will be underwritten (and can be announced at the time the record date for that dividend is announced). Some companies may choose to put in place a contingent DRP underwriting agreement to give the company flexibility to decide to underwrite a dividend in the future. That ought not to be material or required disclosure unless and until a decision is actually made to underwrite the dividend.
7. Disclosure of maximum number of securities to be issued under employee incentive scheme	Amended Exception 13 in LR 7.2	ASX has proposed amendments to Listing Rule 10.15 to eliminate the need for an entity to disclose the maximum number of securities that may be acquired under an employee incentive scheme, which we understand is to eliminate the need for ASX to grant waivers of this requirement.
	Existing LR 10.15.2 and 10.15.2A	However, the introduction of the requirement to disclose the maximum number of securities proposed to be issued under an employee incentive scheme for the purposes of exception 13 in listing rule 7.2 may result in a significant number of waiver applications for the same reason. It is not clear whether this is ASX's intention.
8. Clarification of operation of exception 3 to LR 10.12	Amended Exception 3 in LR 10.12	Listed entities may benefit from clarification in exception 3 to listing rule 10.12 that the restriction on employees participating in a dividend or distribution plan in respect of shares held under an employee incentive scheme is not a limit on participation for the purposes of that exception.
		<p>This is because:</p> <ol style="list-style-type: none"> often employees do not have full entitlement to receive the shares, which are often subject to conditions; and

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		<p>2. it can be very difficult from an administrative perspective for the entity to administer the dividend or distribution plan where shares are held by the trustee on behalf of various employees.</p>
<p>9. Requirement to summarise listing rule in notice of meeting</p>	<p>New LR 14.1A</p>	<p>It may be helpful for listed entities if ASX provides wording that it expects entities to include in notices of meeting for the purposes of complying with new listing rule 14.1A. This may reduce initial compliance costs for entities in meeting the expectations of ASX in summarising the relevant rule and will encourage consistency in market practice. This would be consistent with the current approach under listing rule 14.11.</p>
<p>10. Compliance requirements and censures</p>	<p>LR 18.8 New LR 18.8A</p>	<p>With respect to the proposed new rule 18.8A, we are aware that other major exchanges have a formal power of public censure and accordingly, it is understandable why ASX wishes to introduce a similar or equivalent rule. In any event, the proposed power in relation to censure already clearly exists.</p> <p>However, the listing rules currently contain enforcement mechanisms which are, in our view, adequate to enable the ASX to enforce the listing rules including, in appropriate circumstances, to suspend or remove an entity from the ASX in the event of a breach of the listing rules. Further, section 1101B of the Corporations Act provides that the court may make such orders as it thinks fit if, on the application of ASX, it appears to the Court that a person has contravened the ASX listing rules. The Court can only make such an order if it is satisfied that it would not unfairly prejudice any person.</p> <p>We consider that the existing regime is sufficient to enforce compliance with the listing rules. Where there is a particular rule that requires additional powers, then in our view, that should be addressed by way of a specific rule limited to the relevant situation – as was the case with existing listing rule 10.9. In our view that concept should not be extended to cover the listing rules more broadly.</p>
<p>11. Definition of substantial holder</p>	<p>Existing LR 4.10 Amended LR 19.12, definition of 'substantial holder'</p>	<p>We note that the changes to the definition of substantial holder will have flow-on effects for the purposes of the disclosure requirements under listing rule 4.10 and query whether this is intentional from the perspective of ASX.</p>
<p>12. Time limit for issuing</p>	<p>Amended Appendix</p>	<p>ASX could clarify that either the proposed shorter time limit of 5 business days for an entity to issue securities</p>

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securities under a dividend or distribution plan	6A, Timetable 1.1	under a dividend or distribution plan does not apply where securities under the plan are sourced on market, or if it does apply to such securities, consider retaining the existing 10 business day limit. This is because even the current time limit of 10 business days can be a short time frame for larger entities that commence purchasing securities on the date for payment of the dividend.