OWNERSHIP MATTERS

Suite 4, Level 5, 167 Queen St, Melbourne VIC 3000 **T** +61 3 9602 4548 **www.ownershipmatters.com.au**

1 March 2019

Mavis Tan
ASX Limited
Email: mavis.tan@asx.com.au

RE: Submission on 'Review of ASX Listing Rules'

Dear ASX,

Thank you for the opportunity to comment on the review of the ASX Listing Rules. Ownership Matters (OM), formed in 2011, is an Australian owned governance advisory firm serving institutional investors. This submission represents the views of OM and not those of its clients.

This submission will comment only on those proposed changes to the Listing Rules and Guidance Notes where OM considers its views to be relevant. Our comments, ordered by Listing Rule and Guidance Note, are shown below:

- **ASX Listing Rule 1.1, condition 13 & ASX Listing Rule 12.6:** The proposed requirement for the person responsible for communicating with the ASX on behalf of the listed entity to complete an education course is positive and at worst cannot do any harm.
- **ASX Listing Rule 1.1, condition 20:** The broadening of the ASX's 'good fame & character' test to include the CEO of an entity seeking admission (in addition to the board) is also positive given OM is aware of entities that in the past have changed the composition of their board of directors seemingly to ensure they were able to meet this requirement.
- The requirement however should be broadened beyond specified roles to include a catch all to ensure the ASX is able to deny listing to an entity where the CEO and directors may meet the 'good fame & character' test but where persons materially involved or connected to the entity – for example, a person acting as 'COO' or a person who controls the board through a significant shareholding but is not themselves a director - may not. OM is aware of several situations where large investors were clearly laundering money through their investments and involvement with ASX entities.
- **ASX Listing Rule 3.10.3A:** OM has no objections to the proposed changes to clarify the operation of the Listing Rules around notification of when issues under employee incentive schemes are made; however it would like to reiterate to ASX its view that the ASX should not issue <u>any</u> waivers to entities that are frequent issuers of shares under employee incentive schemes. OM is aware that the ASX has in the past allowed listed entities to only update the market periodically – quarterly or

monthly for example – of option issues meaning shareholders are not aware of the precise number of shares on issue at any given time.

- OM would also like to draw the attention to the ASX to an emerging but questionable practice of issuers issuing options in overseas subsidiaries (beyond the purview of the Corporations Act) with an accompanying but undisclosed "conversion ratio" that makes it impossible for investors to assess dilution in the ASX head stock. In OM's view these arrangements amount to an option over the head stock and should be assessed as such.
- **ASX Listing Rule 3.10.9:** The proposed change to require the details of the underwriter of a DRP and the fees paid to the underwriter to be disclosed are positive and improve information for investors. It is however unclear why the same disclosure requirements have not been extended by ASX to non-pro rata underwritten issues, such as placements. OM would recommend that ASX extend these disclosure requirements to any issue of securities involving underwriting.
- **ASX Listing Rule 3.13.1:** This change is positive and improves the rights of investors to nominate candidates for election to the board by making clear the date nominations for election must be received.
- **ASX Listing Rule 3.13.2:** Clarifying the required disclosure of results of meetings to be given to ASX should reduce the administrative burden on listed entities by removing ambiguity and will improve market disclosure. We believe that the ASX should consider making polls compulsory on all resolutions – at present our understanding of the law is that the fiduciary duty to call a poll when resolutions are "close" only extends to the passing (>50%) or otherwise of the resolution and not the attainment of the 25% threshold under the "first strike" regime. There are numerous instances of remuneration reports being passed on a show of hands, but where the proxies suggest that the poll result would have been close to a first strike.
- **ASX Listing Rule 4.7C:** Introducing a requirement for non-resource entities to file a quarterly activity report in addition to a quarterly cash flow report is positive. OM notes many non-resource entities that file 4Cs already effectively provide quarterly updates with or alongside their 4Cs.
- The additional, specific requirement to provide descriptions of payments to related parties (also included in amendments to Listing Rules 5.3 & 5.4) noted in quarterly cash flow reports is also positive as allowing for more scrutiny of these types of transactions. Requiring an explanation of material differences in forecast cash flows from the prior quarter is also positive as providing investors with more information to interpret a listed entity's performance & prospects.
- **ASX Listing Rule 7.1A.3:** OM supports removing the capacity for listed entities to issue securities under Rule 7.1A for non-cash consideration.
- **ASX Listing Rule 7.2, exception 13:** Requiring listed entities seeking approval to carve out issues under an employee incentive scheme from the Listing Rule 7.1 limit to specify the maximum number of securities able to be issued when seeking approval from securityholders is positive. At present most companies disclose no such limit.
- **ASX Listing Rule 7.9, exception 8:** The proposed exception to allow the board of a listed entity subject to a written takeover proposal to issue securities with the consent of the potential bidder is potentially concerning. The rationale for the change is that the ASX has granted waivers on a similar basis as the bidder has

indicated it does not object. This however creates a situation where a target board could place securities to parties supportive of (or at least not opposed to) a controversial takeover offer with the consent of the bidder, making a successful takeover more likely. There is no compelling reason for this change.

- **ASX Listing Rule 10.1, exception under 10.3:** The ASX has not proposed any change to the exception allowing the issue of securities for cash to a person in a position of influence. This allows for the issue of securities for cash on a non-pro rata basis to a party holding more than 10% of the securities on issue (the ASX's definition of a securityholder in a position of influence).

- This allows a strategic securityholder with board representation via an executive to participate in non-pro rata issues without prior approval from disinterested securityholders. The proposed amended Guidance Note 25, section 2.5 suggests ASX is aware to the potential issues involved with issues to major holders with boards representation; OM would suggest rather than the existing situation here the onus is on the ASX to apply a Rule it simply remove the exemption of the issue of securities for cash for a substantial holder with board representation.

- **ASX Listing Rule 10.12, exception 12:** This current exception is problematic as it routinely allows listed entities to issue equity securities to directors without prior securityholder approval on the grounds the agreement to issue securities was part of their agreement to become a director in the future. This allows quite large equity issues to directors to be agreed prior to their appointment and subverts the intent of Listing Rule 10.11.

- **ASX Listing Rule 10.15.3:** OM supports the proposed requirement to require the details of a director's current remuneration package to be disclosed in the notice of meeting where an entity is seeking approval to make an allocation to a director under ASX Listing Rule 10.14.

- **ASX Listing Rule 14.10:** The proposal to prevent securities held in an employee incentive scheme from being voted by the board on transactions that directors themselves would otherwise be barred from voting on – for example, related party transactions or issues of securities to directors - is positive and consistent with the principles underpinning the voting exclusion rules.

- **ASX Listing Rule 18.8A:** The proposal to allow the ASX to publicly censure an entity for an "egregious breach" of the Listing Rules is positive and is unlikely to do any harm beyond public embarrassment for the entity censured. The ASX should consider such examples of censure when considering whether persons satisfy the ASX's 'good fame & character' tests for listing.

- **Guidance Note 24:** In section 8.3 of the proposed new Guidance Note, the ASX suggests it would be willing to provide a waiver from Listing Rule 10.1 for "standard supply agreements" with persons is a position of influence that otherwise be caught by the requirement for securityholder approval of the acquisition or disposal of a substantial asset. OM cannot see any detriment to securityholders of requiring such standard agreements to be subject to securityholder approval and allowing securityholders to determine if the agreement is on the same terms as "as those that apply to all other customers". This is consistent with the principles underpinning Listing Rule 10.

- **Policy positions underpinning Guidance Notes 24 & 25:** OM fully supports the policy positions enunciated in the proposed guidance notes and would encourage the ASX to routinely disregard requests for waivers from Listing Rule 10 given the range of specified exemptions already in place.
- Specifically in relation to section 4.9 of Guidance Note 24, OM cannot conceive of why the ASX would accept a 'statutory declaration' from a close relative of a director that they were not associates as evidence that the requirements of Listing Rule 10.14 should not apply to an issue of securities under an employee incentive scheme. As the ASX's own proposed guidance states "either the relative is an associate of the director – in which case a waiver would be inappropriate and the entity should obtain the approval of its ordinary security holders to the issue under Listing Rule 10.14.2 – or they are not".
- **The on-market exemption:** The proposed amendments do nothing to address the substantial gap in protections for securityholders relating to issues of securities to persons in a position of influence if the securities are allocated under an employee incentive scheme and are acquired on market.
- The proposed amendments in fact exacerbate the potential for abuse by clarifying that an 'employee incentive scheme' may have only one participant. This would allow for a listed entity to create an employee incentive scheme for a single director and transfer a large number of the entity's listed securities to a director by acquiring the securities on-market using the entity's funds without any prior approval from securityholders. Given the ASX's own stated policy position underpinning Listing Rule 10.14 – designed to ensure "there is no reasonable prospect of the recipient of the securities … influencing the terms of the scheme or the size of the award to them under the scheme" – the rationale for the on-market exemption remains inexplicable and founded on a simplistic understanding of the concept of dilution.

Please feel free to contact us concerning any aspect of our submission. For the avoidance of doubt we are happy for our submission to be made public.

Yours sincerely,

Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd