Governance Institute of Australia

T +61 2 9223 5744 **F** +61 2 9232 7174
E info@governanceinstitute.com.au
Level 10, 5 Hunter Street, Sydney NSW 2000
GPO Box 1594, Sydney NSW 2001
W governanceinstitute.com.au

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Kevin Lewis
ASX Limited
20 Bridge Street
Sydney NSW 2000
Email kevin.lewis@asx.com.au

Dear Kevin,

Proposed Listing Rule enhancements Consultation Paper (Consultation Paper)

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 43,000 governance and risk management professionals from the listed, unlisted, public and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility within listed entities for developing governance policies, ensuring compliance with the Australian Securities Exchange (ASX) Listing Rules and supporting the board on all governance matters. Their familiarity with the practical aspects of compliance with the Listing Rules and contemporary market practice has informed the comments in this submission.

Governance Institute welcomes the opportunity to comment on the proposed amendments.

As a general comment our members consider that that some aspects of the amendments relating to capital raisings will have the effect of reducing entities' ability to raise capital in the manner best suited to their circumstances and capital needs. They also potentially impinge on boards' responsibility for capital management.

Our comments on the specific proposals are set out below.

Security issuances

Security purchase plans (SPPs)
Pro-rata issues

During capital raisings speed of execution is key and companies want to proceed quickly given the risk of market moves impacting on the transaction.

Our members acknowledge that ASX attached conditions to its temporary emergency relief to facilitate capital raisings involving SPPs in the early stages of the COVID-19 pandemic. The environment at that stage was difficult and uncertain and attaching conditions may have been appropriate at that time. Our members question whether there is a demonstrated need for the

proposed changes to become a permanent feature of the Listing Rules given market conditions are beginning to normalise.

We also note that ASX states in the Consultation Paper that the changes relating to SPPs and pro-rata issues are in response to 'some inappropriate practices ASX has *occasionally* observed in relation to SPPs and allocation arrangements'. In addition, there is a reference to directors applying 'preferential scale-back arrangements' to themselves or to 'favoured' security holders. Firstly, if these practices are only observed 'occasionally' our members question whether the proposed amendments to the rules are the most appropriate way to address occasional issues. Secondly, they feel that this situation is already captured by the related party provisions of the Corporations Act and Chapter 10 of the rules.

Directors have a duty to act in the best interests of the company which also means they have a duty to act in the company's best interest in relation to capital management. They will also generally have relatively substantial security holdings due to minimum security holding requirements, and in our members' experience do not typically receive larger allocations than other security holders, relative to their holding. In addition, directors, like all other security-holders, are subject to the $30,000 cap on shares issued to an applicant under an SPP as set out in the ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547 (that is, they are restricted from issuing themselves unlimited shares.) Our members consider it may be more appropriate for ASX to deal with inappropriate practices on a case-by-case basis rather than by way of blanket changes to the rules which impact all listed entities.

The ability to raise capital by way of placement of up to 15 per cent of a company's ordinary share capital in any one year without shareholder approval is well understood by companies and investors alike and has operated well for many years. Our members would be reluctant to see any changes proceed without a lengthier consultation period than the six weeks allowed for comment on the Consultation Paper. Our members consider that there is no demonstrated need for the changes outlined to this rule outlined in the Consultation Paper. The proposals go beyond those imposed temporarily in 2020 during the initial phase of the COVID-19 pandemic. They are also not accompanied by the higher dilution thresholds included in the temporary relief. Our members also question whether the proposed threshold being the lesser of ten per cent and A$50 million may be more than the current 15 per cent threshold. 'Mandating' pro-rata scale-back arrangements by removing companies' ability to rely on the exceptions in Listing Rules 7.2 and 10.12 means it is likely that companies will not pursue pro-rata allocations as readily. As noted above speed of execution is critical in a capital raising, entities need to know how a particular transaction is proceeding and want the outcome to be known quickly to avoid adverse market movements. The inability to rely on the exceptions means they will favour certainty and avoid pro-rata scale back allocations.

Our members also note that pro-rata scale-back arrangements without any flexibility may not always be appropriate in particular situations. For example, some security holders will apply for less than their allocation and mandating a pro-rata allocation will mean that this security holder is unable to obtain the number of securities they actually wish to purchase. In other cases, entities may choose to impose a minimum security holding allocation 'floor' on allocations under a scaled-back SPP. This assists in limiting the number of unmarketable parcels of securities on their registers. It is also recognises employees, who may hold very small numbers of securities due to employee share plans. There also needs to be discretion to apply rounding to scaled-back allocations. Mandating pro-rata allocation by removing the ability to rely on the exceptions in Listing Rules 7.2 and 10.12 removes much needed flexibility. The need for flexibility means that the suggestions to scale back based on the size of a security holder's holding on the record date or an earlier date selected by the entity or pro-rata to the number of securities applied for under the pro-rata issue, without any discretion, may not be workable in practice or result in complexity that means companies do not implement a retail SPP to the detriment of retail shareholders.

While our members are supportive of entities disclosing how they propose to manage shortfalls, as noted above they have concerns about mandating an approach to shortfalls. One potential consequence is that it creates inflexible arrangements but may also impact underwritings. In particular, if entities are required to allocate shortfalls in pro-rata issues on pro-rata to a holding or application, it may mean it is harder to sub-underwrite the offers which are typically made to institutional shareholders wanting to acquire additional securities. This would have a flow on impact on underwriters' ability to underwrite, particularly the retail component which will be longer dated. In addition, a shortfall may be quite small which would make a pro-rata allocation across a large security holder base impracticable. If ASX proceeds with this proposal, there would need to some de minimis application.

Our members support the inclusion of a general statement in the proposed changes to exception 5 in rule 7.2 to the effect that scale-back arrangements for SPPs may include measures to address security holders acquiring nominal holdings to receive an offer or split their holdings to receive multiple offers. They do not consider it necessary to include more specific mechanisms to address this issue into the rules.

Material placements

Our members note the proposal to introduce a disclosure requirement in the case of all 'material' placements by way of non-pro-rata offers in relation to placements and SPPs both about their approach to determining who will participate in the placement, including the approach to the allocation process and following close of the offer, information about who did participate in the offer. They do note that the approach to scale backs can involve the consideration of a number of complexities such as whether it will be on the basis of HINs or whether beneficial owners are included. In their experience it can be complex to identify like applicants.

While our members are supportive of entities disclosing how they propose to manage shortfalls, as noted above they have concerns about mandating an approach to shortfalls. They also note that post offer disclosure can be more complex given the need for flexibility around allocation referred to above. In their experience despite the advent of technology there can still be a need for manual processing during the allocation process.

They also note that the proposed materiality threshold of the lesser of ten per cent and $50 million is quite low and question how it is intended to interact with the 15 per cent annual limit on placements and would like further information about how this is intended to operate.

Other enhancements

Financial reporting

We note the proposed new rule 17.5A which gives ASX the ability to suspend an entity where it lodges a quarterly cash flow report that is not 'compliant'. The Consultation Paper notes the amendment is to address the anomaly that a suspension is automatic for non-lodgement of quarterly cash flows but there is no current consequence for lodging accounts subject to a disclaimer of opinion or adverse opinion.

While our members note the potential anomaly, they consider that the main issue here is that the market must be fully informed. If the market is aware of the disclaimer of opinion or adverse opinion this will be factored into the pricing of the securities. Automatically suspending an entity in these circumstances potentially locks security holders out of the ability to trade in the entity on the basis of this information. There are also no equivalent provisions in relation to yearly and half-yearly accounts.

If ASX's concerns in these situations relates to whether an entity is a going concern ASX is able to suspend an entity it considers unable to trade. Our members consider that these situations should be assessed on a case-by-case basis and automatic suspension is not the most appropriate course of action.

Admission and quotation requirements

Our members support the proposal to amend rule 1.3.2 to provide that the rule does not apply where an entity has a record of profitability or revenue acceptable to ASX. They consider this will assist entities whose assets consist of intangible assets which are generating sufficient revenue acceptable to ASX.

Lodgement of documents for release to the market

Our members have concerns about the proposed amendments to the rules relating to the lodgement of documents for release to the market. Our members value ASX's regulatory approach which has traditionally involved engagement with listed entities and a preparedness to listen to their reasons for a particular course of action. The proposed amendments are at odds with this approach and also seems to be inconsistent with requiring lodgement of 'draft' documents. It may also have the unintended effect of reducing entities' willingness to engage with ASX and of reducing the value of the process of submitting drafts.

Miscellaneous enhancements

Our members also have concerns about the proposed changes to rule 18.1. Again, ASX's regulatory approach has historically involved a willingness to engage with entities and a preparedness to listen. The proposed amendments to the rule are at odds with approach. In addition, they are concerned at the statement that ASX will not provide reasons for its decisions in relation to waivers.

While our members understand that ASX may consider the proposals are designed to protect the integrity of its market, they remain concerned that the removal of any ability to question ASX's decisions impacts on those whose interests may be adversely affected by those decisions.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours sincerely,

Megan Motto
CEO