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Date	1 March 2019
From	Julian Donnan / Robert Pick
To	Mavis Tan, ASX Limited, Sydney
Email	mavis.tan@asx.com.au

Dear Mavis

Submission on proposed ASX Listing Rule amendments

We attach our submission in relation to the recently published proposal and consultation on *Simplifying, clarifying and enhancing the integrity and efficiency of the ASX listing rules*.

Please contact us if you would like to discuss our comments.

Yours sincerely

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1 March 2019

Mavis Tan
ASX Limited
Exchange Centre
20 Bridge Street
Sydney NSW 2000

By Email

Dear Mavis

Submission on proposed ASX Listing Rule amendments

We refer to ASX's consultation paper entitled "Simplifying, clarifying and enhancing the integrity and efficiency of the ASX listing rules" dated 28 November 2018 (***Consultation Paper***) and related proposed changes to the ASX Listing Rules. We appreciate the opportunity to provide this submission as part of the consultation.

1 ASX Listing Rule 3.13.2(e) – proxy voting results

We agree with the ASX's approach to provide further detail in the ASX Listing Rules regarding the results of the meeting. However, we submit that some of the detail in the proposed requirement under ASX Listing Rule 3.13.2(e) to disclose proxy voting information received prior to the meeting is unnecessary.

The *Corporations Act 2001* (Cth) (***Corporations Act***) requires at section 251AA, various items of information in connection with proxy voting, namely votes for, votes against, abstentions, and discretionary voting. Whilst we appreciate that the Corporations Act does not apply to all entities listed on the ASX, we think the detail contained in that rule is adequate, clear and reflective of market practice, and ought to form the basis for ASX's position.

The proposed draft from the ASX introduces additional categories of disclosure regarding proxy voting, specifically, proxies directed to the Chair versus other persons. Whilst there may be some stakeholders that desire as much information as possible on shareholding voting (whether for shareholder organisations or for profit motives relating to proxy advisory work), the result is more likely to result in more cumbersome and fractured disclosure for listed entities. The additional information required by ASX does not actually provide greater insight into the end-result (which is typically the for/ against/ abstain disclosure) which is the most material information for investors.

We think an ASX position that harmonises existing obligations under the Corporations Act is a reasonable way forward on this issue.

2 ASX Listing Rule 7.1 – definition of "A"

We seek clarification on whether or not the proposed 2nd bullet point addition to the definition of "A" in ASX Listing Rule 7.1 (regarding the application of ordinary shares issued on conversion of convertible securities) is intended to capture the conversion of convertible securities that were issued within placement capacity but subsequently converted more than 12 months after its original issuance date. For example, most (if not all) Additional Tier 1 (***AT1***) hybrid securities by Authorised Deposit-Taking Institutions (***ADIs***) contain conversion features which are typically, due to APRA prudential standards, only activated after a certain period of time has elapsed from their issue date (usually from 5 years onwards).

Whilst the rationale for the proposed change is clear in relation to ordinary shares that are issued on conversion very soon (i.e. within the first 12 months) after the issue of the convertible security – i.e. to prevent the unintended inflation of the value of variable "A" when subsequently calculating placement capacity, it is not clear whether or not the proposed change should also be imposed on other convertible securities that can be converted at a later point in the future (e.g. after the first 12 months of the issue of the convertible securities).

From a policy perspective, after the initial 12 month period from issuance has ceased, the convertible security will no longer impact an issuer's placement capacity and there does not appear to be any material policy objections to a subsequent issue of ordinary shares on conversion being counted in variable "A" in the circumstance where the issuer's placement capacity has already fully taken into account of the issue of the convertible security for a period of 12 months. The situation appears to be analogous to an issuance of ordinary shares within placement capacity which will, after 12 months of its issuance, be counted towards variable "A". The mischief that ASX is intending to address with the proposed change does not appear to arise as it relates to convertible securities that are exercised after 12 months and we seek clarification from ASX whether the proposed change is intended to cover all convertible securities, including those where conversion can only occur after 12 months from their date of issue.

3 ASX Listing Rules 3.10.3 / 7.2 (exception 2) / 10.12 (exception 2) / Appendix 3B

We consider the additional disclosure requirements in relation to pro rata offers concerning underwriters and the underwriting agreement are generally appropriate for the purposes of the Appendix 3B, including the disclosure of a summary of the material circumstances whereby an underwriter has the right to avoid or change their obligations (which we understand is intended to cover the termination events in an underwriting agreement).

In the context of a pro rata offer pursuant to a prospectus or PDS or a 'low-doc' rights issue offer document, it is usual for a summary of the key terms of the underwriting agreement (including termination events) to be included in the applicable offer document. Historically, such summaries have been 2-3 pages in length.

Consistent with ASX's intention to simplify and shorten the Appendix 3B, we do not consider that extensive disclosure of termination events in the Appendix 3B is appropriate. This is particularly so where such information will already be disclosed in the offer documents provided to investors.

There is currently a note in the draft Appendix 3B that states "*Note: You may cross refer to a covering announcement or to a separate annexure with this information*.". We assume this is intended to permit a cross reference to another document lodged with ASX (i.e. the offer document) and if so, we suggest that the note be amended to reflect this as the current drafting appears to imply that a cross reference will only be permitted where it refers to a covering announcement or a separate annexure to the Appendix 3B, neither of which accurately describe how the offer document is typically lodged with ASX for these types of transactions.

4 ASX Listing Rule 19.12 – note to definition of "equity security"

The proposed new note to the definition of "equity security" states that:

"Note: ASX has decided under paragraph (h) above that a security issued by an APRA-regulated entity that falls within the definition of "convertible security" in rule 19.12 solely because it can be converted on the occurrence of a "non-viability trigger event" and/or a "capital trigger event" and that would otherwise be a debt security but for the inclusion of those provisions, should be classified as a debt security rather than an equity security for the purposes of the Listing Rules. For these purposes, a "non-viability trigger event" means a provision in the terms of issue of a debt security that allows APRA, solely at its discretion, to require the debt security to be written off or converted into equity securities because, without that occurring, the entity would be non-viable. A "capital trigger event" means that APRA has determined, or the entity has determined and notified APRA, that the ratio of its common equity capital to its risk-adjusted assets has fallen below a minimum threshold fixed by APRA and specified in the terms of issue of the security." (emphasis added)

ASX's drafting note also suggests that the change is intended for "Tier 1 capital notes issued by an APRA-regulated entity".

We seek clarification from ASX as to whether or not AT1 hybrid securities (such as capital notes issued by ADIs) that contain conversion/exchange features in addition to conversion due to non-viability or capital trigger events would fall within ASX's determination of a debt security under paragraph (h) of the 'equity security' definition.

It appears from the note above that such AT1 securities, if they were to be issued after 1 July 2019, would still be treated by ASX as 'equity securities' (as opposed to a 'debt securities') under the ASX Listing Rules given the existence of such market-standard conversion/exchange features.

As such, we query whether or not this was intended given most (if not all) AT1 securities issued by ADIs include such conversion/exchange features and therefore the applicability of the proposed amendment would appear to be limited. For example, the terms of the last three AT1 issuances (NAB Capital Notes 3 (launched February 2019), Westpac Capital Notes 6 (issued December 2018) and CBA PERLS XI (issued December 2018)) all contained optional and/or mandatory conversion/exchange features.

Alternatively, it may be that ASX's proposed classification of such securities as 'debt securities' relates only to Tier 2 capital securities issued by ADIs (rather than AT1 capital securities). If this were the case, this could be clarified by ASX.

5 ASX Listing Rule 18.8A – censure power

We recognise that the proposed censure power provides ASX with an additional enforcement and compliance tool with regards to breaches of the ASX Listing Rules by listed entities.

However, we have reservations about, firstly, whether this power is required given the array of other powers available to ASX to enforce their rules and to address serious or egregious breaches, including, suspension. Secondly, a discretionary power to censure – which has a punitive effect – is not a tool to be taken lightly. The ASX would not be acting within the auspices of a judicial body, listed entities would not have the protection of the common law nor the other statutory protections and rights available to a defendant in a court setting, and there is no right of appeal.

An appropriate balance needs to be maintained between ASX having various powers and tools at its disposal to promote and enforce listing rule compliance, but also to have the scope of such powers/tools carefully and appropriately defined and understood by listed entities as well as the market, to assist a transparent process between ASX and listed entities as it relates to potential listing rule breaches. We note that a number of the foreign exchanges referred to by the ASX in the mark-up of the Listing Rules (including the London Stock Exchange, Hong Kong Stock Exchange, Singapore Exchange, and Shanghai Stock Exchange) that have similar public censure powers also

appear to have review/appeal rights as it relates to listing rule breaches that do not exist under the ASX Listing Rules.

Even if the ASX were minded to push ahead with its rule change, we submit that, as currently drafted, the censure power under ASX Listing Rule 18.8A is imprecise and uncertain as to a number of matters, including:

- the scope of the public censure power and the circumstances in which the public censure power will be used and whether any materiality thresholds will be applicable. The drafting note to the mark-up of the Listing Rules at ASX Listing Rule 18.8A notes that the censure power is only expected to be used in 'egregious' circumstances and we query whether or not clearer disclosure of the circumstances in which the censure power will be used should be included in the rule itself (and/or potentially a guidance note);
- the process proposed to be undertaken before a public censure is made (e.g. will entities be given notice that they will be censured and if so, will they be able to review or provide any comments for consideration on the censure); and
- the proposed form of censure.

In our view, if this rule is adopted, there should be appropriate limits and clear procedures in place in relation to the use of the censure power given the potentially material consequences (including reputational and share price impact) a censure may cause to a listed entity and the absence of appeal rights.

Please let us know if you have any questions in relation to the matters dealt with in this submission or if you would like to discuss any aspect of it.

Yours sincerely

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