blackpeak capital
ABN: 52 601 350 841
AFSL: 472221
40 - 42 Young St
Sydney NSW 2000
+61 2 8823 3464
inquiries@blackpeakcapital.com.au

22 February 2019

Mavis Tan
mavis.tan@asx.com.au

Dear Mavis,

Blackpeak Capital ("Blackpeak") would like to provide feedback on the proposed changes in the ASX Consultation Paper dated 28 November 2018. By way of background, Blackpeak is an independent corporate adviser founded in 2014. Since inception Blackpeak has emerged as the most active independent adviser in the technology sector in Australia, responsible for ~25 transactions in the sector across equity raising (public and private companies), M&A and IPO advisory. Of particular relevance to the proposed changes in the consultation paper that we wish to comment on, Blackpeak was the financial adviser to the IPOs of Wisetech Global (2016), Elmo Software (2017), Audinate Group (2017) and Straker Translations (2018).

GUIDANCE NOTE 1

The assets test

In 1.3.2(b) of Chapter 1 of the Listing Rules it states that an entity being admitted under the assets test must have "…commitments consistent with its business objectives to spend at least half of its cash and assets readily convertible to cash.." GN1 provides some guidance that "amounts allocated to working capital, or which could otherwise be considered to be working capital in nature, such as administration costs and accounts payable.." would not be considered acceptable. There is no specific guidance on how the ASX would treat funds raised for future acquisitions, but in previous engagement with the ASX on recent IPOs we have been advised that funds for future acquisitions will not be considered acceptable.

Our recent experience with technology sector IPOs, coupled with our broader understanding of the typical growth profile of technology companies, suggests that the exclusion of funds allocated to future acquisitions in the relevant calculation for admission under the assets test ignores the fact that growth by acquisition is a very common growth strategy for technology companies. As an example, the Blackpeak-advised WiseTech Global has made over 20 acquisitions since listing in April 2016. As such, we believe that the ASX should give consideration to allowing funds for future acquisitions as part of the calculation, albeit with some restrictions to ensure it is not being abused. For example, if the company applying for admission has made previous acquisitions consistent with its core business (ie. has an established track record of making acquisitions) and has stated to investors that part of the use of funds from the IPO is for acquisitions, then there should be some capacity to include funds for future acquisitions as a portion of the stated cash commitments. This also becomes relevant in the context of the proposed requirement for companies to report under the new rule 4.7C what their quarterly expenditure has been relative to that stated in a use of funds statement (and any material variances).

This approach would reflect the reality for growth companies in the technology sector that acquisitions are a key part of the growth strategy alongside organic initiatives.

GUIDANCE NOTE 11

Escrow for Venture Capitalists

There are a number of proposed changes to the application of escrow rules in Guidance Note 11 – Restricted Securities and Voluntary Escrow. Under the current Guidance Note 11 an investor (including a VC investor) who holds more than 10% of the capital of a company proposing to IPO can be deemed a promoter, and therefore subject to mandatory escrow provisions, unless they are classed as a "genuine venture capitalist". Section 40.2 of the current Guidance Notes states:

Factors that the ASX will take into account in assessing submissions that the holder is a genuine venture capitalist include the following:

- *The holder has a strategy of investing in businesses of the kind conducted by the [listing] entity and there are no personal connections between the holder and the founders of the entity.*
- *The holding does not exceed 30% of voting securities.*
- *The holder's Board representation is limited to one non-executive position.*
- *The holder has paid an issue price for securities that are comparable to the issue prices paid by other unrelated parties investing at or around the same time and has not obtained any identifiable benefit for itself over and above the benefit of the opportunity to invest in the entity.*

Under the proposed changes to Guidance Note 11 the wording is as follows:

For the purposes of paragraph (b) of the definition of "promoter", ASX will generally treat a substantial holder [greater than 10%] of an entity undertaking a new listing as a promoter unless it is clear to ASX that they have had no material involvement in the formation or promotion of the entity. The onus is on the entity to establish this to ASX's satisfaction. ASX is likely to accept that this onus has been discharged where:

- *the holder became a substantial holder because:*
    - *they sold an asset or undertaking to the entity in exchange for securities in the entity;*
    - *or they were a professional venture capital enterprise who subscribed genuine venture capital to the entity in one or more tranches and paid subscription prices for their securities comparable to the subscription prices paid by any other parties investing at or around the same time;*
- *before selling the asset or subscribing the venture capital, the holder had no material economic interest in, and no involvement in the management of, the entity; and*
- *after selling the asset or subscribing the venture capital, the holder has had no involvement in the management of the entity beyond being represented on the board by a single non-executive director who has not been actively involved in the planning and preparation for the entity's listing.*

There are some material changes in the proposed new wording:

- Under the current wording it says that "*The holder's Board representation **is** limited to one non-executive position"* which could allow a 2nd VC NED to exit a Board position prior to commencing an IPO process and this would satisfy the wording. The proposed new wording states in relation to a Board position that the VC "***after …… subscribing the venture capital,*** *has had no involvement in the management of the entity beyond being represented on the board by a single non-executive director who has not been actively involved in the planning and preparation for the entity's listing."* The literal interpretation of this would mean that if the VC has had more than one NED on the Board at any stage since the investment then the ASX could deem the VC as a promoter (assuming they hold at least 10%), and therefore be captured by mandatory escrow provisions.

In relation to the point above, a strict interpretation would appear to be harsh given that there may be a circumstance where a VC has (or has had) 2 representatives on a Board especially if they have a substantial holding in the listing entity. In addition, it would be expected of all Board members to have a role in the preparation and planning of an entity's listing even if they don't sit formally on the Due Diligence Committee, and indeed the experience of a VC NED may be critical to running a good process to achieve a successful listing. With regard to the number of NEDs we would recommend maintaining the wording that requires the VC to have no more than one NED at the time of the IPO, rather than at any time since investment. We would also recommend adjusting the wording to allow a VC NED to participate in the IPO preparation process as would be customary of any NED in an IPO. This participation in the process reflects the requirement for all NEDs to sign off on the prospectus and assume liability for the contents.

Escrow for professional advisers or consultants

In the table in section 3 of the proposed GN11, its states that there is no cash formula relief for a professional adviser or consultant. This puts this class of investor in a worse position than a related party or promoter where cash formula relief is available. In the instance where an adviser has taken shares as payment or part payment for advisory work in lieu of cash, then the adviser should obtain cash formula relief as the share issuance will have an agreed value (number of shares at a specific price) and will be the same as any other seed capitalist who has bought shares at an agreed price.

As an example, Blackpeak received shares in a pre-IPO capital raising by Straker Translations as part payment for its services in that capital raising (majority of the fee was cash). Blackpeak was issued shares at the same time as other investors in the raising and at the same price. Cash formula relief was not available for this issuance despite it being a reinvestment of fees by Blackpeak, which seems an unfair treatment and inconsistent with treatment of other investors in the company.

Acceptable track record of revenue

In section 3.6 of the proposed GN11 the ASX introduces some definition around what constitutes an acceptable track record of revenue. Blackpeak strongly supports the ASX providing this enhanced guidance on how it will assess this, and therefore whether mandatory escrow rules may apply to shareholders. However, we believe that the thresholds for aggregated and consolidated revenue, minimum raising size and minimum market capitalisation are too high.

Each of the Blackpeak-advised IPOs of Elmo Software, Audinate Group and Straker Translations would not have met the requirements as proposed. Despite this, each of the IPOs received broad support from institutional investors and other sophisticated investors. This implies that these institutional/sophisticated investors were comfortable with the level of revenues, offer size and market capitalisations of each IPO. We believe that the relevant thresholds should be set a bit lower as follows:

- Aggregated revenues for last 3 full financial years of $25m;
- Consolidated revenue for last 12 months of $15m;
- Raising size of at least $15m; and
- Market capitalisation of at least $75m

In the absence of mandatory escrow, the market will require voluntary escrow in almost all circumstances in order to support an IPO. The closer a company is to the minimum thresholds above will likely mean a more restrictive voluntary escrow than a company that comfortably exceeds these thresholds. The ASX still retains a discretion to apply mandatory escrow if it deems it appropriate, so we believe a slight lowering of the thresholds as proposed above, which reflect our recent experience, should be considered.

Bona fide purchases from related parties or promoters

In section 10.8 of the proposed GN11 there is some new guidance in relation to treatment of shares acquired by a seed capitalist (not a related party or promoter) from a related party or promoter. Blackpeak supports this enhanced guidance and would request that the ASX consider that for an arm's length transaction as discussed in 10.8, that the 24-month escrow period commences at the time of acquisition of the shares rather than at the time of listing. Our interpretation of the guidance suggests that as an extreme example, a seed investor who buys from a related party or promoter 24 months prior to listing has no mandatory escrow, but if the purchaser acquired the shares 23 months prior to IPO then they have a mandatory escrow of 24 months from the date of listing.

A transaction as contemplated in 10.8 will often occur prior to either party being aware of the ASX rules that would govern the treatment of the transaction (ie. well before the IPO process has commenced), and therefore the change suggested above is more about protecting an unsuspecting purchaser from an onerous mandatory escrow that was not contemplated at the time of the share purchase.

If you have any questions in relation to this letter, please do not hesitate to contact either Jamie Taylor on 0414 922 560 or Scott Colvin on 0416 335 455.

Yours sincerely,

Blackpeak Capital Pty Ltd

Scott Colvin

Managing Director

Jamie Taylor

Director