

15 November 2013

Ms Mavis Tan
Australian Securities Exchange
Via email: mavis.tan@asx.com.au

Dear Ms Tan

**PROPOSED GOVERNANCE-RELATED AMENDMENTS TO THE ASX LISTING RULES
and PROPOSED 3RD EDITION OF THE ASX CORPORATE GOVERNANCE PRINCIPLES**

I thank you for the opportunity to comment on these proposed amendments. This submission relates to the following matters

- (i) the need for further amendment of ASX Listing Rule 10.14
- (ii) to the proposed new ASX Listing Rule 3.19B 'On-market purchases by or on behalf of employees or directors'
- (iii) the proposed amendments to ASX Listing Rule 4.10.3
- (iv) the proposed amendments to ASX Listing Rule 4.7 and the new Appendix 4G
- (v) the need for specific guidance on capital management and corporate governance for companies outside the S&P/ASX300.

1 ASX Listing Rule 10.14

The proposed amendments to this rule are fine in themselves. As the consultation document notes, the exception currently found in ASX Listing Rule 10.14 for on-market purchases means that grants of securities to directors under employee share schemes do not require shareholder approval.

Many companies grant some type of rights-based award (performance rights, share rights) to the executive director to be satisfied on vested by on-market purchases. Companies seek approval from their shareholders by citing ASX Listing Rule 10.14, but noting that it doesn't apply to them because the intention is to purchase any securities needed to satisfy vested rights on-market. The stated rationale for still seeking shareholder approval is that it is 'in the interests of good governance.' The status of such resolutions is legally ambiguous: if there is no 'rule' saying the decision belongs to shareholders in general meeting, the decision to make the grant appears to be lawfully a decision of the Board of Directors. It is not at all clear that the directors can delegate this decision to shareholders.¹ The words, 'in the interests of good governance' are not sufficient to delegate the decision, nor do they make the legal status of the decision making power clear.

In light of the view that ASX Listing Rule 10.14 is within a chapter about related-party transactions (or transactions with persons in a position of influence), it is curious that a present intention to satisfy vested rights by making on-market purchases of securities can avoid the intent of the rule:

to regulate transactions with persons in a position of influence. While chapter 2E of the *Corporations Act 2001* (Cth) prohibits a public company or an entity it controls giving a financial benefit to a director as a related party, the reasonable remuneration exception in s 211 operates to preclude approval on these grounds as the Board typically obtains advice from a remuneration consultant to say the proposed grant is 'reasonable remuneration'. Furthermore, while companies may also seek approval of the proposed grant under chapter 2D.2 of the *Corporations Act 2001* (Cth) so as to allow for payment of share-based remuneration at or after the moment of termination of employment, the purposes of this approval do not address the issue of the related party transactional nature of the grant.

When grants to executive directors for the purposes of ASX Listing Rule 10.14 are made under employee share schemes approved by shareholders for the purposes of ASX Listing Rule 7.2, exception 9, the terms approved by shareholders in such resolutions are of general application and do not relate to the specifics of any one grant. This is clear from the terms of the scheme which give the Board of Directors discretion to set the size and conditions of any grant made under the scheme.

Approval for employee share schemes is typically sought under ASX Listing Rule 7.2, exception 9 to ensure the 15 per cent limit on issues of securities in ASX Listing Rule 7.1 is 'preserved' for other issues. The requirement for shareholder approval seems squarely directed at the issue of capital management and potential dilution. Furthermore, ASIC Class Order CO 03/184, Employee Share Schemes, has a five per cent limit on the issue of securities over a rolling five year timeframe. The potential for dilution appears to be well catered for via current regulation.

The consultation paper notes the reason why ASX Listing Rule 10.14 does not need amendment to cover grants proposed to be satisfied by on-market purchases is that such purchases do not dilute the interests of current shareholders. *Dilution per se is not the issue with such grants.* Rather it is the terms of the grant as to performance required for vesting and the manner in which unvested rights will be treated on termination of employment that justify the amendment.

2 Proposed ASX Listing Rule 3.19B

Proposed listing rule 3.19B is a necessary complement to ASX Listing Rule 10.14 and ASX Listing Rule 7.2, exception 9. Amending the Listing Rules to include proposed ASX Listing Rule 3.19B without also amending ASX Listing Rule 10.14 is only a partial regulatory solution. It provides ex-post disclosure of the event of a purchase, rather than requiring the initial grant which may ultimately lead to the need to purchase shares on-market to have ever been approved at all. Furthermore, as the purchase can be made at any time and not for the purposes of satisfying any one particular vested grant, it fails to tackle the issue of grants to directors made without legally binding shareholder approval.

To the extent it is viewed as appropriate to frame the rule in terms of on-market purchases on behalf of employees or directors, the proposed rule is fine. It is consistent with the approach used elsewhere in the listing rules for other notifiable interests of directors. In essence for any grant to a director under an employee share scheme, three notices will be required under the proposed rule change:

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- (i) an Appendix 3Y notice from the director of a change in his or her interests in securities at the time of the grant;
- (ii) a notice under ASX Listing Rule 3.19B from the company on the details of the purchase on-market at and when it is made; and
- (iii) a further Appendix 3Y notice from the director of a change in his or her interests in securities at the time when the vested rewards are transferred to the director.

While the rule provides necessary information on on-market share purchases, it does not address the basic concern recognised by the consultation paper of purchases on-market can occur without prior shareholder approval.

3 ASX Listing Rule 4.10.3

I agree with the basic aim of the proposed amendments to give the option to include a corporate governance statement on the company's website, or to include the corporate governance statement within the annual report. Choosing to disclose via the website is supplemented by the requirement to make disclosure to the ASX via a separate report (proposed Appendix 4G).

From the perspective of the AGM resolutions relating to the non-executive director fee pool increases (ASX Listing Rule 10.17 together with the provisions of the company's constitution), it is necessary to have information on the Board committees and the directors' involvement in these committees to be able to assess the validity of requests for increases, as well as an annual assessment of the director fee spend. The timing of the disclosures on a website needs to facilitate this task.

4 ASX Listing Rule 4.7.3 and Appendix 4G

The proposed amendment to allow for a choice of where to disclose the corporate governance statement is fine. Appendix 4G as currently worded would seem to allow a choice as to where to disclose compliance or non-compliance with each of the recommendations in differing locations, rather than a global approach of

- the corporate governance statement is only on the website or
- the corporate governance statement is only in the annual report.

If an overall checkbox is included for the two alternatives above, the Appendix G could then be simplified to note compliance or non-compliance with each of the relevant principles.

5 Application of the ASX Corporate Governance Principles outside the S&P/ASX 300

I have recently reviewed the remuneration reports for a number of companies outside the S&P/ASX 300 who face the potential of a second strike against the remuneration report at their 2013 AGM. In reviewing the directors' report for these entities and the AGM agendas, I was struck by the large number of capital-related resolutions on the AGM agendas including, but not limited to, ASX Listing Rule 3.1A, ASX Listing Rule 7.1 and ASX Listing Rule 7.4.² I believe there is a need for some specific guidance for the smaller listed companies on the ASX in relation to capital management and communication with shareholders.

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Recommendations

I make three specific recommendations for the ASX and ASX Corporate Governance Council's consideration:

Recommendation 1: ASX Listing Rule 10.14 should be amended to include all grants of securities to directors under an employee incentive scheme, irrespective of the method of satisfying the right to a fully paid ordinary share on vesting of the rights/ options.

Recommendation 2: Amend the proposed Appendix 4G to require an upfront choice between either (i) disclosure of the corporate governance statement on the company's website and the URL for its location is provided; or (ii) disclosure of the corporate governance statement in the annual report. Each of the principles and recommendations could then be simplified to requiring a 'yes, we comply' or 'no, we don't comply but we've explained.'

Recommendation 3: Provide specific guidance on capital management for ASX listed companies outside the S&P/ASX 300 either as part of a set of Corporate Governance Principles (because the issues relate not only to ethical and responsible decision making consistent with creating long-term value for shareholders, but also to respect the rights of security holders by providing appropriate information and facilities to exercise those rights appropriately) or by way of separate guidance.

Please contact me if I can be of further assistance.

Regards

Kym Maree Sheehan

Dr Kym Maree Sheehan
Principal

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¹ The ability of the company's constitution to allow the directors to delegate their powers to someone else is supplemented by section 198D of the *Corporations Act 2001* (Cth) which states: *(1) Unless the company's constitution provides otherwise, the directors of a company may delegate any of their powers to: (a) a committee of directors; or (b) a director; or (c) an employee of the company; or (d) any other person. The only category shareholders could fall under is (d), an 'other person'.*

² To give two examples (which are simply to illustrate the potential length and complexity of AGM agendas at smaller companies and not about the examples chosen): the upcoming 2013 AGM for EnviroMission Limited (ASX Code: EVM) has 34 resolutions on the agenda, 31 of which are capital resolutions, including ASX Listing Rule 7.1A (item 4), ASX Listing Rule 7.4 resolutions to ratify past issues (items 5 to 33, each of which feature an issue of shares and a grant of options) and an ASX Listing Rule 7.2, exception 9 resolution relation to the employee share option plan. Paramount Mining Corporation Limited's (ASX code: PCP) AGM notice of meeting has 26 resolutions, of which 23 are capital-related and include several ASX Listing Rule 10.11 resolutions, ASX Listing Rule 10.14 and s 208 *Corporations Act 2001* (Cth) resolutions.

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