



OWNERSHIP MATTERS

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Janine Ryan
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RE: Submission on 'Reverse Takeovers: Shareholder approval requirements – exposure draft Listing Rule amendments'

Dear ASX,

Thank you for the opportunity to comment on this consultation reviewing ASX's proposed 'reverse takeover' amendments to the 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 our clients.

OM commends the ASX for responding to investor concern over the use of existing exceptions in the Listing Rules for issues of securities under a takeover to disenfranchise investors by structuring transactions to create bidders whose securityholders will own a minority of the merged entity. The ASX's proposed amendments to the Listing Rules will improve protections for securityholders of ASX listed entities.

These proposed amendments are consistent with the feedback received by ASX from investors and investor groups. In fact every submission by investors, investor groups or firms working for investors supported more radical changes to the Listing Rules to increase securityholders' capacity to vote on major transactions.¹ OM notes that the proposed changes to the Listing Rules – which would require bidder securityholder approval for any takeover that would result in an increase in securities on issue for the bidder of 100% or more – would still provide significant capacity for boards to undertake company transforming purchases without investor approval. OM acknowledges that the ASX has indicated it is not seeking further submissions on the threshold for transactions requiring approval by 'bidder' securityholders but urges it to reconsider given the overwhelming endorsement of a stricter threshold for securityholder approval put forward by investor groups. OM notes that of the jurisdictions listed in Annexure A, which sets out the International comparison of shareholder approval requirements for scrip issues, the majority have a stricter threshold than that proposed by ASX.

¹ The submissions made by domestic investors (Australian Super, Host Plus & Allan Gray), international investors (PGGM and NZ Super), investor bodies (the Australian Shareholders Association, the Australian Council of Superannuation Investors & the Financial Services Council) and firms that work for investors (OM and CGI Glass Lewis) all called for a lower threshold than that proposed by ASX under which securityholder approval would be required. See <http://www.asx.com.au/regulation/public-consultations.htm>.

In urging the ASX to reconsider OM notes that of the 13 public submissions only three opposed any kind of securityholder rights to approve reverse takeovers. These dissenting submissions were united in their disregard for securityholder protections.² Most arguments against providing investors with the right to veto major transactions stem from an unproven belief that such protections would reduce the market for corporate control without recognising numerous jurisdictions similar to Australia have such investor protections – such as the UK - and a functioning market for corporate control.

Our detailed response to specific aspects of the ASX's proposed amendments to the Listing Rules is below. Please feel free to contact us regarding any aspect of our submission.

Yours sincerely,



Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd

Annexure: Responses to the proposed amendments

1. Definition of reverse takeover and capacity for abuse

The proposed definition of reverse takeover is critical to the proposed changes being effective. The ASX has flagged it would retain the capacity to exercise its “discretionary powers under the Listing Rules” to require approval of transactions structured to avoid the proposed framework.

To ensure that ASX's intention is reflected in the actual Listing Rule dealing with reverse takeovers, OM strongly argues that this intent to exercise discretion is made explicit. This could be done by adding to the proposed definition of a reverse takeover language specifying that ASX may deem a transaction to be a reverse takeover requiring securityholder approval regardless of whether the technical definition is met.

Such an approach also relies on the ASX being vigilant and willing to exercise its discretion rather than routinely pre-clearing transactions as not requiring securityholder approval.³

² For example, Hebert Smith Freehills in its submission opposing any change said that “responsible boards must be given sufficient scope to execute deals that benefit the majority of shareholders without costly and unnecessary hurdles being placed in the way” such as shareholders being able to approve such deals while the Law Council of Australia, despite its name, appeared to in its submission prefer a Delaware-style arrangement for shareholder rights noting that the board was “the appropriate body to decide whether to pursue a reverse takeover in accordance with applicable laws”.

³ As an example, OM understands that ASX pre-cleared the purchase by Macquarie Atlas Roads, a fund managed by a Macquarie Group subsidiary in which Macquarie has a substantial interest, of an asset from another Macquarie-managed fund as not being a related party transaction requiring approval from non-Macquarie securityholders.

2. Proposed changes to voting exclusion statements

OM supports the proposed changes to voting exclusion rules. Specific to reverse takeovers the proposed amendment would prohibit the target company and persons standing to receive an additional benefit from a takeover from voting in favour of the resolution required to approve the bidder entity's making of a reverse takeover. The exclusion would not apply to a securityholder in both the bidder and target who would receive a benefit solely in their capacity as a securityholder participating in the offer. OM notes that it is not clear if the vesting of equity incentives held by employees of the bidder as a result of a reverse takeover would fall within the meaning of a "material benefit". ASX's guidance that bona fide redundancy or termination benefits made in accordance with contractual entitlements do not fall within the meaning of a "material benefit" ought to be limited to preserve contractual entitlements and not provide a safe-haven for new entitlements.

The proposed amendments to the voting exclusion rules so that a person excluded from voting on any resolution would only be excluded in voting 'for' a resolution is also positive. Consistent with ASX's experience OM is aware of occasions where securityholders wishing to vote against a resolution – typically ratification or approval of a placement – have been barred from voting due to participating in a placement but below their desired level. It appears listed entities conducting placements where particular securityholders have been discriminated against are aware they can neutralise adverse votes on placement-related resolutions by issuing them relatively small numbers of securities.

3. Contents of a notice of meeting

Consistent with OM's submission to the original consultation on reverse takeovers in 2015 OM does not support ASX mandating detailed requirements for notices of meeting convened to approve a reverse takeover. OM therefore supports ASX's proposed approach of issuing a revised Guidance Note 21 which will provide issuers with guidance on the appropriate disclosures to be made to bidder securityholders in the notice of meeting relating to approval of a reverse takeover.

4. Definition of associates

OM supports the proposed changes to the definition of associates in the Listing Rules.