



Law Council  
OF AUSTRALIA

*Business Law Section*

Kevin Lewis,  
Group Executive and Chief Compliance Officer,  
ASX Limited,  
20 Bridge Street,  
Sydney, NSW 2000

29 April 2016

Dear Mr Lewis,

### **Removal of appeal rights for decisions under ASX Listing Rules**

The Corporations Committee of the Business Law Section of the Law Council of Australia (the **Committee**) wishes to record its concern that the rules providing a right of appeal to the ASX Appeal Tribunal in respect of decisions made by ASX under the ASX Listing Rules were removed with effect from 24 December 2015 without any prior notice. This abolished the right of appeal in respect of decisions:

- Refusing to admit an entity to the official list.
- Refusing to quote the securities of an entity.
- Refusing to grant a waiver to an entity.
- Applying the Listing Rules to an entity.
- Removing an entity from the official list.

The Committee is grateful for the fact ASX has subsequently met with it to provide some information explaining the background to this decision and ASX's reasons for not consulting with market participants before implementing it. However, while the Committee understands ASX's decision was primarily motivated by a desire to protect the integrity of its market in the face of emerging risks, the Committee remains concerned the removal of appeal rights has inappropriately removed important protections for people whose interests may be adversely affected by ASX decisions under the Listing Rules. The Committee also remains unconvinced that it was appropriate to proceed with such a material change to ASX's operating rules without consultation.

As a matter of principle, the Committee is of the view that merits review should be available for decisions by a regulator (including ASX for this purpose) that may adversely affect a person's interests unless there are particular reasons to exclude it. The Committee believes the existence of a merits review process will generally assist in ensuring the fair treatment of affected persons and improve the quality and consistency of the primary decision making process.<sup>1</sup> Moreover, the Committee does not consider the

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<sup>1</sup> The Committee notes that, at the time of its removal, the right of appeal under the Listing Rules did not provide for a full re-hearing under Procedure 3.6.1 (although the original appeal process did do so). Whether

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existence of a properly structured review process should be inconsistent with the protection of market integrity. ASIC is Australia's primary corporate, markets and financial services regulator and substantially all of its decisions (including decisions to grant exemptions and modifications) have always been subject to an external review process. Given the special status of ASX's operating rules under the Corporations Act, the Committee believes a similar review process should be available in respect of ASX decisions.<sup>2</sup>

The Committee accepts that it may, in some circumstances, be appropriate for ASX to refuse to admit an entity to the official list (or to remove an entity from the official list) in order to protect the integrity of the market. However, ASX is the main provider of stock exchange services in Australia and a decision to deny an entity access to the market it operates could have profound implications for the entity's ability to raise capital and fund its business and, in the case of a removal, the ability of investors to realise their investment. As a consequence, the Committee believes an entity should (at the very least) be entitled to procedural fairness in relation to any such decision and should be able to apply for a review of the decision on the ground there has been a breach of the rules of natural justice or other administrative error. And the Committee does not believe there is any reason why a full merits review process should not be available for other decisions under the Listing Rules (such as decisions in relation to waivers).

The Committee understands the previous right of appeal was only exercised infrequently and there were very few successful appeals. However, it does not consider this is a reason for completely abolishing appeal rights:

- The existence of a right of appeal can be valuable and important even if it is not exercised very often. There have been few reviews of ASIC decisions in relation to takeovers by the Takeovers Panel since s656A of the Corporations Act was enacted in 2000, but this has not in any way diminished the importance of this statutory right of review in ensuring the quality and consistency of the primary decision making process.
- The fact there have been few appeals to the ASX Appeal Tribunal in respect of decisions under the ASX Listing Rules may, at least in part, be explained by features of the appeal process and we believe it would have been preferable if ASX had addressed these rather than remove the right of appeal altogether.

In these circumstances, the Committee requests ASX reconsider this decision and consult with the market in relation to the most appropriate way to reinstate an appropriate appeal process for decisions under the Listing Rules.

At this stage, the Committee has three principal observations to make:

- **Admission and removal decisions** – In recognition of the fact the Listing Rules currently provide for ASX to have an “absolute discretion” in relation to decisions to admit an entity to the official list or to grant quotation of an entity's securities, the

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the appeal process for decisions under the Listing Rules should provide for a *de novo* consideration of the merits by the ASX Appeal Tribunal is addressed further below.

<sup>2</sup> The Committee also notes the existence of an internal review process that provides a regime for ASX decisions to be reviewed on their merits may assist in rendering judicial review of ASX decisions unnecessary.

Committee accepts it may be appropriate to limit the grounds for review of these decisions to a breach of the rules of natural justice or other administrative error and to require the Appeal Tribunal to remit the decision back to ASX if it sets aside the original decision.

- **Waivers and other decisions** – The Committee believes the appeal process for these decisions should provide for a *de novo* consideration of the merits by the ASX Appeal Tribunal (as was the case when the appeal process was originally introduced).
- **ASX Appeal Tribunal Procedures** – The Committee believes it would be highly desirable to revise the ASX Appeal Tribunal’s procedures to ensure proceedings are conducted with as little formality and in as timely a manner as a proper consideration of an application permits. In this regard, the Takeovers Panel’s procedures in relation to reviews of ASIC decisions under s656A of the Corporations Act may provide a useful model.

Finally, the Committee would strongly encourage the ASX to undertake a public consultation process in relation to all future changes to its operating rules unless there are compelling reasons not to do so. ASX’s operating rules clearly affect people’s legal rights and obligations and the Committee believes there should be an opportunity for market participants to comment on any changes to those rights or obligations before they take effect. In the Committee’s view, this is so even when ASX is firmly of the view the changes are desirable. In those circumstances, ASX should still expose its views and the reasons for them to public scrutiny. The Committee acknowledges ASX’s consultation processes in relation to Listing Rule changes have generally been very good and have been enhanced in recent years, but was disappointed by the unexpected departure from usual practice in relation to these recent changes.

In this regard, we note the recent release of ASX Compliance Update 4/16 provided further information about the changes to ASX’s admissions framework which were foreshadowed in our meeting with ASX on 17 March. In that meeting, we were given to understand that ASX proposed to release consultation papers in relation to these changes in late April, but Compliance Update 4/16 now appears to suggest finalised Guidance Notes are likely to be issued soon (without consultation). Consistent with the views expressed above, the Committee believes it would be desirable for ASX to undertake a public consultation process in relation to these changes as it has with other material changes to significant Guidance Notes.

The Committee would be pleased to discuss this submission if that is helpful. In the first instance, please contact the Committee Deputy Chair, Wendy Rae, on (03) 9613 8595, if you would like to do so.

Yours sincerely



**Teresa Dyson, Chair**  
Business Law Section