Law Council
OF AUSTRALIA
Business Law Section

Office of General Counsel
ASX Limited
20 Bridge Street
SYDNEY NSW 2000
Via email: regulatorypolicy@asx.com.au

24 June 2016

Dear Sir or Madam,

ASIC Consultation Paper 257: Improving disclosure of historical financial information in prospectuses
ASX Consultation Paper: Updating ASX's admission requirements for listed entities

I have pleasure in enclosing a submission which has been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia.

The submission sets out consolidated comments on ASIC's May 2016 consultation paper on improving disclosure of historical financial information in prospectuses and ASX's consultation paper on updates to its admission requirements for listed entities also released at that time.

If you have any questions in relation to this submission, in the first instance please contact the Committee Chair, Rebecca Maslen-Stannage, on 02-9225 5500 or via email: rebecca.maslen-stannage@hsf.com

Yours faithfully,

Teresa Dyson, Chair
Business Law Section

Enc.

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ASIC CP257/ASX Admissions CP
Law Council – Business Section – Comments
24 June 2016

This table sets out consolidated comments from the Business Section of the Law Council of Australia on ASIC's May 2016 consultation paper on historical financial information in prospectuses and the companion piece from ASX released at that time seeking comment on updates to ASX's admission requirements.

ASX/ASIC proposals and questions	Law Council responses
1. Do you support the introduction of a 20% minimum free float requirement? If not, why not and would you support a different minimum free float requirement?	The Law Council is supportive of articulation of a minimum free float. We would suggest a 15% minimum free float requirement, with a view to re-assessment in the future, given that this is the first time that this requirement is to be formalised in Australia and in light of the broad proposed definition of "non-affiliated security holder" (see our response to Question 2). We would also be comfortable with 20% applying to entities whose indicative market capitalisation at the IPO offer price would be below a stated level.
2. Do you have any comments on the proposed definitions of "free float" and "non-affiliated security holder" for the purpose of the proposed minimum free float requirement? Do you see any issues with excluding shares that are subject to voluntary escrow from the definition of "free float"?	**"Free float"** With respect to the definition of "free float", the Law Council is generally supportive of excluding shares subject to voluntary escrow from the definition of free float, other than to the extent voluntary escrowed shares (1) come out of escrow within 12 months of listing, and (2) are held by non-affiliated shareholders. **"Non-affiliated"** With respect to the proposed definition of "non-affiliated security holders" the Law Council notes that ASX has retained a discretion to treat any person as affiliated whose relationship to the entity or a related party of the entity (or any of their respective associates) is such that ASX believes they should be treated as affiliated. The proposed definition may create uncertainty for entities in circumstances where it may be difficult in the lead up to listing to determine the proportion of security holders that fall within the

	definition and therefore the percentage of the entity's main class of securities that will be available at listing for investors to trade freely in the market. The Law Council believes that greater guidance as to how this assessment will be made will be appropriate.
3. Do you support the proposed changes to the spread test? If not, what element or elements of the changes do you not support, and what are your reasons?	Yes, the Law Council is supportive of the proposed changes to the spread test because it considers that it will assist in achieving efficiency benefits without impacting retail access to markets. The Law Council considers that certain well supported IPOs struggle to achieve the minimum 300 investors because (1) of market or geopolitical volatility, retail may not engage or (2) the business might be complex and retail investors may therefore struggle to understand it. In either scenario institutions may well support the IPO strongly and it would be desirable for such floats not to fail because they fail to meet the current spread requirements.
4. Do you support the increase in the last year's profit element of the profit test? If not, please provide your reasons.	Yes. The Law Council considers that it is appropriate to monitor financial thresholds from time to time to ensure that they continue to operate in the way intended and notes that the increase in this threshold is considerably less than the CPI increase since 1994.
5. Do you support the increase in the net tangible assets and market capitalisation elements of the assets test? If not, please provide your reasons.	Yes. The Law Council agrees with these changes save for a reduced minimum NTA for entities whose main undertaking is a classified asset. The Law Council submits that a minimum $5 million NTA may preclude otherwise quality listing applicants from seeking to list on ASX, particularly in the resource exploration and technology sectors which have traditionally comprised a significant number of the entities on the Official List. It may also make it more difficult for those entities to procure early stage funding. Accordingly, it is suggested that given the nature of their business activities and the accounting treatment of certain assets, entities listing with a classified asset as their main undertaking should be subject to a $3 million minimum NTA requirement. Such a reduced minimum NTA requirement will also ensure that the ASX

	continues to attract listings of early-stage technology companies.
6. Do you think it is appropriate to extend the minimum requirement for $1.5 million working capital after deducting the first year's budgeted administration costs and costs of acquiring any assets (to the extent that those costs will be met out of working capital) to all entities admitted under the assets test? If not, please provide your reasons.	Yes. The Law Council believes: ➢ there is no reason to distinguish between mining and oil and gas exploration entities with any other entity seeking to apply for admission under the "assets test"; and ➢ that it is reasonable to deduct such costs in calculating a required minimum working capital to carry on the entity's stated business.
7. Do you think it is appropriate to maintain a fixed minimum $1.5 million working capital requirement in addition to a requirement for the entity admitted under the assets test to make a statement that it has sufficient working capital to meet its stated objectives? If you think the fixed working capital requirement should be a different amount, please tell us the amount and explain why.	Yes. The Law Council agrees with ASX that having a minimum working capital requirement increases the likelihood that the entity will have sufficient resources to carry on its stated business for a reasonable period. The Law Council does not see the need to change the amount, particularly given the changes referenced in question 6.
8. Do you support the proposed requirement for entities admitted under the assets test to provide 3 full financial years of audited accounts, unless ASX approves otherwise? If not, please provide your reasons and describe what, if any, alternative approach you consider should be taken by ASX in order to meet the objectives of the proposed change.	The Law Council supports the proposal on the following basis: ➢ ASX confirms that it will be satisfied with entities admitted under the assets test to provide 2 years of audited + 6 months reviewed accounts and not strictly 3 years (for so long as ASIC's RG228 provides for this), given that this length of time is acceptable to ASIC in connection with disclosure documents as explained in Part F of ASIC Regulatory Guide 228 (RG 228) – that issue is implicit in ASX's formulation but the Law Council believes that it should be articulated; ➢ ASX maintains sufficient flexibility to grant waivers in other appropriate circumstances (including those consistent with ASIC's RG228); and ➢ the requirement is expressly stated not to operate as a de facto "track record" requirement as seen in a number of Asian securities exchanges – and accordingly a start-up is not prevented

	from seeking listing on ASX. In relation to this, the Law Council recognises that ASIC will still accept less than 3 years of audited accounts for a start-up company, which is relevant to the listing of junior explorer companies or technology start-ups in particular.
9. ASX has proposed that it will generally accept less than 3 years of audited accounts for an assets test entity (or an entity or business to be acquired by the entity) only in the circumstances where ASIC will accept less than 3 full years of accounts in a disclosure document, as explained in Part F of ASIC Regulatory Guide 228 (RG 228). Simultaneously with the release of this consultation paper, ASIC has released a consultation paper seeking comments on proposed changes to RG 228 setting out these circumstances. Are there additional circumstances where you consider ASX should be prepared to accept less than 3 years of audited accounts to those outlined in ASIC's consultation paper on RG 228?	In addition to those considerations raised in response to Question 8, the Law Council supports the "relevant" and "reasonableness" based approach proposed by ASIC in CP 257 in accepting less than 3 years of audited accounts. The Law Council believes that the exceptions to this requirement should not be unduly expanded or relaxed, so as to maintain consistency with the focus on proper financial disclosure and ASX's stricter approach on listing requirements.
ASIC B1, B11, B12 & B13 (when ASIC will accept less than three full years of accounts)	B1. The Law Council supports the initiative to require greater financial integrity in relation to acquired businesses and notes that it is consistent with the regulatory regime in a number of key OECD jurisdictions. It does not believe that the requirement is unduly onerous, provided that ASIC maintains sufficient flexibility to grant waivers in appropriate circumstances. The Law Council would support a transitional introduction of the requirement so that the market (both sellers and buyers) can adjust to the new environment. B11-13. The Law Council agrees with the proposals to provide articulated and more general exceptions to the historic financial statement requirements set out in the consultation paper and accompanying amendments to RG228. It has no specific comments on the examples and asks only that the Commission take the opportunity as its experience evolves to update those examples on a regular basis.
10. ASX has also proposed that it will only accept the types of modified opinion, emphasis of	The Law Council agrees with ASX's proposal and does not believe that ASX should consider it

matter or other matter paragraph in accounts lodged with a listing application that ASIC will accept in a disclosure document, as explained in Part F of RG 228. Are there additional types of modified opinion, emphasis of matter or other matter paragraph that you consider ASX should be prepared to accept to those outlined in ASIC's consultation paper on RG 228?	necessary to accept any additional types of modified opinion, emphasis of matter or other matter paragraphs to those outlined in ASIC's consultation paper on RG 228.
ASIC B2, B3 & B4 (qualified audit opinions etc)	B2. The Law Council agrees with ASIC's position on disallowing a prospectus with any element in an audit opinion that provides limited independent assurance. B3-4. The Law Council also agrees with the positions ASIC has taken relevant to these proposals. In particular, it acknowledges the importance of intolerance on issues such as: ➢ differential materiality levels ➢ lack of availability of access to accounting records from acquired businesses ➢ risk disclosure as a substitute
11. Do you agree with the list of overseas home exchanges proposed in section 2.1 of Guidance Note 4 (ie the main boards of Deutsche Börse, EuroNext (Amsterdam), EuroNext (Brussels), EuroNext (Paris), HKSE, JSE, LSE, SGX, TSE (Tokyo), TSX (Toronto), NASDAQ, NYSE and NZX) as being ones generally acceptable for an ASX Foreign Exempt listing? Are there any of these exchanges you would delete from this list? Are there any other exchanges you would add to this list?	The Law Council broadly agrees with these proposed changes. The Law Council considers that the current changes do not properly recognise the status of the London Stock Exchange (LSE), notwithstanding that the LSE is no longer a member of WFE. In the Law Council's view it would be better to include a definition of "Approved Foreign Exchange" in Chapter 19 which specifically includes the LSE (and other suitable exchanges) rather than continue to use the membership of WFE as the mechanism for identifying suitability (requiring LSE listed companies to seek a waiver). The Law Council would not remove or add any exchanges to the list provided.
12. Do you agree with the introduction of a further window for admission for ASX Foreign Exempt listings allowing them to be admitted to ASX if their market capitalisation is at least $2,000 million? If not, what threshold (if any) do you think would be appropriate?	Yes.
13. Are there any specific issues or concerns that you can identify that would result from ASX removing the current requirements for foreign	No. The Law Council is supportive of that reform.

entities listed on ASX to maintain certificated registers in Australia?	
14. Do you believe the transition date of 1 September 2016 that ASX proposes for the introduction of the new admission rules is appropriate? If you think it should be sooner or later, please explain why?	The Law Council considers that the transition date should take into account the timeframe required for an IPO, especially IPO processes that commenced prior to release of the proposed ASX and ASIC reforms, and recommends a date that allows for an approximate 6 month transition period, being no earlier than 1 November 2016.
15. Do you have any other comments on the issues discussed in this paper or the proposed listing rule and Guidance Note changes?	**Extent of ASX discretions** The Law Council notes that the ASX initiatives are another step in the direction to give ASX greater discretion over decisions as to listing, quotation, suspension and removal. Given the pre-eminence of the ASX market in Australia, it is the Law Council's view that entities considering listing as well as listed entities wishing to continue to be listed should have certainty as to the factors relevant to ASX's decisions on these types of important issues. Specifically, the Law Council believes that as many of the factors relevant to ASX decisions as possible should be set out in detail in the Listing Rules or Guidance Notes. To the extent that ASX decides to alter the factors relevant to its decisions, the revised factors should be published before the changes take effect and should only apply to applications submitted after the effective date. It is accepted, however, that in very unusual situations, this may not be possible – for example, where the decision will have a significant policy or precedential impact, or where ASX considers it necessary to effect the relevant changes in a short time span due to the significance of waving through the relevant application. **Foreign company takeovers** Relevant to Foreign Exempt listings, the Law Council is considering whether to make submissions on whether foreign entities admitted to ASX should be subject to Chapter 6 or the jurisdiction of the Australian Takeovers Panel, particularly where they are not be subject to equivalent regulation under the laws of the place of establishment.
ASIC B8 (when fin information is stale)	The Law Council agrees with ASIC's position on

	when financial information will be considered stale.

The Law Council is in broad agreement with each of the ASIC proposals not identified in the table above.

In relation to the specific textual changes to ASX's listing rules and guidance notes, the Law Council has the following comments:

ASX Listing Rules
The Law Council makes the following comments on the draft changes to the Listing Rules:

Generally
The Law Council considers the proposed amendments to the ASX Listing Rules to be generally uncontroversial and that overall the changes improve the drafting and operation of the rules.

Continuous disclosure
The Law Council does have some additional comments on broader issues relating to continuous disclosure that arise from the proposed changes. The changes to the introduction to the ASX Listing Rules emphasise that a listed entity must continue to comply with the ASX Listing Rules during a suspension or trading halt. It is unclear if this means that an entity is required strictly to comply with ASX Listing Rules 3.1 during this time.

The Law Council considers that the immediacy of disclosure under the ASX Listing Rule 3.1 continuous disclosure obligation during a trading halt or suspension ought to be formally relaxed. At the very least, the ASX Listing Rules should be amended so that ASX Listing Rules 3.1A.2 and 3.1A.3 do not need to be satisfied during a trading halt or suspension for the exception to continuous disclosure obligation to apply. The Law Council proposes further consultation around this issue.

Back-door listings
The Law Council also notes the impact that ASX's proposal to bring forward the date of a listed company's trading suspension to immediately after a transaction announcement (as opposed to suspension taking effect from the date of the shareholder meeting) may have on back-door listings. If amended, a listed entity the subject of a back-door listing will no longer be afforded the opportunity to gauge market reaction after the back-door listing transaction is announced, which is useful in assisting with the pricing of any capital raising to be undertaken by the entity. The Law Council proposes that back-door listings be exempt from this change.

ASX Guidance Note 1
On the whole, the Law Council agrees with the changes made to ASX Listing Rule 1 regarding the criteria for admission.

In respect of the use of "Variable Interest Entity structures" and these not constituting acceptable structures for listing, the Law Council considers that the position could be softened once these types of structures obtain more concrete legal background in their jurisdiction of origin. Given this, the Law Council believes that some exemption wording could be included in the footnote providing that ASX intends to re-consider its position once these structures are legally and judicially evolved. The Law Council would ask ASIC to do the same.

ASX Guidance Note 12 (Listing Rule 11 on changes of scale)
The Law Council has 2 comments on the draft changes to this Guidance Note:

- **3.4 Pre-emptive capital raisings** – the Law Council is supportive of the new guidance on pre-emptive capital raisings connected to transactions affected by ASX Listing Rule 11. However, we submit that ASX could demonstrate greater flexibility in permitting capital raisings to be launched concurrently with approvals etc (as distinct from sequentially), provided that the capital raising is launched at, or after, the time of announcement. This would dramatically assist with transaction timetables and the ability to raise capital. Other global securities exchanges – eg the LSE – do permit capital raisings to operate concurrently.
- **8.2 Break fees** – the draft includes new guidance on the acceptability of break fees negotiated for transactions that are affected by ASX Listing Rule 11. The Law Council has 2 comments on that:
    - the prohibition of naked no vote fees should in the Law Council's view be tempered to permit pure cost reimbursement; and
    - the articulation of a competing transaction trigger applying only where it successfully completes can be too binary – the initial transaction may be impossible to revive even where the subsequent one fails to complete.

The Law Council makes no comment on the proposed changes to ASX Guidance Notes 4, 29 & 30.