Law Council
OF AUSTRALIA
Business Law Section

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

1 April 2014

Dear Ms Tan,

Proposed Governance-Related Listing Rules Amendments – Supplementary Consultation Paper

I have pleasure in enclosing some comments on the ASX's Supplementary Consultation Paper on Proposed Governance-Related Listing Rules Amendments.

The comments have been prepared by the Corporations Committee of the Business Law Section of the Law Council of Australia.

If you have any questions, in the first instance please contact the Committee Chair, Bruce Cowley, on 07-3119 6312 or via email: bruce.cowley@minterellison.com.

Yours sincerely,

John Keeves
Chairman, Business Law Section

Enc.

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Key proposed changes	Proposed manner of changes	Comments
New LR 4.10.22 to replace LR 3.19B	Replace LR 3.19B with LR 4.10.22 to require a listed entity to include the substance of information that would have been required to be disclosed continuously under the proposed LR 3.19B in its annual report as a one-off annual disclosure covering the whole of the reporting period	• The Committee maintains its view that disclosure of securities purchased on market for the benefit of directors or their related parties does not need any additional regulation of the kind described in proposed Listing Rule 4.10.22. • The Committee repeats each of its observations and comments made in its earlier submission (18 November 2013) relating to an earlier formulation of Listing Rule 3.19B. • The Committee's view is that there are more than adequate disclosure obligations to be found in Listing Rule 3.19A - Appendix 3Y – Directors Notifiable Interests when read in conjunction with the Corporations Act requirement to produce and publish a Remuneration Report for consideration at the Annual General Meeting. • The Committee believes that it is not in the best interests of the broader investment community to overregulate by introduction of additional reporting obligations when there are fulsome disclosure obligations already in place. • If the introduction of the rule proceeds, there is a technical issue with its application". o The proposed rule refers to securities being "purchased on behalf of" as well as "ultimately allocated to"; at the time securities are being purchased generally it will not be clear who they are purchased on behalf of as likely to be a pool eg in trust that is subsequently allocated; suggest just require reporting

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		of the number of securities purchased that are allocated to the director/related party in the reporting period, regardless of when they were purchased or the mechanism of purchase.
New LR 10.15B	(1) Replace the exception previously contained in last sentence of opening paragraph of LR 10.14; and (2) make changes to the exception originally consulted upon and extend them to cover the issue of options and performance rights that will be satisfied by the purchase of securities on market.	• The Committee supports this proposed rule change. • ASX might consider whether there is a need to restrict the exception to on-market purchases . In its exposure draft of September 2004, ASX said: "The policy rationale of listing rule 10.14 is **to ensure that shareholders of an entity are given the opportunity to approve any dilution of their holdings by the issue of securities to related parties**." The exposure draft went on to say that waivers were commonly granted for on-market acquisitions by related parties "on the basis that this approach does not result in dilution of existing holders and nor does it result in securities being acquired on advantageous terms". • Since 2004, there has been a significant increase in the disclosure of remuneration, and if listing rule 4.10.22 is introduced with the amendments proposed above, additional disclosure about the allocation of securities purchased. Accordingly, there is greater transparency, and the secondary concern mentioned above in relation to advantageous terms may no longer be regarded as requiring the on-market restriction.
Amendment to LR 10.17	Amend rule regarding regulation of fees payable to directors of a listed entity "to improve	• The Committee supports this proposed rule change. • Clarify in the text at the end of the

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	its drafting and to clarify its content".	rule and in note 2 that fees approved by security holders are excluded.
Amendment to LR 10.17A		• Rather than relying on a note to explain that the requirement that the disclosure of director fees only applies to directors of the listed entity, not child entities, it would be preferable to draft the rule so that this is the case.
Amendment to LR 19.12	(1) Add provision to the effect that a related party of a director of officer of the entity or of a child entity is to be taken to be an associate of the director or officer unless the contrary is established; (2) add a note that one way it may be established that a related party of a director or officer is not their associate is for the director, officer or related party in question to give a statutory declaration to the entity to that effect; and (3) make very minor drafting corrections to the definition of "promoter".	• We support the reversion from the proposed amendment of references to "associate" to "related party" in various rules (eg 10.14, 10.16 etc) to retain "associate". • However, we do not support the deeming of a related party to be an "associate" unless the contrary is established. We are very concerned about this approach. From a regulatory policy perspective, a blanket "deeming" in these circumstances is not appropriate regulation. • If the "related party" does not have any relevant agreement/is not acting in concert with the director/officer, then they should not be "deemed" associates. • ASX already has deeming powers it can exercise in appropriate cases in a number of rules where there are references to associates (eg 10.1.5, 10.16.3). • Putting an onus on a director/officer to establish someone is not an associate is an unnecessary administrative burden with no policy justification. Adopting the suggestion to get a statutory declaration would be an excessive administrative burden. • If, despite these concerns, ASX introduces the deeming provision,

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		there are two technical issues ○ It should be clear that the director/officer only needs to establish the person is not an associate to the company, not ASX. ○ The provision is circular as drafted, it should say: "A +related party of a director or officer of the entity or of a +child entity is to be taken to be an associate of the director or officer unless **it is established that the person is not an associate within the meaning of sections 12 and 16 of the Corporations Act.**"
Various LRs referencing "market price"	(1) Replace various references to "market price" in LRs 4.10.8, 6.22.2, 7.1A.3, 7.2 Exception 15, 7.3.3, 7.3A.2, 7.3A.6, 7.11.3, 7.33, 10.12 Exception 8, 10.15.3, 10.15A.3 and 19.12 with a reference to "closing market price" or "volume weighted average market price", as deemed appropriate; and (2) replace the definition of "trading platform" in LR 19.2, which is used in the definition of "market price" with the definitions of "ASX market" and "Chi-X market", including minor consequential changes to LRs 3.19A.2, 7.11.2 and 19.12; and (3) remove redundant definition of "trading participant" in LR 19.12.	• The Committee supports this proposed rule change.
LR 7.2 Exception 2	Add explanatory note to exception 2 in LR 6.2 to	• The Committee supports this

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	clarify that the exception only applies to the issue to an underwriter under an underwriting agreement of securities comprising the shortfall from a pro rata issue to holders of ordinary securities, and not to any other issue of securities to the underwriter under an underwriting agreement (eg. in payment of an underwriting fee).	proposed rule change.
LR 10.12 Exception 1	Add explanatory note to clarify that the exception only applies to securities taken up as part of a pro rata issue; it does not apply to a person taking up all or part of the shortfall of a pro rata issue.	• The Committee does not support the amendment to the rule by the inclusion of an explanatory note as proposed. • If all members of the company (to the extent practicable and as permitted by the Listing Rules) are entitled to participate in a pro rata offer, and where such persons do not take up their full entitlement or decline altogether, why is it not appropriate for a member of the board to subscribe for additional shares under the shortfall without needing to obtain member approval? • The Committee does not understand the policy rationale for this amendment and would welcome further clarification and an ability to comment once that clarification is received.
LR 14.2	Amend to require a proxy form to give a security holder the ability to direct their proxy to abstain from voting on a resolution or to vote or abstain from voting on a resolution at the proxy's discretion; and	• The Committee supports this proposed rule change.

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	(2) require that the proxy form must also include a statement as to how the chair intends to vote undirected proxies if the proxy form specifies that the chair of the meeting is appointed as proxy if a security holder does not appoint another person to act as their proxy or the chair is appointed proxy by default; and (3) remove the requirement for a so-called "chairman's box" in a proxy form that currently appears in LRs 14.2.3A and 14.2.3B.	
LR 14.11.1	Amend to correct "minor typographical errors" and clarify which parties are covered by a voting exclusion statement for the purposes of LR 10.14.	• The Committee supports this proposed rule change.
LR 17.5	Correct a previously omitted consequential change required in conjunction with new reporting rules for mining entities and oil and gas entities that came into effect on 1 December 2013, reinstating ASX's power to suspend a mining exploration entity's securities from quotation if it fails to give to ASX an Appendix 5B and giving ASX the same power to suspend an oil and gas entity as it has for a mining exploration entity that fails to provide a quarterly report or Appendix 5B.	• The Committee supports this proposed rule change.

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Various LRs affected by changes to ASX internal processes	Amend LRs 1.10.2, 19.12, 15.5, 15.7, 18.1.2 and the explanatory note to Chapter 5 "to reflect changes in (ASX's) internal process".	• The Committee supports these proposed rule changes.