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Dear Ms Tan

ASX Listing Rules Update Consultation

The Australian Financial Markets Association (AFMA) is making comment on the Consultation Paper entitled *'Simplifying, clarifying and enhancing the integrity and efficiency of the ASX listing rules'*

Overall, the package of proposed changes is welcomed as providing more clarity simplification and streamlining of processes. The review work reflects a considered and balanced set of updates and the ASX is commended for the diligence that went into its preparation. The following comments are in the nature of queries, requests for clarification and suggested improvements on points of details. There are no significant objections. AFMA supports proceeding with the updates subject to our comments.

Particular comments are by reference to the Consultation Paper section and item numbering.

2.6 Disclosure of underwriting agreements

Disclosure of underwriting agreements – amending various rules to achieve consistent disclosure of the key features of underwriting agreements, including the name of the underwriter, the extent of the underwriting, the fee or commission payable, and a summary of the material circumstances where the underwriter has the right to avoid or change its obligations.

ASX is keen to receive feedback on the changes to the disclosures required in relation to underwriting arrangements proposed above. Are they appropriate, in terms of their reach and content? Will they be burdensome to comply with? Might there be any unintended consequences if they are adopted?

AFMA Comment on 2.6

Not applicable to sub-underwriters

AFMA would like it to be clearly confirmed by ASX that this requirement does not apply to sub-underwriters

Alignment with ASIC RG 228

The proposed information is of the type that is commonly included in disclosure materials. The preparation of prospectuses normally follows the guidance of ASIC in this regard set out in ASIC RG 228. For this reason, AFMA suggests that the changes should be aligned with ASIC's requirements under RG 228.166 – in particular, that "a summary of the material circumstances where the underwriter has the right to avoid or change its obligations" should be amended to read "any significant termination rights". This will:

- still achieve ASX's desired objective of summarising the key termination events;
- ensure consistency across the regulatory requirements;
- prevent any misinterpretation that conditions precedent and other provisions need to be summarised; and
- prevent any negative connotations from the use of the phrasing "avoid or change", particularly given that termination of an underwriting agreement is very rare.

3.1 Announcing issues of securities and seeking their quotation

Announcing issues of securities and seeking their quotation – simplifying and rationalising the current process for announcing issues of securities and applying for their quotation. This involves changes to existing rules 2.7, 2.8 and 3.10.3 and Appendix 3B; the replacement of rule 3.10.5; and the introduction of new rules 3.10.3A, 3.10.3B and 3.10.3C and a new Appendix 2A.

AFMA comment on 3.1

AFMA suggests some improvement in the process around the giving and wording of the warranty. It is noted that the section 707(3) warranty is required to be given under both the Appendices 2A and 3B (the same warranty is also required under Appendices 1A, 1B and 1C).

Regarding the process, it would be more appropriate and make more procedural sense for this warranty to be given at the time of filing the Appendix 2A once the number of securities to be issued are known and the market has been cleansed (and not at the time of the filing of the Appendix 3B).

Regarding the wording, it assumes that all securities are freely tradeable as and from the time of issue. However, sections 707(3) and 1012C(6) do not operate in that way. Specifically, they apply to resales within 12 months of issue to retail investors. Entities can make direct arrangements with recipients of securities to the effect that there will be no re-sale within 12 months or that the securities will only be traded amongst institutional

investors for that period. This is very common in global securities issues and is regularly used in Australia.

To address these concerns the following wording is suggested:

> *"We warrant to ASX that…the entity has conducted the issue and taken all reasonable steps to ensure either that the securities are tradeable free of any limitation under section 707(3) or section 1012C(6) of the Corporations Act or appropriate arrangements have been otherwise directly agreed with the allottee(s)*."

This wording would:

- recognise that certain institutional securityholders may be comfortable to receive an allotment of securities and not trade them for 12 months. We understand that entities sometimes request comfort from allottees that this will be the case (e.g. through warranties confirming that the allottee will not dispose of the securities for 12 months except by offers that do not need disclosure);
- recognise that other institutional securityholders may agree only to transfer the securities to other securityholders that have the benefit of a section 708 exemption (and so on); and
- also recognise that some entities and institutional securityholders may agree that a subsequent on-sale within 12 months will be accompanied by the requisite disclosure to investors.

Consistent with our view on the above wording of the warranty, where the warranty is given in other forms (e.g. Appendices 1A, 1B and 1C) it should be changed to the same wording.

Announcements

Consistency in disclosure to the market is an important issue for AFMA. Our objective is to promote consistency. For this reason, clarity would be welcomed in relation to announcing issues of securities and applying for their quotation.

In relation to LR 2.8, it would be helpful if the timing for lodgement of applications for ASX Debt Listings under LR 1.9 could be stated (i.e. the timing for lodgement of an Appendix 1B under LR 1.9 needs to be made clear – otherwise LR 2.8.7 could apply to ASX Debt Listings). We expect that the timing for lodgement of an Appendix 1B should be on or prior to the issue date for the debt securities. We note that under LR 2.7, ASX has explained that if following lodgement of an Appendix 1B there is a change in the number of securities to be quoted, then the applicant must give ASX a completed Appendix 2A *"by no later than midday (Sydney time) at least one business day prior to the intended date for quotation of the securities"*. So in our view timing for lodgement of the Appendix 1B should be stated as well.

In relation to LR 3.10.3, we note the following:

- that LR 3.10.5 will now only apply to equity securities (i.e. that an issuance of debt securities will not need to be announced); and
- LR 3.10.3 will be amended so that proposed issuances of all securities (other than an issue to be made under a dividend or distribution plan or an employee incentive scheme or as a consequence of the conversion of any convertible securities) must be made to ASX on an Appendix 3B.

The amended LR 3.10.3 is understood to mean that a listed entity must announce proposed issues of all debt securities (i.e. whether or not they are to be quoted on ASX). This means, for instance, that listed entities who are frequent issuers of debt securities (including, in the case of banks and insurers, Tier 2 Capital securities) to wholesale investors in domestic and offshore markets would be required to announce every issuance once an agreement is reached to do so (i.e. following execution of the relevant subscription or purchase agreement in relation to the debt securities). We understand that many issuers have not to date generally made announcements of that nature because their understanding has been that ASX has not required those announcements under LR 3.10.3.

We suggest that LR 3.10.3 should not apply to "business as usual" issuances of debt securities (including Tier 2 Capital securities) to domestic and offshore investors in the ordinary course of the issuer's business (unless those debt securities are listed on ASX or where they are offered under a prospectus or PDS in accordance with the relevant disclosure requirements under the Corporations Act).

3.4 The additional 10% placement capacity in rule 7.1A

The additional 10% placement capacity in rule 7.1A – implementing the changes foreshadowed in Strengthening Australia's equity capital markets: ASX Listing Rule 7.1A after three years and some other changes to simplify and rationalise aspects of rule 7.1A.

AFMA comment on 3.4

AFMA supports these amendments, with the suggestion that there be:

- clarification in the new rule 7.1A.1 that the new limb (b) only applies if a rule 7.1A mandate resolution is rejected by securityholders at that AGM. Without this change, entities may be deprived of the 12 month period even if a 7.1A resolution is not proposed at a subsequent AGM; and
- reconsideration of whether it is necessary to remove the ability of entities to make an issue under their additional 10% placement capacity in rule 7.1A for non-cash consideration. The rationale for the change cites that it seldom used and creates significant compliance issues, but removing it also removes flexibility for listed entities. We appreciate that ASX may in appropriate circumstances grant relief to facilitate this but feel that a better protection would be a simple requirement that non-cash issues need ASX consent but not a waiver (thereby providing a more streamlined route to these types of offerings).

4.1 Escrow

Escrow - streamlining the escrow regime in chapter 9 and Appendices 9A and 9B to substantially reduce the administrative burden for applicants seeking to list on ASX and for ASX. ASX is keen to receive feedback on the changes to the escrow regime proposed above. Do stakeholders support simplifying the escrow regime? Will the changes reduce the workload currently involved in obtaining escrow agreements from all holders of restricted securities? Are there any other changes ASX could sensibly make to reduce the burden of the escrow requirements and still maintain the integrity of its escrow regime?

AFMA comment on 4.1

AFMA supports the proposed amendments to chapter 9 and Appendices 9A, 9B and new 9C, as well the revised GN 11, with the following suggested adjustments.

10 business day notification unnecessary

ASX currently requires that an entity notify it that restricted securities or securities subject to voluntary escrow will be released from escrow not less than 10 business days before the end of the escrow period (rule 3.10A).

Some voluntary escrow arrangements include an early release mechanism if certain thresholds are met (e.g. 10 day VWAP is a certain percentage about the IPO price). All escrow arrangements include a final release date.

In each of these circumstances, the criteria and timing for release has been published on ASX well in advance (e.g. in the IPO prospectus). Given this, we propose that the ASX 10 business day notification requirement should be deleted. The rule can be inadvertently overlooked by entities which then subjects the relevant securityholder's securities to an additional restriction period through no fault of their own. In addition, it is impractical in the context of securities which may be subject to an early release mechanism as the date of release will not necessarily be known 10 business days in advance.

If ASX is not inclined to make that deletion, then we request that ASX amend rule 3.10A to allow the 10 business day notification to be made 10 business days in advance of the earliest possible time for release of the relevant escrowed securities so that escrowed holders are not held back from selling their securities once an early release threshold has been met. This will assist in avoiding situations where a securityholder is unable to dispose of its securities just after results are issued or because a trading window has closed due to a delay in meeting the early release thresholds and then having to account for an additional 10 business days.

Track record based on pro forma accounts

GN 11 notes that one of the mandatory escrow exceptions for an entity seeking admission under the "assets test" is that it has an acceptable track record of profitability or revenue. We assume it is based on pro forma accounts, rather than statutory accounts, given that the latter is often not meaningful due to pre-IPO restructures etc. Obviously, ASX would

retain discretions to deal with inappropriate pro forma adjustments in this context. It would be helpful if ASX could please update GN 11 to make this clear.

Market approach to mandatory period

The mandatory escrow periods prescribed by ASX are 24 month and 12 month periods, with the longer period being for related parties, promoters and quasi-promoters given they are usually likely to have a bigger economic stake in, and have a closer and deeper understanding of the underlying value of, the undertaking being listed than other unrelated securityholders.

Commonly, the restricted period for voluntary escrow arrangements is based on the forecast period and 1 full audit cycle. This is so the relevant parties have "skin in the game" long enough to be accountable. The relevance of the voluntary escrow conventions is that it demonstrates the way the market thinks about the issue. As ASX is revisiting escrow requirements, we would ask that thought be given by ASX as to whether it would be appropriate for ASX to use these periods rather than the 12 and 24 months periods.

Sell downs advertence to competition law

Careful attention is paid by our members to competition law compliance risk with respect to the cartel provisions when assisting with fund raising. In this context, careful consideration need to be given to the management of a sell-down of securities recently released from escrow in circumstances where there are multiple escrowed securityholders that hold in aggregate a significant stake in the entity. Orderly markets at the time of escrow release where there are multiple holders are in our view essential. Escrowed securityholders may seek to gain order priority over others affecting the confidence that bookbuild participants may have in post-escrow block trades regarding the extent of what may be "coming out" next in the case of partial sales and that the extent of market overhang will not be known if the holders cannot in some way aggregate their efforts. These concerns could be to the detriment of the entity's share price and therefore other securityholders and may impact IPOs adversely.

To address these concerns a suggested preferred structure is for the escrowed securityholders to have the option to sell-down as a block together at the time of the release from escrow, with any escrowed securityholders who choose not to participate being locked up for the next 60 or 90 days.

Competition law implications are important in the evaluation of the best way forward in this area balanced against the statutory requirements for an orderly market

The ASX work could assist entities to help manage any sell-down and to apply a holding lock to any of the escrowed securityholders who choose not to participate in the initial sell-down.

In addition, we also suggest that the revised GN 11 makes a definitive statement on the importance of an orderly market at the time of entry into the escrow arrangements and at escrow release.

It is noted that ASIC in RG 5 states:

> *"an entity will commonly enter into escrow arrangements with certain existing security holders in support of a public offering of securities. This may promote investor confidence and an orderly market…Listing rule escrow is designed to align (a) the interests of [certain parties]…and (b) the interests of other holders…The escrow arrangements may promote an orderly market in the securities by preventing a sell-down of a substantial number of securities immediately after the securities are issued."* (paragraphs 244, 252-255).

The draft revised GN 11 also makes the point in respect of voluntary escrow:

> *"Voluntary escrow is sometimes offered up in a new or re-compliance listing by a founder or promoter with a substantial holding to make the listing more attractive to investors. It serves to demonstrate their continuing commitment to the entity and to remove concerns about their holdings "overhanging" the post-listing market. It is also sometimes demanded by underwriters, lead managers or cornerstone investors as a condition of their involvement in a new or re-compliance listing."*

Further to this some additional wording for emphasis near the start of GN 11 and to cover escrow release is desirable. An example of such wording is as follows:

> *"ASX recognises the importance of escrow arrangements in promoting investor confidence and an orderly market for securities. Escrow arrangements assist in aligning the interests of escrowed securityholders with other securityholders, demonstrate the escrowed securityholders continuing commitment to the entity and removes concerns about their holdings overhanging the aftermarket. It is for these reasons that ASX considers that escrow arrangements are reasonably necessary to implement a new or re-compliance listing.*
>
> *ASX also recognises that similar investor confidence and orderly market concerns arise in the lead up to securities being released from escrow. This is because there is a risk that the escrowed securityholders will try and frontrun each other, that bookbuild participants in post-escrow block trades have no confidence in the extent of what may be "coming out" next in the case of partial sales and that the extent of market overhang will not be known if the escrowed securityholders cannot in some way aggregate their efforts. ASX notes that it may be appropriate in some circumstances for multiple escrowed securityholders to enter into arrangements jointly to selldown their released securities (with non-participating released securities being locked up for a period of time) in order to promote investor confidence and maintain an orderly market."*

4.2 Notification by profit test entities of continuing profits

Notification by profit test entities of continuing profits – amending rule 1.2.5A to allow the statement required from the directors of a 'profit test' listing that they have made enquiries and nothing has come to their attention to suggest that the economic entity is not continuing to earn profit from continuing operations, to be included in the entity's listing prospectus, PDS or information memorandum, rather than having to be provided separately to ASX.

AFMA comment on 4.2

Market feedback indicates that, despite the proposed amendment, most entities will continue separately to provide the required confirmation to ASX, rather than electing to include it in their prospectus, PDS or information memorandum.

Section 5 - Updating the timetables for corporate actions

ASX is keen to receive feedback on the proposed changes to the timetables for corporate actions mentioned in sections 5.1 - 5.13 above, including in particular the changes to the timetable for interest payments mentioned in section 5.2. Are they appropriate, in terms of their reach and content? Will they be burdensome to comply with? Might there be any unintended consequences if they are adopted?

AFMA comment on section 5

AFMA is supportive of proposed changes to the corporate action timetables.

One suggestion is to adopt interactive timetables, similar to those adopted by NZX for rights offers. These electronic timetables permit an automatically generated timetable once the relevant launch / record dates are entered. This has received great support in the NZ market, from issuers and market participants.

In respect of the rights issue timetables (Appendix 7A sections 2-6) we have the following comment. ASX has inserted the following note: *"Note: If all of these steps have not been completed prior to the commencement of trading, day 0 will be deemed to be the next business day and all subsequent dates in the timetable will be adjusted accordingly."*

- We consider that this works for non-accelerated rights issues (sections 2-3) where there is no trading halt.
- However, it may be problematic to delay the whole timetable for any of the accelerated structures (sections 4-6) if the issuer goes into trading halt and launch after the market open for whatever reason.
- Where the issuer was to launch a raising after market close, it would still generally consider that to be the launch day and not require an extra day at the back end. Having the record date at "Business Day 2" (as it is drafted) also

provides scope for some trading to have occurred on "Day 0" before an issuer went into halt

We also note that the accelerated rights issue timetables allow institutional offer periods of anywhere between 1-3 days, irrespective of structure. That is fine as it allows flexibility depending on the circumstances, but for the AREO (section 5) and PAITREO (section 6) timetables, the most common day for announcing the institutional offer and coming out of trading halt would be 'Business day' 3 (not Business day 2 as currently drafted). We appreciate the 'Business day' references are more examples/indicative vs. the 'Time Limits' which are the key constraints, but it may be worth clarifying.

We would also like to confirm that, the accelerated timetables allow (but don't require) a gap of up to 2 days between retail offer shortfall announcement and the associated bookbuild. It is usual practice to hold the bookbuild immediately post the retail shortfall announcement. We seek confirmation that the proposed timing does not require a 2 day gap.

5.6 Opening date of an issue to existing security holders

Opening date of an issue to existing security holders – re-drafting and shifting into rule 7.10 the requirement that currently appears in section 1 of Appendix 7A that the opening date of an issue of securities to existing security holders which is not a pro rata issue must be at least 10 business days after the disclosure document or PDS is sent to them, unless the disclosure document or PDS is lodged with ASIC and given to ASX at least 7 days before the opening date.

AFMA comment on 5.6

The need for this period in all cases is questioned. In the case of a completely vanilla deal (e.g. an entitlement offer that strictly follows a timetable provided for in Appendix 7A), there should be no requirement for the timetable to be reviewed in advance and for a trading halt to be automatically granted provided that Exchange Traded Offer maturity dates were unaffected.

It is our understanding that timetables are always confirmed and trading halts always granted for entitlement offers. This means that ASX is unnecessarily having to undertake procedural actions for each relevant capital raising.

The risk of a timetable error not being picked up until post-launch could be mitigated if ASX provided a smart form timetable that entities could enter dates into and receive an automatic response. This would help free ASX's time up to focus on other matters and would facilitate capital raisings that need to move quickly to launch in a condensed timeframe (e.g. over a long weekend).

5.14 Deferred settlement trading

The CHESS Replacement Settlement Enhancements Working Group recently requested that ASX consider shortening and standardising the timeframes for deferred settlement trading markets, and removing conventions for deferred settlement trading where they are no longer relevant.

ASX is keen to receive feedback from stakeholders, including listed entities, investors, brokers and corporate advisers, on:

- *the importance or otherwise of ASX allowing deferred settlement trading in securities affected by corporate actions;*
- *any costs, risks or disadvantages associated with deferred settlement trading and how they might be mitigated; and*
- *any changes that could be made to improve the operation of deferred settlement markets.*

AFMA comment on 5.14

AFMA is supportive of ASX retaining deferred settlement trading in securities affected by corporate actions.

We agree with ASX and see a number of benefits from the current practice of allowing deferred settlement trading, including permitting investors to manage their exposure to market risk on the securities they expect to receive in a corporate action, and greater to permit greater liquidity and timelier price discovery for those securities.

Accordingly, AFMA considers that deferred settlement reading should be retained for all corporate actions, including IPOs.

While there may be benefits in standardising the timeframes for deferred settlement trading markets, and removing conventions for deferred settlement trading where they are no longer relevant, we consider that it is preferable to retain flexibility in timeframes, as applicable to the relevant corporate action.

7.15 Warranties

Expanding the warranties currently in clause 2 of the Appendix 1A, 1B and 1C applications for admission and clause 2 of the Appendix 3B application for quotation of securities.

AFMA comment on 7.15

AFMA has the following observations to make on the proposal.

In relation to the proposed inclusion in Appendix 1A, 1B and 1C of an authorisation to allow ASX to disclose to any third party all information that has been provided to ASX in connection with the listing, we suggest that this authorisation is framed too broadly and would allow ASX to disclose information that the entity considers to be confidential or commercially sensitive information to third parties without prior consultation with the

entity. This may create a disincentive for entities seeking admission to provide full and frank disclosure to ASX. This risk is made more acute by the greater level of information that ASX is requiring in connection with new listings, particularly in relation to those entities which ASX considers to be higher risk (e.g. tech start-ups).

In relation to the proposed inclusion in Appendix 1A, 1B and 1C of an authorisation for third parties to provide ASX with any information relating to the entity seeking admission or its employees, officers or agents, we question the legal effectiveness of the entity giving this authorisation on behalf of all of its employees, officers and agents. We suggest that ASX consider whether this authorisation could be narrowed so that it applies to information relating to the entity, its directors, CEO and company secretary. It would be more practicable for an entity to seek consent for giving that authorisation from this narrower pool of people.

In relation to all of these forms, we note the proposed warranty given by the entity on lodgement that the information given in connection with the admission of the entity or the quotation of securities is or will be "accurate, complete and not misleading".

Consideration could be given to adopting a policy similar to ASIC's terms and conditions that apply to electronic lodgement. Under those terms, the person who makes the lodgement agrees to provide information that is complete, true and accurate, to the best of their knowledge – this assists with the delineation between the liability of the entity and the liability of the individual who lodges the relevant document.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au if further clarification or elaboration is desired.

Yours sincerely

David Love
General Counsel & International Adviser