



CHARTERED SECRETARIES
AUSTRALIA

Leaders in governance

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By email: kelly.boschenok@asx.com.au

Dear Kevin

***ASX Listing Rules Guidance Note 1:
Applying for admission — ASX listings***

Chartered Secretaries Australia (CSA) is the independent leader in governance and risk management. As the peak professional body delivering accredited education and the most practical and authoritative training and information in the field, we are focused on improving organisational performance and transparency. Company secretaries have primary responsibility in listed companies to deal with the Australian Securities Exchange (ASX) and interpret and implement the Listing Rules. Our Members deal on a day-to-day basis with ASX and have a thorough working knowledge of the operations of the markets, the needs of investors and the Listing Rules, as well as compliance with the Corporations Act (the Act).

CSA reiterates our concern at the lack of public consultation on the ASX proposal to amend the Listing Rules with effect from 1 January 2012 to add a new condition 17 to Listing Rule 1.1 to require an applicant for ASX listing to satisfy ASX that its directors or proposed directors at the date of listing are of good fame and character. CSA notes that it is difficult to provide feedback on the Guidance Note when ASX did not undertake consultation on the new Listing Rule, thus depriving stakeholders of the opportunity to comment on the new requirement.

CSA's feedback relates to the statutory declaration requirements set out in the draft Guidance Note and the broad power ASX has assigned itself in relation to sourcing information on directors or proposed directors of applicants for listing.

Statutory declaration

Page 15 of the Guidance Note states that a statutory declaration is required from each director or proposed director stating that:

(d) no listed entity of which he or she was a director (or, in the case of a listed trust, in respect of which he or she was a director of the responsible entity) at the time of the relevant conduct has been the subject of any disciplinary action (including any censure, monetary penalty, suspension of trading or termination of listing) by a securities exchange or other authority responsible for regulating securities markets for failure to comply with its obligations under the listing rules applicable to that entity;....

or, if the director is not able to give such confirmation, a statement to that effect and a detailed explanation of the circumstances involved.

CSA Members note that a proposed director at the date of an application for listing may well be the director of an existing listed entity that has been subject to an infringement notice from the Australian Securities and Investments Commission (ASIC), which notice has been accepted without admitting any liability. CSA is of the view that such a director should not be required to repeat all the detail of the circumstances of the infringement notice which is already available to ASX, ASIC and in the public domain. The director or proposed director should be able to state that an infringement notice was issued and liability was not admitted without further detailed explanation of the circumstances.

CSA also notes that in some instances information may be confidential to the regulators or the courts or subject to some other reasonable confidentiality restriction and the director or proposed director will not be able to provide a detailed explanation of the circumstances involved.

CSA recommends that the Guidance Note provide more clarity as to what is required in a 'detailed explanation of the circumstances', and provide guidance that information that is already available to ASX, ASIC and in the public domain need not be repeated and confidential information that is subject to a reasonable confidentiality restriction need not be disclosed.

CSA also notes that a statutory declaration is required from each director or proposed director stating that:

- (a) the director has not been the subject of any criminal or civil penalty proceedings or other enforcement action by any government agency in which he or she was found to have engaged in behaviour involving fraud, dishonesty, misrepresentation, concealment of material facts or breach of duty;

CSA notes that the wording here is very broad. Clarity is essential as to communicating exactly what information ASX requires when any individual is filling out the statutory declaration.

CSA recommends that ASX review the wording in the statutory declaration to ensure that there is certainty as to what is required to be disclosed.

CSA also recommends that any changes to the Guidance Note on what is required in the statutory declaration are reflected in the final version of the pro forma statutory declaration that will be available on the ASX website.

ASX having regard to information from any source

On page 15 of the Guidance Note it states that:

In considering whether the applicant's directors or proposed directors meet the 'good fame and character' requirement, ASX will primarily have regard to the documents mentioned above. However, ASX may also have regard to any other information it has about the directors or proposed directors from any source and, in an appropriate case, may require an applicant for listing to provide additional information about its directors or proposed directors.

CSA notes that ASX has assigned itself very broad powers in relation to the information it will consider. CSA is of the view that it is not clear if 'any source' [of information] will include media reports, rumour and speculation.

CSA is of the view that the process by which ASX informs itself in relation to any director or proposed director should be transparent and proper. The Guidance Note does not provide clarity as to:

- which information will be considered
- what evidentiary weight will be allocated to particular sorts of information, and
- whether directors will be able to respond to the information that ASX sources before ASX forms a view that may be based on that information.

CSA notes that there is an appeals process set out on page 18, but this is an extreme option to pursue and the right to an appeals process does not address the lack of transparency in the process for sourcing information. The draft Guidance Note does not account for where the information comes from or whether a director or proposed director can defend themselves or make submissions in relation to the information sourced by ASX.

CSA recommends that the Guidance Note clarify what ASX considers to be appropriate information that it will consider, how ASX will assess that information and how directors can respond to such information, so that it is clear that a transparent and proper process is in place.

CSA also notes that the Guidance Note specifies that it is the applicant for listing that must provide additional information about directors or proposed directors if required by ASX. A director may not, or may not be able to, provide the additional information required by ASX to the company, or the applicant company may not be aware of circumstances being investigated that are relevant to ASX's requirements. CSA points out that, while it will generally be the company secretary who will compile the information to provide to ASX on behalf of the applicant for listing, the Guidance Note needs to clarify that the onus for providing the information ultimately sits with the individual director and not the company.

CSA recommends that the Guidance Note should clarify that that the onus for providing the information ultimately sits with the individual director and not the company.

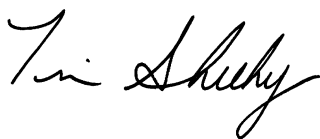
Application of new listing rule

CSA notes that the new listing rule applies to any director or proposed director of an applicant for listing at the time of applying for listing. However, if a director is appointed within a few months of listing, the listing rule no longer applies. Presumably ASX's rationale is that it is for the board at that time to undertake due diligence on proposed board appointments and for shareholders to ratify those appointments at the first general meeting of members.

Importantly, CSA would be opposed to any future attempts to establish a 'good fame and character' ASX pre-approval regime being applied to any director appointment of an already listed entity.

We have drawn on our Members' experience in our submission and would be more than happy to speak to you about any of the matters raised within it.

Kind regards



Tim Sheehy
CHIEF EXECUTIVE