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Dear Kevin and Mavis

Proposed Governance-Related Listing Rule Amendments Supplementary Consultation

Governance Institute of Australia is the only independent professional association with a sole focus on the practice of governance. We provide the best education and support for practising chartered secretaries, governance advisers and risk managers to drive responsible performance in their organisations.

Chartered 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). Our Members also hold primary responsibility within listed companies for developing governance policies and supporting the board on all governance matters. Their familiarity with the listing rules and their practical implementation has informed the comments in this submission.

Governance Institute of Australia (Governance Institute) welcomes the opportunity to comment on the supplementary consultation: *Proposed Governance-Related Listing Rule Amendments* (the Listing Rule amendments).

General comments

Governance Institute notes that many of the changes proposed to the Listing Rules and to Guidance Note 9 were made to give effect to the reforms to the 3rd edition of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (the Principles and Recommendations). We note that ASX also took the opportunity to seek feedback on some other proposed governance-related changes to its Listing Rules.

We provided feedback on the first consultation and are pleased to see that many of our recommendations were considered and changes were made to reflect the comments of stakeholders. In particular, Governance Institute strongly supports the removal of the proposed amendments to Listing Rule 3.19B, and the deletion of the requirement that a chairman's box appear on proxy voting forms. We are particularly appreciative of the consideration given to the last matter, which did not form part of the original public consultation.

We note that provisions have been made in the Listing Rules to allow for early adoption of the 3rd edition of the Principles and Recommendations, in particular, in Listing Rules 4.7 and 4.10.3. We also recognise that some entities will not be ready to completely adopt the new Appendix

4G but may be early adopters of some of the elements of the Principles and Recommendations. Governance Institute assumes, therefore, that ASX would be satisfied if a company which has chosen to be an early adopter could modify its Guidance Note 9 checklist accordingly.

In light of some of the changes proposed by the listing rules, and noting that some companies may need to make further changes to align with the amended listing rules, Governance Institute suggests that ASX give consideration to delaying the proposed start date of 1 July 2014, if further amendments to the listing rules are required, and the listing rules are not available in final form for companies well before the start date.

We have reviewed the further amendments to the Listing Rules, and are broadly supportive of the changes made; however, Governance Institute also provides the following feedback and recommendations below in relation to the amendments.

Listing Rule 4.10.22

Governance Institute supports the removal of the proposed amendments to Listing Rule 3.19B and the transplanting of the principle of these requirements to Listing Rule 4.10.22. We also note, however, that as drafted, the requirements of Listing Rule 4.10.22 may be difficult for organisations to satisfy.

We note that companies may purchase securities on market under the terms of an employee share scheme which are then held in a trust and subsequently allocated to individuals who participate in the employee incentive scheme. This means that companies are not always aware of when the securities being allocated were originally purchased, and for whom those securities were purchased in the first instance.

We find that the current drafting of Listing Rule 4.10.22 is ambiguous. We are unsure if ASX is requesting a company to report on:

- one category of securities, being those securities that are both purchased by, or on behalf of, and then allocated to, a director or related party during the same reporting period, or
- two separate categories of securities being those securities that are purchased on behalf of directors during the reporting period, and separately those securities that are allocated to a director (for example, out of a trust) during the reporting period regardless of when the trust acquired the securities.

As it stands, the proposed listing rule appears to require companies to determine for whom securities are being purchased at the time when they are purchased, which is rarely the case in practice.

Governance Institute believes that the listing rule should address the allocation of the securities during a reporting period, irrespective of when they were purchased.

Governance Institute recommends, therefore, the deletion of part (c) of Listing Rule 4.10.22 and the insertion of either Listing Rule 4.10.22A or 4.10.23 (as considered appropriate by ASX) which relates solely to the allocation of shares, and which we suggest could seek the disclosure of:

If any securities (whenever purchased) are allocated to a director or related party of a director:

- *the name of the director;*
- *if applicable, the name of the related party; and*
- *the number of purchased securities which were allocated to the director or related party during the reporting period.*

Listing Rule 10.15B

The second part of Listing Rule 10.15B permits the issue of options and performance rights over securities, without shareholder approval, to employees or directors or their related parties under the terms of an employee incentive scheme where the securities to be granted on the exercise of the options or the satisfaction of the performance rights are required by the terms of the employee incentive scheme to be purchased on-market.

This second part of the exception to Listing Rule 10.14 appears to be narrower than the first, in that it limits the exception to instances where the incentive scheme requires, as compared to 'allows' or 'provides' for, the purchase of the underlying shares on-market.

Governance Institute notes that the terms of employee incentives schemes will not usually mandate how securities are to be allocated on the exercise of the options, or the satisfaction of the performance rights are to be procured. Securities may, therefore, be allocated from a trust, purchased on-market, or purchased off-market in order to satisfy this requirement.

Governance Institute recommends, therefore, that the second part of the exception should align with the first part and permit the issue of options and performance rights, without shareholder approval, in circumstance where an employee incentive scheme 'provides' for an on-market purchase of securities to satisfy the exercise of options and/or performance rights, and in fact that right is exercised. We further submit that such an alignment would bring this exception in line with the way in which our Members currently understand the rule to operate.

Such drafting might clarify that the exception applies to securities that are not issued for the purposes of an employee incentive scheme. An additional note could also be included with words to the effect:

Securities are not issued when they are purchased on-market, purchased off-market or allocated from a trust.

Listing Rule 10.17

Governance Institute notes that Listing Rule 10.17 details the payments to directors that must be disclosed by a company. We note, however, that the situation might arise where a child entity is a listed entity and has its own fee cap approved, but has directors on the board who are also directors of the parent company which operates independently in an overseas market.

We note, therefore, that in these special instances, ASX may be required to issue a waiver, to ensure that the child entity is not unfairly caught by a requirement to disclose.

Governance Institute also seeks clarification with respect to Note 2 and the preceding text which outlines the situation in which fees payable by the entity or its child entity will not be required. We believe that, as currently stated, the text does not clearly identify whether the fees have already been approved by security holders.

Governance Institute recommends, therefore, the following amendment to Note 2 (in italics):

For the avoidance of doubt, directors' fees sacrificed to pay for the purchase of securities in the entity (whether under an employee incentive scheme of the type referred to in rule 10.15B or otherwise) and not otherwise approved by the holders of the entity's ordinary securities, must come out of the total amount of directors' fees approved by the holders of its ordinary securities under rule 10.17.

Listing Rule 10.17A

Similarly, Governance Institute notes that Listing Rule 10.17A could be more clearly drafted to identify the extent to which the disclosure requirements apply with respect to the fees paid by an entity or its child entity.

Governance Institute recommends, therefore, that Listing Rule 10.17A be redrafted with words to the following effect:

10.17A The total amount of directors' fees paid by an entity or its child entity to directors of the entity must not exceed...

Listing Rule 14.2.1

Governance Institute notes that it is not clear from the amendments to Listing Rule 14.2.1 as to whether or not a fourth box is required to 'allow the proxy to vote or abstain from voting on the resolution in their discretion'. Governance Institute notes that the opening words on the proxy form will usually encompass that the failure by the security holder to tick the box corresponding with either voting for, against, or abstaining from voting will allow the nominated proxy to either vote or abstain from voting on the resolution at their discretion.

Governance Institute seeks confirmation that ASX does not intend for a further box to be included in the proxy form. We note that it has been our experience that security holders do not always tick a particular box, but may sign the proxy form indicating their support for the chair of the meeting, and providing the chair with the discretion to vote accordingly. We believe that the usual words contained in the opening sentence of the proxy form adequately allow for this to occur. As such, **we recommend** that it be confirmed that the usual opening words of the proxy form be considered sufficient to satisfy the requirements of this section.

However, if it is intended that a further box be required, **Governance Institute would also recommend** that ASX allow for the situation where the security holder does not tick any of the boxes (including the fourth box allowing the proxy to vote or abstain from voting) but does sign the document, that the discretion as to voting remains with the appointed proxy. That is, whether the additional box is required or not, a security holder should still be able to appoint a proxy to exercise their discretion by signing the proxy form, even though they have not ticked the appropriate box.

Listing Rule 14.2.2

While Governance Institute notes that it is common practice for companies to indicate on the proxy form the voting intentions of the chair of the meeting, and the intended voting of the undirected proxies, we note that the current drafting of Listing Rule 14.2.2 does not account for a change of the chair's voting intentions owing to exceptional circumstances. Governance Institute believes that the proxy form should reflect that the stated voting intention is considered accurate and correct at the time of issuing the proxy form, but may be subject to change in exceptional circumstances.

We understand that although it is uncommon for circumstances to arise in which a chair will need to vote differently from how they have indicated they will do so, companies, nonetheless, should be provided with a safeguard for exceptional circumstances in which the voting intention of the chair changes.

Governance Institute recommends, therefore, that a note be inserted which clearly outlines that the voting intention of the chair is considered true and correct at the time of issuing the notice of meeting, but that in exceptional circumstances, the voting intention of the chair could change.

Listing Rule 19.12

Associate

Governance Institute notes the definition of associate put forward in Listing Rule 19.12, and in particular the notation that a 'related party of a director or officer of the entity or of a child entity is to be taken as an associate of the director or officer unless the contrary is established'.

Governance Institute does not support this position, and notes that the appropriate definition of an associate is as captured in ss 12 and 16 of the Corporations Act.

Governance Institute notes that the reverse onus of proving that a related party is not an associate places a further administrative burden on companies, with little or no benefit accrued to shareholders. As such, **Governance Institute recommends** the deletion of the second paragraph of the definition of associate.

We note, however, that if ASX decides to keep the definition as currently stated, we believe that the listing rule should only have to be established to the satisfaction of the company, and not the ASX. That is, we recommend that the note suggesting that a director sign a statutory declaration be softened to note that the company is able to manage the related parties and associates of their directors as they see fit. While only captured in a note, we believe that the suggestion that a director sign a statutory declaration is an onerous recommendation for companies to adopt.

As reiterated in our first submission, we are also of the view that ASX should ensure that references to 'associate' only relate to ss 12 and 16 of the Corporations Act and not include reference to related parties. We are the view that it is not appropriate to add the 'related party' definition (as a blanket rule) every time the term 'associate' is used. Again, if ASX decides to retain references to related parties, we recommend that such references be contained in a note, rather than in the body of the listing rule.

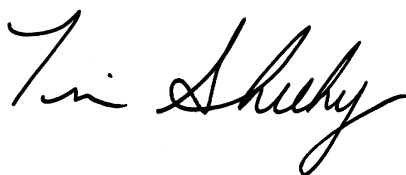
Security Purchase Plan

Governance Institute notes the reference made in the definition of security purchase plan to ASIC Class Order [09/425] on share and interest purchase plans. We also note that this Class Order will change, and **we recommend** that reference to the specific Class Order be removed, and instead that reference be made to release granted by ASIC relating to share plans.

Governance Institute reiterates our support for the proposed amendments to the listing rules, and notes that our recommendations have been put forward with a view to clarifying their operation where we believe that there may be some confusion or lack of clarity.

We look forward to seeing the final amended listing rules and would be happy to provide further feedback on any drafting queries that ASX may have.

Kind regards



Tim Sheehy
Chief Executive