



OWNERSHIP MATTERS

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15 November 2013

ASX Limited

Email: mavis.tan@asx.com.au

RE: Submission on proposed governance changes to the Listing Rules

Dear ASX,

Thank you for the opportunity to comment on the ASX's proposed governance related changes to the ASX Listing Rules. Ownership Matters (OM) is an Australian owned governance advisory firm serving institutional investors that was formed in 2011. The views in this submission are those of OM and not its clients.

OM's submission is principally concerned with ASX Listing Rule 10.14 and the proposed new Rule, 3.19B. OM commends the ASX for acting to address the current gap in market disclosure practices concerning purchases by listed entities of their own securities on behalf of employees and employee incentive plans. It however believes additional improvements to market integrity around employee equity incentive plans could be made with additional changes to the Rules. At present the ASX Listing Rules support a relatively liberal regime around investor approval of equity incentive plans, investor approval of limits on equity incentives for employees and around related party transactions generally.

Our submission addresses these issues as follows:

Proposed ASX Listing Rule 3.19B: As noted above, OM supports ASX's intention to require contemporary disclosure of share purchases by listed entities on behalf of employees. These changes close the existing gap in the Listing Rules which do not require contemporaneous disclosure where a company is acquiring its own shares on behalf of employees as opposed to the disclosure obligations where a buy-back is being undertaken. OM is broadly supportive of the proposed Listing Rule with some suggestions for improved operation as follows:

- Entities should also be required to disclose whether securities were acquired directly or through a third party, and if a third party was used, they should be identified and a summary of the arrangements with the third party should be provided. OM notes that third parties conducting buy-backs on behalf of an issuer are required to be identified under the ASX Listing Rules and also notes that some larger and more sophisticated listed entities have begun entering into forward purchase arrangements with investment banks to supply shares, acquired on-market, for use in incentive schemes. To this end the Rule may also need to be clarified to ensure it catches not only the immediate purchase of shares but also the entry into arrangements for future purchases of shares by a third party.

- Entities should also be required to disclose how many securities have been purchased on-market for the purposes of employee incentives over the prior 12 month period and the number of securities released from these incentive schemes to employees over this period. This is similar to the requirement for entities to disclose aggregate purchases under a current buy-back with each announcement of new purchases. It also allows shareholders to track the actual efficiency of these purchases as well as their cumulative effect and is similar to the requirements involving the new issue of securities on exercise of incentives under an Appendix 3B.
- It is not clear why a delay of five days is required for disclosure of these types of on-market purchases while disclosure is required the next day for purchases under a buy-back. On this basis it is not clear what hardship would be imposed on listed entities to disclose purchases for employee incentive schemes the following trading day.
- The director and related party disclosure requirements may be problematic for entities that acquire securities ahead of time in an attempt to 'hedge' their liability. This is because in these cases securities are purchased to meet expected liabilities across the employee group rather than to satisfy incentives as they vest.

Listing Rule 10.14 and approval of equity incentives: OM notes ASX's comments that ASX does not "necessarily agree" with the need for prior shareholder approval for the on-market purchase of equity incentives to directors under ASX Listing Rule 10.14. OM notes the proposed new Rule 3.19B will end one of the benefits for issuers of acquiring securities on-market – the lack of any requirement for contemporaneous disclosure of equity incentives satisfied through on-market purchase.

As OM has previously indicated, it does not support the Listing Rule 10.14 exemption allowing entities to avoid approval for equity incentives for directors acquired on-market. It appears based on a definition of dilution that assumes dilution occurs only when new shares are issued and not when company assets are used to purchase shares on behalf of insiders. OM respectfully requests that ASX reconsider its views on this issue in the context of the purpose of Listing Rule 10 which is to prevent persons of influence – including related parties – receiving benefits from the company not available to other shareholders or parties who do not have privileged insider positions.

OM would also encourage the ASX to consider a review of the current liberal regime applying to approval of equity incentive plans for ASX listed entities. Investors in ASX listed entities, unlike their US counterparts, have no capacity to approve the amount of their investment allocated to employees including executives through equity incentive schemes. The ASX Listing Rules also have no limits analogous to those in the NZSX Listing Rules on the aggregate proportion of a listed entity's securities able to be allocated to employees without securityholder approval.

At present the ASX Listing Rules permit an entity to issue up to 15 percent of its own securities every year to employees without prior securityholder approval and impose no limits on purchases of securities for the purposes of employee incentive plans. A new Listing Rule, requiring listed entities to seek periodic approval for a total number of securities that may be allocated – either through new issues or on-market purchases – to employees would improve confidence among investors in ASX listed entities that their investment will not be diluted without their consent by equity allocations to employees.

Voting exclusions: OM would also suggest the ASX should update its voting exclusions in relation to votes on related party and remuneration matters including approvals for termination benefits, remuneration reports and under Listing Rules 10.1, 10.11 and 10.14. Those listed entities that acquire their own securities to hold in 'treasury' to hedge anticipated future vesting under equity incentive schemes, typically in a share trust, are able to direct how these securities may be voted on resolutions. A relatively large number of listed entities presently list one or more employee share vehicles among their 20 largest securityholders and in cases where these securities are not allocated to specific individuals, allowing these securities to be voted at management's direction on related party and remuneration approvals is inconsistent with the principles behind the ASX's voting exclusion regime.

Thank you again for the opportunity to comment on the proposed changes to the Listing Rules. Please do not hesitate to contact us in relation to any matter raised in this submission.

Yours sincerely,

The image shows two handwritten signatures in black ink. The signature on the left is 'Dean Paatsch' and the signature on the right is 'Martin Lawrence'. Both are written in a cursive, flowing style.

Dean Paatsch & Martin Lawrence

Ownership Matters Pty Ltd