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Via email: ListingsPolicy@asx.com.au

Dear ASX

## ASX consultation on shareholder approval requirements under the ASX Listing Rules

Thank you for the opportunity to comment on ASX's consultation paper regarding shareholder approval requirements under the ASX Listing Rules.

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of 53,000 includes directors and governance leaders across publicly listed entities, not-for-profits, large and small businesses, and public sector bodies.

The AICD supports ASX undertaking its review, and acknowledges that ASX has received representations on the relevant matters. It is in the interests of all market participants for the Listing Rules to be broadly supported, and for listed entities, directors and investors to have certainty around their operation. We acknowledge that the current debate creates significant uncertainty for listed entities and their directors seeking to comply with a long-established regime.

We commend ASX for its detailed consultation paper and thorough approach to the consultation, recognising the significance of potential changes to the ASX Listing Rules on the Australian public market.

This submission has been informed by engagement with directors of listed entities, legal experts and other stakeholders.

**Attachment A** provides our detailed responses to the key consultation questions of most relevance to the AICD and its members.

# 1. Executive Summary

The AICD's overarching position is that any changes to the current settings must be proportionate and only made in response to a demonstrated systemic issue.

Any proposed changes must also be assessed in the broader context of ongoing initiatives to simplify and modernise regulatory settings and listing frameworks, which aim to enhance the attractiveness of Australian markets, support growth and innovation and reduce the regulatory burden for listed entities.

We recognise that the ASX Listing Rules play an essential role in safeguarding market integrity, supporting investor confidence and ensuring market efficiency, and that any changes to existing settings must strike the right balance for all market participants.

It is also critical that potential changes are considered holistically, to ensure that the cumulative burden of regulation – which can act as a major barrier to business growth and new investment, reduce competitiveness, and discourage participation in public markets – is not exacerbated for listed entities.

While we have concerns about the proposal to reduce the limit on issues of shares without approval under exceptions 6 and 7 in Listing Rule 7.2, we are broadly supportive of ASX's preliminary positions in relation to changes in admission status.

**Bidder shareholder approval of share issues for takeovers and mergers**

Our submission focuses primarily on whether to reduce the limit on issues of securities without shareholder approval under exceptions 6 and 7 in Listing Rule 7.2, and responds to ASX's initial position that it would support a reduction in the limit from 100% to 25% of ordinary securities on issue at the date of announcement of the transaction for entities that are in the S&P/ASX 300 or that have a market capitalisation of more than $300 million.

The AICD acknowledges that ASX will be required to strike a balance between a range of considerations and disparate views on this matter, as in the context of ASX's consultation on 'reverse takeovers' in 2017.

We agree with ASX that the risk of unintended consequences in changing rule settings that have been in place for many years can be high, and regulatory change often comes with a cost to regulated entities.

We would strongly caution against ASX revising its settings based on market concerns about a limited number of transactions. Exceptions 6 and 7 to Listing Rule 7.2 were introduced in the Australian context to ensure listed entities could undertake regulated takeovers and schemes without an approval hurdle that could make execution difficult and limit competitiveness – a policy rationale that remains sound in the absence of clear countervailing evidence.

Our engagement with directors and legal M&A experts presents a clear view that existing laws and rules, in general, work effectively. There is strong concern that reducing the limit on issues of securities without approval risks adverse consequences that would further hinder competitiveness with private markets.

At the same time, we acknowledge arguments in favour of the proposal on the basis that it enhances the framework for investor protection.

Ultimately, it is the role of the board to be the primary decision-maker in relation to corporate activity within the existing legal and regulatory framework. Directors are subject to fiduciary duties owed to the company, including to act in good faith in the best interests of the company, and are accountable to shareholders through a suite of existing mechanisms.

As outlined in the AICD's Practice Statement on directors' 'best interests duty' (supported by the Bret Walker SC-Gerald Ng opinion)[1], directors have considerable discretion to identify the best interests of the company, taking into account relevant facts and circumstances. As a guiding principle, directors should take a long-term view of where the company's interests lie.

Conversely, shareholders are not a homogenous body, and will have different priorities, time horizons, risk appetites and levels of involvement. As part of its role, boards must navigate potentially competing shareholder perspectives, with the benefit of the information available to it and external advice.

Any rule change should not unduly limit boards' abilities - acting in the best interests of the company – to make decisions in relation to strategy and growth and to act swiftly and strategically in response to market

[1] See 'AICD Practice Statement: Directors' "best interests" duty in practice' at https://www.aicd.com.au/content/dam/aicd/pdf/tools-resources/director-tools/board/directors-best-interests-duty-in-practice-web2.pdf

opportunities (particularly where there is a level of competition involved), noting the high level of regulatory and judicial oversight already applied to takeovers and schemes in Australia.

If ASX determines that a reduction in the limit on issues of securities without approval under exceptions 6 and 7 in Listing Rule 7.2 is warranted, our view is that to balance the various considerations:

- a more appropriate limit would be 50% rather than 25%. This would address concerns about dilutionary impact while limiting broader undesirable market impacts and maintaining listed entities' competitiveness in M&A transactions;
- the reduced limit should apply to a more limited number of listed entities, such as the S&P/ASX 100 or 200, to further avoid adverse market impact and outsized impacts on smaller entities; and
- ASX should consider mechanisms to allow listed entities to modify the operation of the rules, including the option of including a different limit in a company constitution, or seeking a standing three-year approval from shareholders for the current 100% cap to apply.

**Shareholder approval for changes in admission status**

We are broadly supportive of ASX's preliminary positions in relation to:

- the potential new requirement that a dual listed company should seek shareholder approval if it wishes to change its admission status to be an ASX Foreign Exempt Listing; and
- the potential new requirement that a dual listed company should seek shareholder approval to delist from ASX even if it will continue to maintain its foreign listing, on the basis that this requirement would be limited to dual listed companies that were first listed on ASX before taking an additional listing on another exchange.

We acknowledge that ASX's proposals would represent a substantive change to the regulatory settings for listed entities, but note that they would apply in limited circumstances and believe that they strike a reasonable balance between market flexibility and investor protection.

**Shareholder approval for change to nature or scale of activities under listing rule 11.1.2**

We would strongly oppose the introduction of a new requirement for shareholder approval of any significant transaction, including any changes to the current form of listing rule 11.1.2.

Introducing a prescriptive approval requirement in this context would:

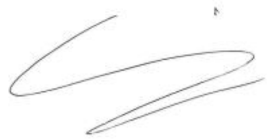
- unduly reduce strategic flexibility for boards who have been elected by shareholders to manage the business of their companies (and are subject to fiduciary duties in favour of those companies);
- further increase the regulatory burden for listed entities at a time when Australia is seeking to reduce it, and to enhance the attractiveness of Australian markets; and
- be out of step with international jurisdictions (including the UK, where the Financial Conduct Authority (**FCA**) has recently removed the requirement for approval of significant transactions).

The existing rule 11.1 provides an appropriate and well-understood safeguard for transactions involving a significant change in the nature or scale of a listed entity's activities, and ASX already has broad discretion under rule 11.1.2 to require shareholder approval where genuinely warranted.

## 2. Next Steps

We hope our submission will be of assistance. If you would like to discuss any aspects further, please contact Sally Linwood, Senior Policy Adviser, at salinwood@aicd.com.au or me at cgergis@aicd.com.au.

Yours sincerely,



**Christian Gergis GAICD**

Head of Policy

# Attachment A – Responses to consultation questions

**Should the current limit on issues of securities without approval under exceptions 6 and 7 in Listing Rule 7.2 be reduced? Do you think that reducing the limit on issues of securities without approval under exceptions 6 and 7 in Listing Rule 7.2 would make it more difficult for listed bidders to compete in and execute takeovers and mergers? If so, what problems would it create?**

The AICD is unconvinced that a reduction is necessary or appropriate in the Australian market, noting the broader work underway by ASIC and ASX to streamline and modernise regulatory and listing frameworks and the policy rationale for the inclusion of the relevant exceptions.

ASIC's consultation on the state of Australia's capital markets has underscored the regulatory pressures facing listed entities, as well as broader market shifts including declining public listings and expansion of private-market investment. As part of ensuring that the right balance is struck for all market participants, ASX should be comfortable that any changes to the current settings do not exacerbate these challenges or undermine the competitiveness, efficiency and attractiveness of Australia's public markets.

There was a sound policy rationale for the inclusion of exceptions 6 and 7 in Listing Rule 7.2, which are long-standing. As outlined in Guidance Note 21 and referenced in the consultation paper, ASX recognised that an approval requirement could make it difficult to complete a takeover or acquisition by way of a scheme of arrangement, and put the entity at a competitive disadvantage to an unlisted bidder or acquirer in a contested takeover or acquisition. ASX has also stated that exceptions 6 and 7 recognise the robust regulatory framework and the high level of regulatory and curial oversight applied to takeovers and schemes in Australia.

In this context, any changes in the Australian context should be approached with a high degree of caution, and implemented only where there is strong evidence demonstrating the need for change, and where the anticipated benefits clearly outweigh the associated burdens and risks.

*Public market and M&A impacts*

Based on our engagement with members and legal M&A experts, there is a strong concern that, in the Australian context, the proposal risks a number of adverse consequences that would impact public markets and further limit effective competition with private markets including:

- introducing costs, delays and uncertainties that add risk to transactions;
- decreasing the competitiveness of ASX listed entities and in particular putting them at a disadvantage compared to private bidders;
- creating a disincentive for companies pursuing inorganic growth to list on the ASX;
- introducing further complexity to Australia's post listing regulatory environment, a key consideration for companies contemplating a public listing;
- influencing funding structures by limiting equity-raising options, which may mean companies rely more heavily on debt financing; and
- adding significant complexity to process and timing through the introduction of an additional approval requirement in circumstances where multiple approvals may already be required (such as Foreign Investment Review Board (**FIRB**) and/or Australian Competition and Consumer Commission (**ACCC**) approval).

We acknowledge ASX's review of transactions over FY21 to 25 and its assessment that the introduction of a 25% limit on exceptions 6 and 7 would have impacted 19 transactions over the period FY21 to FY25 if it was limited to ASX listed bidders that were in the S&P/ASX 300 or had a market capitalisation over $300 million, or 46 transactions if it was applied to all ASX listed bidders regardless of size.

While the relevant exceptions may have directly impacted only a relatively small number of transactions, the proposal risks a broader chilling impact on public market M&A and public listings for the reasons outlined above.

*Role of the board*

As emphasised in our cover letter, any rule change should not unduly limit boards' abilities - acting in the best interests of the company – to make decisions in relation to strategy and growth and to act swiftly and strategically in response to market opportunities.

Directors are subject to fiduciary duties owed to the company, including to act in good faith in the best interests of the company.

In doing so, boards often need to synthesise different shareholder perspectives, noting that a company's register can reflect a wide spectrum of investment styles and priorities. Shareholders may range from superannuation funds and other institutional investors to hedge funds, short-term traders, retail investors, and strategic corporate holders (who may be competitors), encompassing both passive investors and more active investors who take deliberate, engaged positions. Each group brings its own priorities, time horizons and risk appetite.

Boards will consider shareholders as a whole in making decisions in the best interests of the company. A one-size-fits-all approval requirement may create a risk that certain groups of shareholders who take a more active stance will be afforded outsized influence over the outcome of any vote and the strategic direction of a company.

Shareholders have a suite of mechanisms to hold directors to account including through voting on director elections; the ability under the Corporations Act to requisition or call a general meeting, propose resolutions or ask questions about the management of the company; the non-binding vote on the remuneration report required by the Corporations Act, which may trigger the two strikes rule; and the statutory derivative action mechanism. ASIC also has the ability to bring a case against directors for breaching their statutory directors' duties, which is a relatively novel feature of the Australian market as compared with peer jurisdictions[2].

The existing mechanisms provide a means for a market-based solution to any company-specific concerns (without the need for regulatory intervention), including by allowing shareholders to requisition a resolution to change a company's constitution to tailor limits on share issues. We note that there have been recent instances where resolutions to amend company constitutions have been proposed to address an institutional shareholder request, and endorsed by the relevant company boards.

*UK Financial Conduct Authority Listing Rule reforms*

We acknowledge the international benchmarking on shareholder approval thresholds that ASX has undertaken, and the complexities associated with comparison of limits applied by different exchanges.

In terms of international settings, it is notable that the UK's Financial Conduct Authority (**FCA**), as part of a suite of significant reforms to its listing regime that took effect in July 2024, has removed the need for shareholder approval for significant transactions and instead introduced a new disclosure-based regime. Shareholder approval for key events, like reverse takeovers and de-listing, is still required.

[2] See 'Criminal and Civil Frameworks for Imposing Liability on Directors' at https://www.aicd.com.au/content/dam/aicd/pdf/news-media/research/2025/allens-research-memorandum-to-aicd-September-2025.pdf

The UK reforms were introduced in the context of a decline in listings in the UK[3] and reflect the FCA's determination that it was appropriate to move towards a more disclosure-based regime, recognising, as noted in the relevant FCA Policy Statement, that capital markets exist to enable investors to trade in and out of securities and take decisions that accord with their own risk appetite and the parameters of their investment mandates[4].

We note in particular the following comments made by the FCA in its Policy Statement, which acknowledge the impact of the reforms on investment risk but highlight the importance of the role of the board:

> *Removing shareholders' ability to veto significant transactions places more emphasis on boards to make decisions that preserve or increase (rather than erode) shareholder value. However, the support for the vote by investors appears to be based on the premise that shareholders and boards are 'on different sides' and shareholders are better informed than the board on what delivers the best outcomes for the company and, by extension, shareholders. We note that the boards of UK-listed companies will continue to be answerable to their shareholders as a whole. Our changes do not alter the company's obligations to its shareholders at law, nor the directors' fiduciary duties. They emphasise that it is for the board to own its decisions and be transparent about the company's significant transactions*[5].

We consider the shift to be relevant primarily as it supports the arguments *against* any reform to the current Listing Rule 11.1. In this regard, we also note ASX's commentary in Guidance Note 12 which highlights the adverse consequences of the imposition by ASX of a requirement that a commercial transaction, otherwise within the authority of the directors, must be submitted to shareholders.

The shift also, however, represents an example of existing settings being rebalanced by a peer jurisdiction as part of an effort to maintain the competitiveness of a public market.

We acknowledge that the reform relates to significant transactions rather than share issues for a regulated takeover or merger, and that there are important differences between the UK's settings for share issues and Australia's. These include the statutory pre-emption rights afforded to shareholders of UK incorporated entities (that will apply on any issue of shares for cash consideration unless shareholders have approved their disapplication) and their translation to the FCA Listing Rules, and the requirement for shareholder authorisation to allot shares (with market practice being to seek up to ~33% of existing share capital for such purposes).

That said, it is a relevant move in a comparable jurisdiction which highlights other means of tailored investor protection without the need to impose a one-size-fits-all rule change that has the potential to negatively impact the public market.

**If the limit is reduced, should this be to 75%, 50%, 25% or another amount?**

If, on balance, ASX considers it appropriate to reduce the current threshold, the AICD believes a 50% limit would be a more proportionate setting.

A reduction from 100% to 50% would broaden the range of transactions requiring shareholder approval beyond reverse takeovers, but would confine this to situations involving genuinely higher dilution risk. This

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[3] See: 'FCA overhauls listing rules to boost growth and innovation on UK stock markets' at https://www.fca.org.uk/news/press-releases/fca-overhauls-listing-rules-boost-growth-and-innovation-uk-stock-markets?utm_source=chatgpt.com and 'UK Listing Review' at https://assets.publishing.service.gov.uk/media/603e9f7ee90e077dd9e34807/UK_Listing_Review_3_March.pdf

[4] See: 'Financial Conduct Authority Policy Statement: Primary Markets Effectiveness Review: Feedback to CP23/31 and final UK Listing Rules' at https://www.fca.org.uk/publication/policy/ps24-6.pdf. See also speech by Sarah Pritchard, executive director of markets and international, delivered at the Capital Markets Industry Taskforce conference in September 2024 at https://www.fca.org.uk/news/speeches/fca-new-listing-rules-and-whats-come?utm_source=chatgpt.com

[5] See: 'Financial Conduct Authority Policy Statement: Primary Markets Effectiveness Review: Feedback to CP23/31 and final UK Listing Rules at' https://www.fca.org.uk/publication/policy/ps24-6.pdf

approach would minimise broader unintended consequences and help preserve the competitiveness of listed entities.

**Should the current limit (the reverse takeover limit) be kept for entities outside the S&P/ASX 300 and with no more than $300 million market capitalisation (the same group of entities as for Listing Rule 7.1A)?**

As outlined above, we suggest that ASX consider applying any change in the limit that it considers warranted to a more limited group of listed entities, such as the S&P/ASX 100 or 200, in order to mitigate against the risk of broader adverse consequences on the market and avoid the potential for outsized impacts on smaller entities.

We agree that the current limit should be retained for entities outside any cohort to which a new limit applies.

**What do you think may be the direct and indirect costs of the introduction of a lower limit on issues under exceptions 6 and 7? Would these costs be outweighed by the potential benefits? Are there any other significant unintended consequences or other risks that this change raises that have not been considered in this consultation paper? If so, are there ways that these risks may be satisfactorily addressed while still proceeding with the proposed change?**

While direct costs may include additional costs associated with a general meeting and potentially greater advisory and transaction structuring expenses, indirect costs are likely to be more material, as outlined above in the context of potential public market impacts.

For example, it may make listed entities less competitive in M&A transactions, cause increased complexity and slower capital deployment for listed bidders, tilt the playing field further toward private capital, and ultimately discourage companies from pursuing an ASX listing. Although these impacts are difficult to quantify, they should weigh heavily in assessing whether change is justified. We note the detailed cost benefit analysis undertaken by the FCA in relation to the FCA Listing Rule reforms[6].

**Do you think that exceptions 6 and 7 should be strictly limited to issues under takeovers and mergers conducted under Australian law, with no waivers provided to extend them to takeovers and mergers conducted under the laws of foreign jurisdictions?**

In our view, ASX's policy position that exceptions 6 and 7 in Listing Rule 7.2 should not only apply to takeovers and mergers by scheme of arrangement under the Corporations Act but may be extended by waiver to similar processes under the laws of foreign jurisdictions makes sense.

As ASX recognises, ASX listed entities operate in a global market. Provided the relevant takeover or merger is subject to an acceptable regulatory regime equivalent to the Corporations Act, we do not see a reason for strictly limiting the exceptions to takeovers and mergers conducted under Australian law by removing the option for a waiver.

We consider that the new requirement announced by ASX in July 2025 that all listed entities granted a waiver must disclose the nature and effect of the waiver and the entity's reasons for seeking the waiver, within one business day of receiving it (except when the waiver relates to a confidential and incomplete proposal or negotiation) will improve transparency while retaining flexibility.

[6] See 'Primary Markets Effectiveness Review: Feedback to CP23/10 and detailed proposals for listing rules reforms' at https://www.fca.org.uk/publication/consultation/cp23-31.pdf

**Should security holder approval be required for a change in admission category from ASX Listing to ASX Foreign Exempt Listing?**

We are broadly supportive of ASX’s preliminary position in relation to the potential new requirement that a dual listed company should seek shareholder approval if it wishes to change its admission status to be an ASX Foreign Exempt Listing.

We acknowledge that a change in a dual listed entity’s admission category to ASX Foreign Exempt Listing can have a significant impact on the voting and other rights of the entity’s shareholders.

We also note that that the requirements to be admitted as an ASX Foreign Exempt Listing are demanding, and ASX has indicated that this type of change is unusual, with only three changes of admission category to ASX Foreign Exempt Listing over the past three years.

Accordingly, we believe that ASX’s preliminary position strikes a reasonable balance between market flexibility and investor protection.

**Should security holder approval be required for a voluntary delisting by a dual listed entity on ASX? If security holder approval is required, should this apply only to a dual listed entity that was first listed on ASX, but not to an entity that was listed on a foreign exchange before listing on ASX?**

We are broadly supportive of ASX’s preliminary position in relation to the potential new requirement that a dual listed company should seek shareholder approval to delist from ASX even if it will continue to maintain its foreign listing.

We agree that this requirement should be limited to dual listed companies that were first listed on ASX before taking an additional listing on another exchange, for the reasons outlined by ASX in its consultation paper.

As above, we believe that ASX’s preliminary position strikes a reasonable balance between market flexibility and investor protection.