OWNERSHIP MATTERS

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The Manager
Financial Markets Unit
Corporations and Capital Markets Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: CFR-Review-FMI@treasury.gov.au

RE: Consultation Paper - Council of Financial Regulators: Review of Financial Market Infrastructure Regulation

To Whom It May Concern,

Thank you for the opportunity to comment on the Council of Financial Regulators consultation paper on the review of financial market infrastructure regulation. Ownership Matters (OM) is an Australian owned governance advisory firm serving institutional investors that was formed in 2011. The principals of OM have extensive experience in assessing the protections offered by the ASX Listing Rules to shareholders in ASX-listed companies and providing advice to institutional investors. This submission reflects the views of OM and not those of our clients.

We wish to comment on only one aspect of the consultation paper, section 6.3, which deals with the responsibility for making listing rules. The consultation paper asks for views on the Council's preferred proposal of giving the Australian Securities & Investments Commission (ASIC) the explicit power with Ministerial approval to direct licensed market operators such as ASX to make a listing rule with specified content.

OM strongly supports this change for the following reasons:

- It provides additional protection for investors in Australian listed entities, especially in an environment where increased competition for listings from alternative market operators to the ASX may create an incentive for market operators to lower listing rule protections in order to attract additional listings (similar to the drive for US states to adopt management friendly corporate laws to attract company registrations in a similar fashion to Delaware).
- It gives regulators formal power to impose listing rules to deal with changing circumstances or listed entity behaviour should the ASX or other market operators be slow to move to address changes or shareholder demands. As an example where the ASX Listing Rules have lagged market practice, OM notes that disclosure requirements around capital raisings have not been updated to reflect the prevalence of non-entitlement offer raisings. Listed entities are rightly still required to disclose the identity of advisors and fees paid to advisors when raising capital in a manner that is equitable to all securityholders through an entitlement offer but not where raisings are conducted on a non-pro rata basis through placements to individuals selected by the board and its advisors.

Should the Council adopt this position, then we believe it should also recommend that ASIC institute a regular, open and transparent process whereby investors as well as issuers can suggest areas for improvement in the Listing Rules. Any submissions made through such a process should be a matter of public record.

OM, while endorsing the proposed change, would encourage the Council to again consider an alternative noted in the consultation paper of transferring "responsibility for setting, monitoring and enforcing all listing rules to ASIC, or another independent third party". This is consistent with international practice (In the UK for example) and with the 2010 transfer of supervision of market participants to ASIC and would be consistent with the stated reasons for the Council's proposal to empower ASIC to make listing rules. It would also remove the current concern with enforcement of continuous disclosure rules, where primary responsibility rests with ASX (under Chapter 3 of the Listing Rules) but where ASIC has enforcement responsibilities under the Corporations Act. Recent media reports suggest the dual role of ASX and ASIC in this area has made investigation and prosecution of potential breaches of continuous disclosure obligations difficult.[1]

More broadly the change is also consistent with the ASX's own view that it is more appropriate for certain areas of its Listing Rules to be overseen by ASIC rather than ASX and in some cases for Listing Rules to have statutory backing. In its submission to the Productivity Commission ASX suggested that Listing Rules dealing with related party and executive pay issues be consolidated in the Corporations Act in part for consistency and to make enforcement of breaches easier (as the ASX cannot pursue individuals for breaches of its rules).[2]

It is not clear if moving responsibility for supervision of listed entities to ASIC would improve supervision outcomes. There are several examples of apparently undetected breaches of the ASX Listing Rules, for example ASX Listing Rule 12.7 (which requires listed entities in the S&P/ASX 300 to establish an audit committee that is entirely non-executive with a majority of independent directors including the chairperson) even among Top 100 listed entities. There also appears to be differential interpretation of ASX Listing Rules among listed entities with no guidance as to the correct interpretation including in regards to rules playing a critical role in protecting non-related party shareholders. Some entities for example have adopted a strict 'black letter' approach to rules such as Listing Rule 10.11 (which deals with the issue of equity to related parties) with others adopting a more liberal interpretation allowing for the issue of equity securities to directors without prior shareholder approval.

We would be happy to discuss any of the above matters in more detail and our contact details are provided below. Thank you once again for the opportunity of commenting on the consultation paper,

Yours sincerely,

Martin Lawrence & Dean Paatsch

Ownership Matters Pty Ltd

[1] *The Australian Financial Review*, ASIC points finger at ASX's records, Hannah Low, 29 November 2011, p.13.

[2] See http://www.pc.gov.au/__data/assets/pdf_file/0003/89544/sub064.pdf, pages 3 and 4.