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Dear Ms Raman

**Consultation Paper 222 (Reducing red tape: Proposed amendments to the market integrity rules)**

This is a submission by the Corporations Committee of the Business Law Section of the Law Council of Australia ("**Committee**"), responding to ASIC's Consultation Paper 222 entitled "Reducing red tape: Proposed amendments to the market integrity rules" ("**CP 222**") relating to the potential repealing or refinement of certain market integrity rules ("**Market Integrity Rules**")<sup>1</sup> to reduce the compliance burden upon-market participants ("**Proposed Reforms**").

The Committee welcomes the opportunity to comment on the Proposed Reforms and is grateful for the amount of time granted in which to respond.

Please note that this submission is limited to section D of CP 222 which concerns Market Integrity Rules which prohibit ASX, Chi-X and APX market participants from performing certain transactions during takeovers, schemes of arrangement ("**schemes**") and buy-backs.

**1 Executive summary**

1.1 We support Option 2, as set out in CP 222, as the Committee considers that the relevant provisions of the *Corporations Act 2001* (Cth) ("**Corporations Act**") provide adequate protection to investors and the market more generally and therefore, absent appropriate policy reasons:

- (a) the additional trading restrictions imposed by Parts 6.4 and 6.5 of the Market Integrity Rules unnecessarily restrict trading in securities, and thereby adversely impact on the efficiency of the market for those securities; and
- (b) Part 6.6 of the Market Integrity Rules is duplicative with the provisions of the Corporations Act.

1.2 As noted in CP 222, Option 2 has the additional benefit of reducing the compliance burden on-market participants.

<sup>1</sup> In this submission "Market Integrity Rules" refers to each of the ASIC Market Integrity Rules (ASX Market) 2010 ("**ASIC Market Integrity Rules (ASX)**"), ASIC Market Integrity Rules (Chi-X Market) 2011 ("**ASIC Market Integrity Rules (Chi-X)**") and ASIC Market Integrity Rules (APX Market) 2013 ("**ASIC Market Integrity Rules (APX)**").

- 1.3 If ASIC does not propose to adopt Option 2, our preference would be to adopt Option 1 as set out in CP 222.

## **2 General submissions**

- 2.1 As a general principle, the Committee considers that:

- (a) securities listed on a securities exchange should be freely tradeable unless there is an appropriate policy reason for restricting trading; and
- (b) as set out below, the Corporations Act currently adequately restricts trading in certain circumstances where it is appropriate for policy reasons to do so.

### **Takeovers**

- 2.2 One of the purposes of Chapter 6 of the Corporations Act is to ensure that, as far as practicable, target shareholders have a reasonable and equal opportunity to participate in any benefits accruing to the target shareholders through any proposal under which a person would acquire a substantial interest in the company, body or scheme.<sup>2</sup>
- 2.3 To achieve that purpose, Chapter 6 contains a number of provisions which prohibit acquisitions of securities by a bidder or an associate which are not “on-market”. These include section 623 of the Corporations Act which prohibits a bidder or its associates giving, offering to give or agreeing to give during the offer period of a takeover bid a benefit which is likely to induce the person or its associates to accept an offer under the bid or dispose of securities in the bid class, where the benefit is not offered to all holders of securities in the bid class under the bid – however, this prohibition does not apply to an acquisition or securities through an on-market transaction.
- 2.4 Section 9 of the Corporations Act defines an “on-market” transaction as a transaction that is effected on a prescribed financial market and is an on-market transaction as defined in the rules governing the operation of the market, or if those rules do not define on-market transactions, effected in the ordinary course of trading. The definition of “on-market” in the Market Integrity Rules excludes crossings outside of trading hours and special crossings.
- 2.5 However, other than the 20% rule<sup>3</sup> there are no restrictions in the Corporations Act which limit the ability of a non-bidder to acquire securities other than where it is an associate of the bidder. Therefore, Parts 6.4 and 6.5 of the Market Integrity Rules are more restrictive than the relevant provisions in the Corporations Act because they prohibit all market participants from conducting certain trades during a takeover.
- 2.6 The Committee does not consider that there is an appropriate policy reason for the additional restrictions in the Market Integrity Rules and therefore supports that they be repealed, as proposed in Option 2.

### **Schemes**

- 2.7 In relation to schemes, the Corporations Act does not impose any restrictions on a bidder or their associates acquiring securities of the target. Therefore, Parts 6.4 and 6.5 of the Market Integrity Rules are more restrictive than the relevant provisions in the Corporations Act because they prohibit all market participants from conducting certain trades during the scheme process.

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<sup>2</sup> Corporations Act, section 602(c).

<sup>3</sup> See Corporations Act, section 606(1).

- 2.8 In practice, there is little incentive for a bidder to acquire the securities of the target before implementation of a scheme as in order for a scheme to be binding on a particular class of members, a resolution in favour of the scheme must be:
- (a) passed by a majority in number of the members in that class present and voting at the class meeting, either in person or by proxy; and
  - (b) passed by at least 75% of the votes cast on the resolution.<sup>4</sup>
- 2.9 The customary analysis is that shares held by the person who will acquire 100% of the scheme company share capital as a result of the scheme and their associates will be treated as a separate class for these purposes.<sup>5</sup>
- 2.10 Accordingly, because the bidder will not vote on the resolution, any acquisition of target securities will increase the ability of other target shareholders to block the resolution.
- 2.11 The Committee does not consider that there is an appropriate policy reason for the additional restrictions in the Market Integrity Rules and therefore supports that they be repealed, as proposed in Option 2.

### ***Buy-backs***

- 2.12 Part 2J.1 of the Corporations Act provides for the ability of a company to buy back its own shares, provided the buy-back does not materially prejudice the company's ability to pay its creditors and the company follows the procedures laid down in Division 2 of Part 2J.1.<sup>6</sup> Those procedures are designed to protect the interests of shareholder by, among other things, seeking to ensure fairness between the company's shareholders.<sup>7</sup>
- 2.13 One of the types of buy-back that may be undertaken is "on-market" buy-back. A buy-back is an "on-market" buy-back if it results from an offer made by a listed company on a prescribed financial market in the ordinary course of trading on that market.<sup>8</sup> This means that the buy-back must be characterised by trading in strict order of price and time priority, no pre-agreements and with indifference as to the identity of counterparties.<sup>9</sup> Therefore, a trade undertaken as a crossing would not be considered to have occurred "in the ordinary course of trading on that market" and accordingly are prohibited under the Corporations Act.
- 2.14 As stated in CP 222, the "on-market" requirement ensures that the benefits of participating in an on-market buy-back are available equally to all shareholders and cannot be specifically directed by the company.
- 2.15 Given the above, the fact that Part 6.6 of the Market Integrity Rules prohibits a market participant from effecting certain types of crossing on behalf of an issuer during the term of a buy-back offer conduct on-market by that issuer is duplicative with the provisions of the Corporations Act and should be repealed, as proposed in Option 2.

## **3 Responses to questions set out in section D of CP 222**

Set out in the Annexure to this submission are the Committee's responses to the specific questions set out in section D of CP 222.

<sup>4</sup> Corporations Act, section 411(4)(a).

<sup>5</sup> Re Hellenic & General Trust Ltd [1975] 3 All ER 382, 386.

<sup>6</sup> Corporations Act, section 257A.

<sup>7</sup> Corporations Act, section 256A(b).

<sup>8</sup> Corporations Act, section 257B(6).

<sup>9</sup> Attorney-General (Vic) v Walsh's Holdings Ltd [1973] VR 137, 144 (Gowans J); ICAL Ltd v County Natwest Securities Australia Ltd & Transfield (Shipbuilding) Pty Ltd (1988) 39 NSWLR 214, 244-245 (Bryson J). See also ASIC Regulatory Guide 110 (Share buy-backs), RG 110.61.

#### **4 Conclusion**

The Committee supports Option 2 for the reasons outlined above. However, if ASIC does not propose to adopt Option 2, our preference would be to adopt Option 1 as set out in CP 222.

#### **5 Further discussion**

The Committee would be pleased to discuss any aspect of this submission. In the first instance, please do not hesitate to contact the Chair of the Committee, Bruce Cowely, by telephone on \_\_\_\_\_ or via email: \_\_\_\_\_

Yours sincerely

John Keeves  
**Chairman, Business Law Section**

**Annexure**  
**Response to questions set out in section D of CP 222**

**D1Q1** *Do you think that Part 6.5 (ASX), (Chi-X) and (APX), in its current form, creates uncertainty about the types of trades that can be executed during takeovers and schemes? If so, please give reasons for your view.*

The Committee does not consider that Part 6.5 of the Market Integrity Rules creates any uncertainty about the types of trades that can be executed during takeovers and schemes.

**D1Q2** *Do you think that Part 6.6 (ASX), (Chi-X) and (APX), in its current form, creates uncertainty about the types of trades that can be executed during buy-backs? If so, please give reasons for your view.*

The Committee does not consider that Part 6.6 of the Market Integrity Rules creates uncertainty about the types of trades that can be executed during buy-backs.

**D1Q3** *In relation to Option 1:*

- (a) *Do you agree that Parts 6.4 and 6.5 (ASX), (Chi-X) and (APX) should be amended so that they only apply to market participants acting on behalf of the bidder or their associate (proposal D1(a)(i))? Please give reasons for your view. Does your answer differ for takeovers and schemes? If so, please provide your views for both takeovers and schemes.*
- (b) *Do you agree that Rule 6.5.1(ASX), (Chi-X) and (APX) and Rule 6.5.2(ASX) should be amended so that they only restrict special crossings in an off-market bid during the offer period rather than the bid period (proposal D1(a)(ii))? Please give reasons for your view. Does your answer differ for takeovers and schemes? If so, please provide your views for both takeovers and schemes.*
- (c) *Do you agree that Part 6.6 (ASX), (Chi-X) and (APX) should be retained in its current form (proposal D1(a)(iii))? Please give reasons for your view.*
- (d) *What do you consider to be the estimated cost savings (itemise your costs where possible (e.g. staff costs, transaction costs, system costs)) or other benefits to market participants and investors from:*
  - (i) *proposal D1(a)(i) (if your answer differs substantially for takeovers and schemes, please give reasons and provide separate estimates for takeovers and schemes); and*
  - (ii) *proposal D1(a)(ii) (if your answer differs substantially for takeovers and schemes, please give reasons and provide separate estimates for takeovers and schemes).*

Please refer to section 2 of our submissions which answer the above questions in relation to (a), (b) and (c).

We are unable to estimate the costs savings of other benefits to market participants and investors.

**D1Q4 In relation to Option 2:**

- (a) Do you agree with the proposal to repeal Part 6.4 (ASX), (Chi-X) and (APX) (proposal D1(b)(i))? Please give reasons for your view. Does your answer differ for takeovers and schemes? If so, please provide your views for both takeovers and schemes.**
- (b) Do you agree with the proposal to repeal Part 6.5 (ASX), (Chi-X) and (APX) (proposal D1(b)(ii))? Please give reasons for your view. Does your answer differ for takeovers and schemes? If so, please provide your views for both takeovers and schemes.**
- (c) Do you agree with the proposal to repeal Part 6.6 (ASX), (Chi-X) and (APX) (proposal D1(b)(iii))? Please give reasons for your view.**
- (d) What do you consider to be the estimated cost savings (itemise your costs where possible (e.g. staff costs, transaction costs, system costs)) or other benefits to market participants and investors from:**
  - (i) proposal D1(b)(i) (if your answer differs substantially for takeovers and schemes, please give reasons and provide separate estimates for takeovers and schemes); and**
  - (ii) proposal D1(b)(ii) (if your answer differs substantially for takeovers and schemes, please give reasons and provide separate estimates for takeovers and schemes).**
  - (iii) proposal D1(b)(iii).**

Please refer to section 2 of our submissions which answer the above questions in relation to (a), (b) and (c).

We are unable to estimate the costs savings of other benefits to market participants and investors.

**D1Q5 Do you have any concerns about retaining Parts 6.4–6.6 (ASX), (Chi-X) and (ASX), as is. Please give reasons for your view.**

Please refer to section 2 of our submissions which sets out our concerns with Parts 6.4, 6.5 and 6.6 of the Market Integrity Rules.

**Q6 Can you suggest any alternative approaches to Options 1 and 2 regarding Parts 6.4–6.6 (ASX), (Chi-X) and (APX). If so, please give a detailed explanation of your preferred approach(s) and reasons for your view.**

The Committee does not propose any alternative approaches to Option 1 and 2.