

## SIGNIFICANT CHANGES TO ACTIVITIES

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To assist listed entities and their advisers to understand how ASX applies Listing Rules 11.1 to 11.3 to transactions that may result in a significant change to the nature or scale of a listed entity's activities</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>The obligation of a listed entity to notify ASX of a proposed significant change to the nature or scale of its activities under Listing Rules 11.1 and 11.1.1</li> <li>ASX's discretions under Listing Rule 11.1.2 to require a proposed significant change to the nature or scale of a listed entity's activities to be approved by security holders and under Listing Rule 11.1.3 to require the entity proposing it to re-comply with ASX's admission and quotation requirements</li> <li>The requirement for the disposal of an entity's main undertaking to be subject to security holder approval under Listing Rule 11.2</li> <li>When ASX will exercise its discretion to suspend the quotation of an entity's securities under Listing Rule 11.3</li> <li>How "back door listings" are regulated under Listing Rules 11.1 to 11.3</li> <li>The provisions that should be included in an agreement effecting a significant change to the nature or scale of a listed entity's activities or a disposal of its main undertaking</li> <li>The requirements for a notice of meeting proposing a resolution of security holders to approve a significant change to the nature or scale of a listed entity's activities or a disposal of its main undertaking</li> <li>The steps involving in re-complying with ASX's admission and quotation requirements</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>Guidance Note 1 <i>Applying for Admission – ASX Listings</i></li> <li>Guidance Note 4 <i>Foreign Entities Listing on ASX</i></li> <li>Guidance Note 8 <i>Continuous Disclosure: Listing Rules 3.1 – 3.1B</i></li> <li>Guidance Note 11 <i>Restricted Securities and Voluntary Escrow</i></li> <li>Guidance Note 16 <i>Trading Halts and Voluntary Suspensions</i></li> <li>Guidance Note 17 <i>Waivers and In-Principle Advice</i></li> <li>Guidance Note 35 <i>Security Holder Resolutions</i></li> </ul>

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**Important notice:** ASX has published this Guidance Note to assist listed entities to understand and comply with their obligations under the Listing Rules. Nothing in this Guidance Note necessarily binds ASX in the application of the Listing Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and listed entities should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person.

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## 1. Introduction

This Guidance Note is published to assist listed entities admitted to the ASX official list as an ASX Listing<sup>1</sup> and their advisers to understand how ASX Limited ("ASX") applies Listing Rules 11.1 to 11.3 to transactions that may result in a significant change to the nature or scale of a listed entity's activities.<sup>2</sup>

Listing Rules 11.1 to 11.3 provide:

- 11.1 If an entity proposes to make a significant change, either directly or indirectly, to the nature or scale of its activities, it must provide full details to ASX as soon as practicable. It must do so in any event before making the change. The following rules apply in relation to the proposed change.*
- 11.1.1 The entity must give ASX information regarding the change and its effect on future potential earnings, and any information that ASX asks for.*
- 11.1.2 If ASX requires, the entity must get the approval of holders of its ordinary securities and must comply with any requirements of ASX in relation to the notice of meeting. The notice of meeting must include a voting exclusion statement.*
- 11.1.3 If ASX requires, the entity must meet the requirements in Chapters 1 and 2 as if the entity were applying for admission to the official list.*
- 11.2 If the significant change involves the entity disposing of its main undertaking, the entity must get the approval of holders of its ordinary securities and must comply with any requirements of ASX in relation to the notice of meeting. The notice of meeting must include a voting exclusion statement. The entity must not enter into an agreement to dispose of its main undertaking unless the agreement is conditional on the entity getting that approval. Rules 11.1.1 and 11.1.3 apply.*
- 11.3 ASX may suspend quotation of the entity's securities until the entity has satisfied the requirements of rules 11.1 or 11.2.*

Listing Rule 11.1 was originally inserted into the Listing Rules primarily to regulate "back door listings", although ASX can and does apply its discretions under Listing Rules 11.1.2 and 11.1.3 in other circumstances that do not involve a back door listing.<sup>3</sup> One of the defining characteristics of a back door listing transaction is a significant

<sup>1</sup> Listing Rules 11.1 to 11.3 do not apply to entities admitted to the official list as an ASX Debt Listing or as an ASX Foreign Exempt Listing (see Listing Rules 1.10 and 1.15.1). Unless otherwise indicated, references in this Guidance Note to a listed entity or entity mean an entity admitted to the ASX official list as an ASX Listing.

<sup>2</sup> In addressing whether a transaction that may result in a significant change to the nature or scale of a listed entity's activities should be subject to security holder approval, this Guidance Note does so solely from the perspective of the Listing Rules. A transaction of this type may require security holder approval under the Corporations Act, the entity's constitution or the general law governing the duties of directors. The board of a listed entity may also determine that it is appropriate, as a matter of good corporate governance, to submit such a transaction to security holders for approval even where there is no Listing Rule or other legal requirement to do so.

<sup>3</sup> See '3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3' on page 20.

change to the nature and/or scale of the activities of the listed entity facilitating the transaction. It is the proposal to make such a change which attracts the notification requirements in Listing Rule 11.1 and 11.1.1, and which enlivens ASX discretions under Listing Rule 11.1.2 and 11.1.3. Listing Rule 11.1.2 empowers ASX to require the transaction to be approved by the entity's security holders before it is consummated to ensure their interests are safeguarded. Listing Rule 11.1.3 empowers ASX to require the entity to meet ASX's requirements for admission and quotation as if the entity were applying for admission to the official list for the first time<sup>4</sup> so that the important controls and protections built into those requirements are not circumvented.

Where an entity is required under Listing Rule 11.1.3 to meet ASX's requirements for admission and quotation, the process it undergoes is generally referred to as a "re-compliance listing". The application the entity lodges for admission to the official list as part of this process is referred to as an "application for re-admission" and the point at which the entity is reinstated to quotation having satisfied ASX's admission and quotation requirements is referred to as "re-admission".

Listing Rule 11.2 addresses one particular type of transaction involving a significant change to the nature and/or scale of a listed entity's activities – a disposal of its main undertaking – where, for policy reasons, the Listing Rules specifically require security holder approval.

### 1.1 Back door listings

The term "back door listing" refers to a process where someone with an undertaking<sup>5</sup> that they want to operate through a listed vehicle achieves this by injecting the undertaking into an existing listed entity rather than the more conventional process of applying themselves to be admitted to the official list under Listing Rule 1.1 (a "front door listing").

A back door listing can take a number of forms. In Australia, it usually involves an existing listed entity purchasing the undertaking in question in return for either:

- an issue of securities<sup>6</sup> to the vendor(s) of the undertaking (perhaps with a cash payment<sup>7</sup> and/or other consideration as well); or

<sup>4</sup> For convenience, referred to in this Guidance Note as ASX requiring "re-compliance" with its admission and quotation requirements.

<sup>5</sup> Listing Rule 19.12 defines the expression "undertaking" to include both assets and businesses.

<sup>6</sup> ASX will typically apply escrow requirements to these securities unless the entity is one that, under Listing Rule 9.2, is not required to comply with the restrictions in Appendix 9B (see Chapter 9 of the Listing Rules and '8.7. Escrow requirements for restricted securities' on page 46).

<sup>7</sup> Note, however, that an entity which has in the 2 years prior to the date of its application for re-admission to the official list acquired, or in connection with its re-admission is proposing to acquire, a "classified asset" from a related party or a promoter, or an associate of a related party or a promoter, of the entity, will need to satisfy Listing Rule 1.1 condition 11. That condition explicitly requires the entity to have issued restricted securities as the consideration for the acquisition, and therefore prohibits cash payments as part of the consideration, unless the consideration was reimbursement of expenditure incurred by the related party, promoter or associate in developing the classified asset or, under Listing Rule 9.2, the entity is not required to apply the restrictions in Appendix 9B. For these purposes, a "classified asset" is defined in listing rule 19.12 as:

- (a) an interest in a mining tenement or petroleum tenement that is substantially explorative or unproven;
- (b) an interest in intangible property that is substantially speculative or unproven, or has not been profitably exploited for at least 3 years, and which entitles the entity to develop, manufacture, market or distribute the property;
- (c) an interest in an asset which, in ASX's opinion, cannot readily be valued; or
- (d) an interest in an entity the substantial proportion of whose assets (held directly, or through a controlled entity) is property of the type referred to in paragraphs (a), (b) or (c) above.

- a payment of cash<sup>8</sup> to the vendor(s) of the undertaking with the cash raised through an offer of securities by the listed entity.<sup>9</sup> In this case, the vendor(s) or their associates will sometimes (but not always) participate in the offering so that they receive an equity interest in the listed entity.<sup>10</sup>

Occasionally, a back door listing may be effected via a scheme of arrangement under which a listed entity merges or amalgamates with a non-ASX listed entity, with the scheme providing for an issue of securities by the listed entity to the owner(s) of the non-ASX listed entity.<sup>11</sup>

As mentioned previously, one of the defining characteristics of a back door listing transaction is that it involves a significant change to the nature and/or scale of the listed entity facilitating the transaction.

A back door listing is typically undertaken with a listed entity which has comparatively small scale operations relative to the size of the undertaking being back door listed. Sometimes this situation may have come about because the entity has dissipated assets through ongoing losses or unsuccessful exploration activities. Sometimes it may be because the entity has run into financial difficulties and has undergone an administration or receivership or has had to downsize the scale of its operations to reduce debt. Sometimes it may simply be that the entity started off with relatively small scale operations and has not achieved the growth that it had hoped for. Consequently, being party to a back door listing will usually involve a significant change to the scale of a listed entity's activities and any accompanying issue of securities will often be significantly dilutive to existing security holders. Where this is the case, ASX will generally impose a requirement under Listing Rule 11.1.2 that the back door listing transaction is approved by security holders.

Sometimes (but not always), a back door listing will involve a significant change to the nature of the listed entity's activities and/or result in a significant change to the make-up of the listed entity's board of directors, with representatives of the vendor(s) being appointed to the board. Again, where this is the case, ASX will generally impose a requirement under Listing Rule 11.1.2 that the back door listing transaction is approved by security holders.<sup>12</sup>

ASX will invariably exercise its discretion under Listing Rule 11.1.3 to require a listed entity that facilitates a back door listing to re-comply with ASX's admission and quotation requirements. This is on the principle that someone seeking to have an undertaking listed should not be able to achieve by the back door what they cannot achieve by the front door.

ASX does not treat a transaction between two ASX listed entities, such as:

- a takeover offer by one listed entity for another listed entity under Chapter 6 of the Corporations Act 2001 (Cth);<sup>13</sup>
- a scheme of arrangement involving a merger or amalgamation of two listed entities or an acquisition by one listed entity of another listed entity; or
- a sale of assets from one listed entity to another listed entity,

as a back door listing for these purposes. These transactions may still need to be notified to ASX under Listing Rule 11.1 if they involve a significant change to the nature or scale of the activities of either listed entity. Further,

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<sup>8</sup> See note 7 above.

<sup>9</sup> The offer of securities may take place before, at the same time as, or after, the purchase transaction.

<sup>10</sup> Again, ASX will typically apply escrow requirements to these securities unless the entity is one that, under Listing Rule 9.2, is not required to comply with the restrictions in Appendix 9B (see note 6 above).

<sup>11</sup> In other jurisdictions that have more accommodating merger statutes than Australia, a back door listing will often involve a "reverse merger" between a listed entity and the entity seeking the back door listing.

<sup>12</sup> A back door listing that does result in a significant change to the nature of a listed entity's main undertaking raises similar sorts of policy considerations to a disposal by an entity of its main undertaking and, by analogy with Listing Rule 11.2, therefore warrants security holder approval.

<sup>13</sup> Referred to in this Guidance Note as the 'Corporations Act'. Unless otherwise indicated, references in this Guidance Note to sections of an Act are to sections of the Corporations Act.

while they are not regarded as a back door listing and therefore will not attract the application of ASX's discretions under Listing Rules 11.1.2 or 11.1.3 on that score, they may still do so if they fit within one of the other cases mentioned below where ASX will generally exercise those discretions.<sup>14</sup>

### 1.2 The significance of an entity's main undertaking

The concept of a listed entity's main undertaking is an important one under the Listing Rules. Listing Rule 11.2 requires security holder approval to a disposal by a listed entity of its main undertaking. In addition, whether a proposed transaction will lead to a change in the nature of a listed entity's main undertaking is an important consideration in ASX's decision as to whether it ought to exercise its discretion under Listing Rule 11.1.2 to require security holder approval.<sup>15</sup>

This reflects the fact that security holders in an entity which has a clearly identifiable main undertaking will often have made their decision to invest in the entity having regard to the nature of its main undertaking and their assessment of its value and its contribution to the overall composition and diversity of their investment portfolio. A proposed transaction that will lead to a significant change in the nature of its main undertaking is therefore a highly material one that, at the very least, ought to be notified to security holders as soon as practicable. In some cases, mentioned below, it may also be appropriate for the transaction to be subject to the approval of security holders.

### 1.3 The meaning of "main undertaking"

While Listing Rule 19.12 defines the expression "undertaking" to include both assets and businesses, the addition of the descriptor "main" carries with it a particular connotation. ASX considers the term "main undertaking" means something different to, and is to be distinguished from, "main asset" or "main investment" and is essentially synonymous with "main business activity".<sup>16</sup>

In many cases, identifying an entity's main undertaking will be relatively straightforward. If an entity only conducts one business, as many smaller entities do, then plainly that business will be its main undertaking. Similarly, if an entity conducts a number of businesses but one business so obviously and significantly outweighs all of the others that it is clearly identifiable as its main business, then that business will be its main undertaking.

In the case of a conglomerate entity that conducts a number of different businesses, it is quite possible that no one of its businesses will be separately identifiable as its main business. In that case, the main undertaking of the entity will effectively be conducting conglomerate businesses.

ASX generally applies a 50% "rule of thumb" in assessing whether a business constitutes the main undertaking of a listed entity. If a business accounts for less than 50% of a listed entity's:

- consolidated total assets;
- consolidated annual revenue or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure;
- consolidated EBITDA; and
- consolidated annual profit before tax,

<sup>14</sup> That is, cases (2), (3) or (4) mentioned under '3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3' on page 20.

<sup>15</sup> As mentioned above, in some cases, a back door listing will involve a significant change to the nature of a listed entity's main undertaking and, where it does, ASX will typically impose a requirement under Listing Rule 11.1.2 that the back door listing transaction is approved by security holders. However, ASX will also exercise its discretion to require security holder approval to a back door listing that involves a significant change to the scale of a listed entity's activities, even if it does not involve a significant change to the nature of the entity's main undertaking.

<sup>16</sup> This position is consistent with judicial authority: see *ASC v Cracow Resources Ltd*, unreported, NSW Supreme Court, Windeyer J, 12 August 1993 BC9305041.

then ASX considers that to be reasonably compelling evidence that the business is not the entity's main undertaking. If a business accounts for more than 50% of all four of the above measures, then ASX considers that to be reasonably compelling evidence that the business is its main undertaking. If a business accounts for more than 50% of one or more of these measures but not all of them, then ASX will examine the situation more closely to determine whether or not the business should be regarded as the entity's main undertaking.

In applying this rule of thumb, it is important to ensure that the rule is being applied to the main undertaking itself rather than to a component part of the main undertaking. The fact that the component parts of an entity's main undertaking may be conducted by different child entities or divisions or in different jurisdictions, or may be treated as different segments for the purposes of preparing its accounts,<sup>17</sup> does not make them different undertakings for these purposes. An entity can dispose of part of its main undertaking (for example, by disposing of a particular child entity or division or its business activities in a particular jurisdiction), including a part that accounts for more than 50% of all four of the above measures, without that constituting a disposal of its main undertaking. This point is elaborated further in the discussion below of how ASX treats partial disposals of an entity's main undertaking under Listing Rule 11.2.

## 2. Listing Rules 11.1 and 11.1.1: notification of significant transactions

### 2.1 The policy objectives of the notification requirement

The notification requirements in the introductory words to Listing Rule 11.1 and in Listing Rule 11.1.1 seek to ensure that ASX is made aware of, and given sufficient information about, a proposed transaction that may result in a significant change to the nature or scale of a listed entity's activities so that it can give proper consideration to:

- whether the transaction involves a back door listing in respect of which it should exercise its discretion under Listing Rules 11.1.2 and 11.1.3 to require security holder approval and re-compliance with ASX's admission and quotation requirements;
- whether the transaction raises other concerns that warrant ASX exercising its discretion under Listing Rules 11.1.2 and/or 11.1.3 in relation to the transaction; and
- in the case of a disposal, whether Listing Rule 11.2 applies to the transaction,

in each case before the transaction is consummated.

### 2.2 The meaning of "activities"

Given the context in which it is used, the reference to "activities" in Listing Rule 11.1 clearly is intended to mean the business activities of a listed entity. Changes to an entity's non-business activities (such as its community activities) are not relevant for the purposes of Listing Rule 11.1.

A listed entity's activities need to be looked at in their totality to determine whether a proposed transaction will involve a significant change to the nature or scale of those activities. For example, where a listed entity conducts business operations through child entities, the entire group needs to be looked at on a consolidated basis to make this determination.

### 2.3 What constitutes a significant change to the nature of an entity's activities?

One of the two grounds on which a proposed transaction has to be notified to ASX under Listing Rule 11.1 is if it will involve a significant change to the *nature* of an entity's activities. ASX considers this to mean a major change in the character of an entity's business activities. In the case of an entity that has a clearly identifiable main undertaking, this requires there to be a major change in the character of its main undertaking. In the case of a conglomerate entity that conducts a number of different businesses, no one of which is separately identifiable as

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<sup>17</sup> It depends on the basis for segmentation. Sometimes, for example, segmentation may occur by reference to different regions or different divisions without regard to the nature of the business activities in question.

its main undertaking, this requires there to be a major change to the conglomerate character of its business activities.

To illustrate, at one end of the spectrum, ASX would regard the following examples as a significant change to the nature of an entity's activities:

- an entity whose main business activity is mining exploration deciding to switch its main business activity to an information technology business (or vice versa);
- an entity whose main business activity is exploring for minerals deciding to switch its main business activity to exploring for oil and gas (or vice versa);<sup>18</sup>
- an entity whose main business activity is trading in financial products deciding to switch its main business activity to making strategic long term investments in a particular sector;
- an entity that has been admitted as an investment entity<sup>19</sup> under Listing Rule 1.3.4:
  - changing its main business activity to something other than investing, directly or through a child entity, in listed or unlisted securities or derivatives; or
  - changing its objectives to include exercising control over or managing any entity, or the business of any entity, in which it invests;
- a conglomerate entity that conducts a number of different businesses deciding to dispose of all of those businesses and to acquire a new business (its main undertaking changes from conducting conglomerate businesses to conducting the new business).

At the other end of the spectrum, ASX would not regard the following examples as a significant change to the nature of an entity's activities:<sup>20</sup>

- a manufacturing entity whose main business activity is manufacturing one type of consumer good reconfiguring its manufacturing facility to manufacture a different type of consumer good (its main undertaking is, and remains, manufacturing consumer goods);
- a mining exploration entity whose main business activity is exploring for one type of mineral on particular tenements deciding to explore for a different type of mineral on the same tenements (its main undertaking is, and remains, exploring for minerals on those tenements);
- a mining exploration entity that is successful in its exploration endeavours consequently becoming a mining producing entity (this is a natural extension of, rather than a major change to, its main business activity);
- an entity whose main business activity is trading in financial products and whose investment portfolio is invested wholly in equity products making a trading decision to sell all of those investments and to invest the proceeds in fixed interest products (its main undertaking is, and remains, trading in financial products);
- a conglomerate entity that conducts a number of different businesses deciding to dispose of some of those businesses or to acquire new businesses (its main undertaking is, and remains, conducting conglomerate businesses).

<sup>18</sup> ASX considers that exploring for minerals is a fundamentally different business activity to exploring for oil and gas.

<sup>19</sup> Listing Rule 19.12 defines an "investment entity" as one whose activities, or the principal part of its activities, consist of investing (directly or through a child entity) in listed or unlisted securities or derivatives and whose objectives do not include exercising control over or managing any entity, or the business of any entity, in which it invests.

<sup>20</sup> Depending on the circumstances, some of these examples could involve a significant change to the scale (as distinct from the nature) of the entity's activities and therefore may need to be notified to ASX on that score under Listing Rule 11.1.



In between these two ends of the spectrum, ASX will examine the situation carefully and in its totality to determine whether what is proposed is a significant change to the nature of an entity's activities.<sup>21</sup>

### 2.4 What constitutes a significant change to the scale of an entity's activities?

The second of the two grounds on which a proposed transaction has to be notified to ASX under Listing Rule 11.1 is if it will involve a significant change to the *scale* of an entity's activities. ASX considers this to mean a substantial or sizeable change (upwards or downwards) to the size of an entity's business operations.

ASX notes that under former Australian accounting standards an amount which is equal to or greater than 10% of the applicable base amount has generally been presumed to be material unless there is evidence or convincing argument to the contrary.<sup>22</sup> The word "significant" has a different connotation to the word "material" and imports something substantially larger. This would suggest that for something to be significant it would need to involve a change of substantially more than 10%.

For clarity and ease of application by listed entities, ASX has adopted 25% as an appropriate benchmark for determining whether or not a transaction involves a significant change to the scale of an entity's activities that requires notification to ASX under Listing Rule 11.1. This is also helpful to ASX in ensuring that transactions of a certain size that might also lead to a significant change in the nature of an entity's activities are notified to ASX under Listing Rule 11.1.

This 25% benchmark is solely for the purposes of giving clear and easily applied guidance to listed entities as to what transactions ought to be notified to ASX under Listing Rule 11.1. The fact that a transaction may result in a change of scale of that magnitude does not mean that ASX regards the transaction as one that would warrant the exercise of its discretion to require security holder approval under Listing Rule 11.1.2 or to require re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3.

### 2.5 Guidelines for notification of transactions

Applying the guidance above, ASX considers that the following transactions involve a significant change to the nature or scale of an entity's activities and therefore ought to be notified to ASX under Listing Rule 11.1:

- an entity is proposing to embark on a transaction,<sup>23</sup> or a series of transactions,<sup>24</sup> that will result in a change to the nature of its main undertaking;
- an entity is proposing to dispose of, or to embark on a series of disposals that together will result in a disposal of, its main undertaking;
- an entity is proposing:
  - to acquire a business and the acquisition is likely to result in an increase of 25% or more in; or
  - to dispose of or abandon an existing business, if the business in question accounts for 25% or more<sup>25</sup> of,

any of the following measures:

<sup>21</sup> In making this determination, ASX may have regard to whether the transaction is likely to lead to a change in the industry or sub-industry group into which the entity has been classified under Standard & Poor's Global Industry Classification Standard.

<sup>22</sup> See paragraph 15 of Accounting Standard AASB 1031 *Materiality* (July 2004). This Standard was effectively withdrawn on 1 January 2014 as being "unnecessary local guidance on matters covered by IFRSs", although the Australian Accounting Standards Board did expressly note that "it would not expect the withdrawal to change practice regarding the application of materiality in financial reporting" (see Interim Accounting Standard AASB 1031 *Materiality* (December 2013)).

<sup>23</sup> This applies whether the transaction involves an acquisition or a disposal.

<sup>24</sup> This applies whether the series of transactions involve acquisitions, disposals or a mixture of acquisitions and disposals and regardless of the size of each individual transaction in the series.

<sup>25</sup> An entity should generally use its most recent published accounts as the reference point for these particular measures to determine whether any of the specified 25% thresholds will be exceeded.

- consolidated total assets;
- consolidated total equity interests;
- consolidated annual revenue or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure;
- consolidated EBITDA; or
- consolidated annual profit before tax.

These notification guidelines apply regardless of:

- the level at which the transaction is proposed to take place (that is, whether the transaction involves the listed entity itself or a child entity);
- the form the transaction is proposed to take (for example, whether it involves a direct acquisition or disposal of the business assets concerned or the acquisition or disposal of ownership interests in an entity that directly or indirectly owns the business assets concerned);
- the legal mechanism through which the transaction will be effected (for example, whether it is happening as part of a negotiated sale and purchase, takeover offer, scheme of arrangement or other legal mechanism); and
- the consideration received for the transaction.

### **2.6 Initial discussion with ASX ahead of announcing a transaction under Listing Rule 11.1**

Given the potential complexities involved, ASX strongly recommends that an entity contemplating a transaction that will lead to a significant change to the nature or scale of its activities first discuss<sup>26</sup> the transaction with ASX Listings Compliance before it comes under an obligation to announce the transaction to the market.<sup>27</sup>

ASX Listings Compliance will be able to provide general guidance on the application of Listing Rules 11.1-11.3 and a preliminary view on the likelihood of ASX exercising its discretion under Listing Rules 11.1.2 or 11.1.3 in relation to the transaction or, in the case of a disposal, of ASX taking the view that the transaction requires security holder approval under Listing Rule 11.2.

Where there is a likelihood of ASX exercising its discretion under Listing Rule 11.1.3, ASX Listings Compliance will also be able to provide a preliminary view on:

- the steps involved in re-complying with the Chapters 1 and 2;
- the potential application of escrow conditions<sup>28</sup> and the “20 cent rule”<sup>29</sup> in relation to any securities that are proposed to be issued, or other consideration that is proposed to be paid, as part of the transaction; and

<sup>26</sup> Before having these discussions, it would be helpful for the entity and its advisers to familiarise themselves with this Guidance Note and Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>27</sup> See ‘2.8 When must a notification be given under Listing Rule 11.1?’ on page 13.

<sup>28</sup> Listing Rule 1.1 conditions 10 and 11, Chapter 9 and Appendices 9A, 9B and 9C. See also ‘8.7. Escrow requirements for restricted securities’ on page 46.

<sup>29</sup> Listing Rule 2.1 condition 2. See also ‘8.8 The 20 cent rule’ on page 47.

- the expected timeframe for re-compliance, given its current workloads and the nature and complexity of the transaction.<sup>30</sup>

The need to have an initial discussion with ASX Listings Compliance is particularly important if the transaction is one where there is a likelihood of ASX exercising its discretion under Listing Rule 11.1.3 and it involves any of the following:

- there are concerns that the entity's proposed structure and operations may not be appropriate for a listed entity;<sup>31</sup>
- the entity is proposing to have on issue securities with unusual terms (including, without limitation, any "performance securities"<sup>32</sup>) that could raise issues under Listing Rule 6.1 (the terms that apply to each class of an entity's securities must, in ASX's opinion, be appropriate and equitable);
- the entity is unclear as to how ASX is likely to apply the escrow requirements in Chapter 9 and Appendices 9A, 9B and 9C of the Listing Rules in relation to any "restricted securities";<sup>33</sup>
- the entity is proposing to request any unusual waivers from, or confirmations in respect of, the Listing Rules in connection with the transaction or its re-admission;
- the entity wishes to obtain ASX's approval not to provide with its re-admission application 2 full years of audited accounts for any significant entity or business it is proposing to acquire as part of the transaction or to obtain ASX's opinion on the acceptability of any modified opinion, emphasis of matter or other matter paragraph that those accounts might contain;<sup>34</sup>
- there are concerns that a current or proposed director, CEO or CFO of the entity may not meet ASX's good fame and character requirements;<sup>35</sup>
- there are circumstances present that could lead to ASX exercising its discretion not to re-admit an entity to the official list;<sup>36</sup> or
- the entity is not in a position to include in its announcement about the transaction all of the information referred to in Annexure A.<sup>37</sup>

The entity should provide to ASX Listings Compliance all material information in its possession relevant to the matter being discussed so that the discussions are informed and meaningful.

As a practical matter, an entity that chooses to have an initial discussion with ASX ahead of announcing a transaction under Listing Rule 11.1 and reflects that discussion in its announcement is less likely to run into issues with its announcement than one that chooses not to have such a discussion.

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<sup>30</sup> Where the transaction involves the entity changing its name and seeking to have a new trading code, ASX Listings Compliance will also be able to provide information about available ASX trading codes and arrange the reservation of a suitable code for the entity. On the reservation of trading codes, see Guidance Note 18 *Market Codes and Status Notes*.

<sup>31</sup> See Listing Rule 1.1 condition 1, as discussed in section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>32</sup> See Guidance Note 19 *Performance Securities*.

<sup>33</sup> See section 3.13 of Guidance Note 1 *Applying for Admission – ASX Listings* and '8.7 Escrow requirements for restricted securities' on page 46 below.

<sup>34</sup> See '8.6 Satisfying the profit test or assets test' on page 43 and sections 3.10 and 3.11 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>35</sup> See '8.10 Directors, CEO and CFO must be of good fame and character' on page 50 and section 3.21 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>36</sup> See '8.1 The steps involved in re-compliance with ASX's admission and quotation requirements' on page 38 and section 2.9 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>37</sup> See '2.10 Additional steps for transactions requiring re-compliance under Listing Rule 11.1.3' on page 15.

### 2.7 Seeking in-principle advice from ASX

If an entity has concerns or doubts about whether ASX may apply Listing Rule 11.1.2, 11.1.3 or 11.2 to a proposed transaction, in lieu of, or in addition to, discussing this issue with ASX, the entity can also apply for in-principle advice from ASX on the issue.

In this context, the in-principle advice will be a statement in writing expressing ASX's view on the application of Listing Rule 11.1.2, 11.1.3 or 11.2 to the proposed transaction and, if applicable, ASX's preparedness to grant a waiver of the relevant Listing Rule.

By obtaining in-principle advice on these matters before it comes under an obligation to announce the proposed transaction to the market,<sup>38</sup> the entity can have a high degree of confidence<sup>39</sup> about ASX's position on these matters and reflect that in the contractual documentation for, and in any announcement about, the proposed transaction.

There is no prescribed form for this type of application. The application should take the form of a letter addressed to the entity's home branch and clearly marked "Not for public release".<sup>40</sup> The letter should include detailed information about the proposed transaction, including all of the information mentioned below that ASX would expect to be included in the announcement of the transaction to the market under Listing Rule 11.1.<sup>41</sup> It should also include any submissions that the entity may wish to make on:

- whether or not the transaction involves a significant change to the nature or scale of the entity's activities to which Listing Rule 11.1 applies;
- if so, whether or not ASX should exercise its discretion under Listing Rules 11.1.2 and/or 11.1.3 in relation to the transaction; and
- where relevant, whether or not the transaction involves a disposal of the entity's main undertaking to which Listing Rule 11.2 applies.

ASX does not charge a fixed fee<sup>42</sup> for providing in-principle advice about the application of Listing Rule 11.1.2, 11.1.3 or 11.2 to a proposed transaction.

Where ASX exercises its discretion under Listing Rule 11.1.3 to require re-compliance with ASX's admission and quotation requirements as a consequence of a proposed transaction, that will inevitably raise the issue of the entity's suitability for re-admission to the official list under Listing Rule 1.1 condition 1 and Listing Rule 1.19 if it proceeds with the transaction. If the entity has any concerns in this regard, the entity can apply for (and in practice will be required by ASX to apply for<sup>43</sup>) in-principle advice on the application of Listing Rule 1.1 condition 1 and Listing Rule 1.19 to the proposed transaction.

In this context, the in-principle advice will be a statement in writing from ASX either that:

- (a) based on the facts known at the time, if the entity proceeds with the proposed transaction, ASX is not aware of any reason that would cause the entity not to have a structure and operations suitable for a listed entity for the purposes of Listing Rule 1.1 condition 1 or that would cause ASX to exercise its discretion to refuse re-admission to the official list under Listing Rule 1.19; or

<sup>38</sup> See '2.8 When must a notification be given under Listing Rule 11.1?' on page 13.

<sup>39</sup> Any in-principle advice that ASX provides in this regard will be expressed to be non-binding and based on the facts known at the time. It may be given subject to conditions and will usually be expressed to apply for a limited time only. If the entity omits or misrepresents material facts in its application for in-principle advice, or if other material facts come to light after the in-principle advice is provided, ASX may withdraw or change its in-principle advice.

<sup>40</sup> Listing Rule 15.6.

<sup>41</sup> See '2.9 The form and contents of a notification under Listing Rule 11.1' on page 14.

<sup>42</sup> ASX may charge a time-based fee if the application raises novel or complex issues and the time involved in dealing with the application exceeds, or is likely to exceed, 10 hours: see Listing Rule 16.7 and Schedule 3 of Guidance Note 15A *Schedule of ASX Listing Fees*.

<sup>43</sup> See '2.10 Additional steps for transactions requiring re-compliance under Listing Rule 11.1.3' on page 15.

(b) if ASX is aware of any such reasons, those reasons.

By obtaining favourable in-principle advice under paragraph (a) above before it comes under an obligation to announce the proposed transaction to the market,<sup>44</sup> the entity can have a high degree of confidence<sup>45</sup> about ASX's position on these matters and not face the embarrassment of having to correct or retract an announcement about the proposed transaction should ASX's initial view on these matters be an unfavourable one.

It should be noted that receipt of favourable advice under paragraph (a) above is not a guarantee that the entity will be re-admitted to the official list. The entity must still meet all of the requirements for admission and quotation set out in Chapters 1 and 2 of the Listing Rules. Further, regardless of any view expressed in ASX's in-principle advice, ASX will retain its absolute discretion under Listing Rule 1.19 not to admit the entity to the official list, which it can exercise at any time.<sup>46</sup>

It should also be noted that receipt of favourable advice under paragraph (a) above, by itself, is not to be taken as an indication that the entity will receive any other Listing Rule waiver or confirmation required or contemplated by the proposed transaction. If the entity wants comfort in that regard, it will need to apply for specific in-principle advice on ASX's preparedness to grant the waiver or confirmation in question.

There is a prescribed form for applications for in-principle advice on the application of Listing Rule 1.1 condition 1 and Listing Rule 1.19. An editable version of that form can be downloaded from the ASX website at: [www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm). The completed form should be sent under cover of a letter addressed to the entity's home branch and clearly marked "Not for public release".<sup>47</sup>

ASX charges a fixed fee of \$5,000 (plus GST) for providing in-principle advice on the application of Listing Rule 1.1 condition 1 and Listing Rule 1.19.<sup>48</sup> Payment must be made at the time of lodging the application for the in-principle advice with ASX.<sup>49</sup> ASX will not commence working on the application until the fee has been paid.

Guidance Note 17 *Waivers and In-Principle Advice* has further guidance on how to apply for in-principle advice.

## 2.8 When must a notification be given under Listing Rule 11.1?

Listing Rule 11.1 requires an entity to notify the "full details" of a proposed significant change to the nature or scale of its activities "as soon as practicable" and "in any event before making the change". ASX interprets these requirements as effectively meaning "as soon as reasonably practicable after the entity has determined the details of the proposed transaction and is committed to proceeding with it."

<sup>44</sup> See '2.8 When must a notification be given under Listing Rule 11.1?' on page 13.

<sup>45</sup> Again, any in-principle advice that ASX provides in this regard will be expressed to be non-binding and based on the facts known at the time. It may be given subject to conditions and will usually be expressed to apply for a limited time only. If the entity omits or misrepresents material facts in its application for in-principle advice, or if other material facts come to light after ASX provides its in-principle advice, ASX may withdraw or change its in-principle advice.

<sup>46</sup> Among other reasons, this is because the full range of issues with an entity's application for re-admission to the official list will often not be apparent until the entity lodges its re-admission application with its listing prospectus or PDS.

<sup>47</sup> Listing Rule 15.6.

<sup>48</sup> See Listing Rule 16.7 and Schedule 3 of Guidance Note 15A *Schedule of ASX Listing Fees*.

<sup>49</sup> Payment can be made either by cheque made payable to ASX Operations Pty Ltd or by electronic funds transfer to the following account:

Bank: National Australia Bank  
Account Name: ASX Operations Pty Ltd  
BSB: 082 057  
A/C: 494728375  
Swift Code (Overseas Customers): NATAAU3302S

If payment is made by electronic funds transfer, the entity should email its remittance advice to [ar@asx.com.au](mailto:ar@asx.com.au) or fax it to (612) 9227-0553, describing the payment as "fee for in-principle advice" and including the name of the entity, its home branch (ie Sydney, Melbourne or Perth) and the amount paid.

In the case of unilateral action by the entity (such as a decision to abandon its main undertaking), this will usually happen at the point when the board of directors of the entity formally approves the proposed action and resolves to proceed with it.

In the case of a transaction between the entity and another party or parties (such as a transaction to facilitate a back door listing), this will usually happen at the point when the transaction agreements have been signed with the relevant party or parties.

The obligation of a listed entity to notify ASX of a proposed significant change to the nature or scale of its activities is separate to, but operates in tandem with, its continuous disclosure obligations under Listing Rule 3.1.

A proposal to make a significant change to the nature or scale of a listed entity's activities will usually require notification to ASX under Listing Rule 3.1 as well as under Listing Rule 11.1. In many cases, these disclosure requirements will arise at the same time – that is, once there is a firm proposal that is no longer incomplete or subject to negotiation.<sup>50</sup> For that reason, the announcement an entity makes about a market-sensitive proposal to make a significant change to the nature or scale of its activities under Listing Rule 3.1, and the formal notification it gives to ASX about that proposal under Listing Rule 11.1, will often be one and the same.

It should be noted, however, that information about a proposed transaction may need to be disclosed to ASX at an earlier point under Listing Rule 3.1 than is required under Listing Rule 11.1 if it ceases to be confidential.<sup>51</sup> It may also be required to be disclosed at an earlier point under Listing Rule 3.1B than is required under either Listing Rule 3.1 or 11.1, if ASX considers that there is a need for information about the proposed transaction to be disclosed to prevent or correct a false market in the entity's securities.

ASX would strongly encourage an entity negotiating a significant transaction that is potentially notifiable to ASX under Listing Rules 3.1 and 11.1 to have a template letter ready for use at all times during those negotiations requesting ASX to grant a trading halt or voluntary suspension. In this way, if it needs to request an urgent trading halt or voluntary suspension to manage its disclosure obligations, it can do so without delay.

## 2.9 The form and contents of a notification under Listing Rule 11.1

A notification under Listing Rule 11.1 must be in writing<sup>52</sup> and given to the ASX Market Announcements office for release to the market.<sup>53</sup> The notification should include all material information about the proposed transaction, including:

- the parties to, and material terms of, the transaction;
- information about the likely effect of the transaction on the entity's consolidated total assets, total equity interests, annual revenue, annual expenditure, EBITDA and annual profit before tax;<sup>54</sup>
- if the entity is proposing to issue securities as part of, or in connection with, the transaction, detailed information about the issue, including its effect on the total issued capital of the entity and the purposes for which any funds raised by the issue will be used;

<sup>50</sup> See generally Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1-3.1B*.

<sup>51</sup> This is by virtue of Listing Rule 3.1A.2 ceasing to apply once the information is no longer confidential.

<sup>52</sup> Listing Rule 19.10. This includes email (Listing Rule 19.3(l)).

<sup>53</sup> Listing Rule 15.2.1.

<sup>54</sup> An entity may choose to provide this information by way of comparison to those measures as at the end of, or for, the previous reporting period (as applicable). If the entity has only been admitted to the official list for a short period and has not yet filed accounts with ASX pursuant to Chapter 4 of the Listing Rules, the comparison should be made to the pro forma financial information included in the prospectus, PDS or information memorandum provided to ASX in connection with the entity's admission pursuant to Listing Rule 1.1 condition 3. If the entity has filed accounts with ASX pursuant to Chapter 4 of the Listing Rules but they are for a period of less than a full financial year, the comparison should be made to annualised revenue, expenditure and profit.

- if there are any changes to the board or senior management proposed as part of, or in connection with, the transaction, details of those changes;
- if the transaction requires security holder approval under Listing Rule 11.1.2 or 11.2 or for some other reason,<sup>55</sup> that fact and an outline of the process for seeking that approval;
- if the transaction requires re-compliance with the requirements for admission and quotation under Listing Rule 11.1.3, that fact and an outline of the process for fulfilling that requirement – noting that, in this case, the announcement must be approved by ASX before it is released to the market in accordance with the process outlined in section 2.10 below; and
- the proposed timetable for implementing the transaction.

If the transaction is one of a series of proposed transactions, detailed information should be given about all of the proposed transactions, including their cumulative effect on the measures mentioned in the second bullet point above.

If the announcement does not address all of the requirements above to ASX's satisfaction and ASX Listings Compliance identifies the omission before the announcement has been released to the market,<sup>56</sup> ASX may decline to release the announcement until the missing information has been included. ASX may also ask the entity to request a trading halt<sup>57</sup> or voluntary suspension,<sup>58</sup> or impose an ASX-initiated suspension,<sup>59</sup> until an updated announcement with the missing information has been released to the market.

If ASX Listings Compliance identifies the omission after the announcement has been released to the market, ASX may require the entity to release a corrective announcement with the missing information. ASX may also ask the entity to request a trading halt or voluntary suspension, or impose an ASX-initiated suspension, until the corrective announcement has been released to the market.

If an entity announces a transaction that, in ASX's opinion, may fall within Listing Rule 11.1 and the entity's announcement overlooks the application or possible application of Listing Rules 11.1.2, 11.1.3 and 11.2, ASX will usually ask the entity to request a voluntary suspension,<sup>60</sup> failing which ASX will impose a mandatory suspension, until these issues have been resolved to ASX's satisfaction. This is to allow sufficient time for the entity to make submissions to ASX on the issues and for ASX to form a considered view on the submissions. Should ASX determine that the transaction requires re-compliance under Listing Rule 11.1.3, it also allows the entity sufficient time to complete the additional steps required under section 2.10 below.

### **2.10 Additional steps for transactions requiring re-compliance under Listing Rule 11.1.3**

An entity must not release an announcement to the market about a proposed transaction under Listing Rule 11.1 that requires re-compliance pursuant to Listing Rule 11.1.3 unless and until ASX has reviewed a draft of the

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<sup>55</sup> For example, because:

- the proposed transaction will take a form (such as a scheme of arrangement or reduction of capital) that requires security holder approval under the Corporations Act;
- the proposed transaction requires approval under another Listing Rule (such as Listing Rule 7.1, 10.1 or 10.11); or
- the entity, for its own reasons, is intending to submit the proposed transaction to security holders for approval even though it may not be legally required (for example, because it considers that an appropriate step to take as a matter of good corporate governance).

<sup>56</sup> ASX Listings Compliance generally does not review market announcements until after they have been released to the market. To do otherwise, would delay the release of the information to the market and conflict with the fundamental principle underpinning Listing Rule 3.1 that market sensitive information should be released to the market immediately.

<sup>57</sup> Under Listing Rule 17.1.

<sup>58</sup> Under Listing Rule 17.2.

<sup>59</sup> Under Listing Rule 11.3 or 17.3.

<sup>60</sup> ASX will not allow an entity to request a trading halt in this circumstance. A trading halt can only last for a maximum of two trading days. It will inevitably take longer than two trading days for these issues to be resolved.

announcement and indicated to the entity that ASX has no objections to the draft. The entity must follow the process outlined in this section 2.10.

First, the entity must make a written request to ASX for its securities to be placed into voluntary suspension,<sup>61</sup> effective immediately. The stated reason for the suspension should be “pending an announcement to the market of a proposed transaction under Listing Rule 11.1”. The period of the requested suspension should be “until the entity has complied with the procedures outlined in section 2.10 of Guidance Note 12 in relation to the proposed transaction”.<sup>62</sup> No other details of the proposed transaction should be included in the request for the voluntary suspension.

Secondly, if the entity has not already received favourable in-principle advice in accordance with in section 2.7 above on its suitability for re-admission to the official list under Listing Rule 1.1 condition 1 and Listing Rule 1.19 if it proceeds with the transaction, the entity must apply for in-principle advice on that issue. If it receives favourable in-principle advice, it may proceed to the next step of the process. If it receives unfavourable in-principle advice, it must make an announcement to the market that it is no longer proceeding with the proposed transaction referred to in its request for voluntary suspension.<sup>63</sup>

Thirdly, having received favourable in-principle advice on its suitability for re-admission to the official list, the entity must then provide a draft of an announcement with full details of the proposed transaction to ASX for review at the earliest possible opportunity.

ASX may require changes to the draft announcement if:

- the notice does not include all the information referred to in section 2.9 above;
- the notice does not include adequate information about the additional steps the entity will need to complete set out in this section 2.10 before it can proceed with its application for re-admission; or
- ASX otherwise considers the notice to be incomplete, inaccurate or misleading.

Fourthly, once ASX has indicated to the entity that ASX does not object to the draft announcement, the entity must release the announcement on the ASX Market Announcements Platform.

Fifthly, if it has not already been given them, the entity must apply to ASX for any listing rule waivers or confirmations essential to the transaction proceeding (including, in particular, any “2 cent waiver”,<sup>64</sup> escrow “look through” relief<sup>65</sup> or confirmation that performance securities<sup>66</sup> or other securities with unusual terms proposed to be included in its capital structure meet the requirements of Listing Rule 6.1).

Sixthly, once the outcome of its application for all essential waivers and confirmations is known, ASX will expect the entity to make a further announcement to the market about that outcome.<sup>67</sup> If ASX gives all of the essential waivers and confirmations, ASX will expect the further announcement also to confirm that the transaction is proceeding and to outline the process and timetable for completion of the transaction and the entity’s re-admission. If ASX declines to give an essential waiver or confirmation, ASX will expect the further announcement to state what

<sup>61</sup> ASX will not grant a trading halt in these circumstances. A trading halt can only last for a maximum of two trading days. It will inevitably take longer than two trading days for these issues to be resolved.

<sup>62</sup> This applies even where the entity is already in a trading halt or suspension.

<sup>63</sup> Where the entity announces that it is no longer proceeding with the transaction, ASX may consider reinstating its securities to trading at this point, provided ASX is satisfied that the entity is in compliance with its obligations under the listing rules (including, in particular its continuous and periodic disclosure obligations in chapters 3 and 4, and its ongoing obligations in chapter 12) and there is no other reason to continue the suspension.

<sup>64</sup> See ‘8.8 The 20 cent rule’ on page 47.

<sup>65</sup> See ‘8.7 Escrow requirements for restricted securities’ on page 46.

<sup>66</sup> See Guidance Note 19 *Performance Securities*.

<sup>67</sup> ASX also will not commence work on any further documentation that the entity may lodge with ASX in connection with the transaction (including any draft notice of meeting with a proposed resolution seeking approval of the transaction under Listing Rule 11.1.2) until the entity has obtained favourable rulings on all essential waivers and confirmations.



the entity intends to do in light of that decision by ASX. This could be either not to proceed with the proposed transaction<sup>68</sup> or to proceed with the proposed transaction but to restructure it to remove the need for any waiver or confirmation that has not been granted. In the latter case, the further announcement must provide full details of the changes to the transaction structure and outline the process and timetable for completion of the transaction and the entity's re-admission.

The entity's securities will remain suspended from quotation throughout the entire period it takes the entity to comply with the second to the sixth steps above.

If the transaction is proceeding, ASX will consider reinstating the entity's securities to quotation at the conclusion of the sixth step if (and only if) ASX is satisfied that:

- the cumulative announcements the entity has made about the proposed transaction contain all of the information referred to in Annexure A;
- the entity has not in the preceding 12 months announced any other proposed transaction under Listing Rule 11.1 which required re-compliance pursuant to Listing Rule 11.1.3 and which, for any reason, did not proceed to completion;<sup>69</sup>
- the entity is in compliance with its obligations under the listing rules (including, in particular its continuous and periodic disclosure obligations in chapters 3 and 4, and its ongoing obligations in chapter 12); and
- there is no other reason for trading in the entity's securities to remain suspended.<sup>70</sup>

Otherwise, the entity's securities will remain suspended from quotation until the entity has re-complied with ASX's admission and quotation requirements or the requirement to re-comply has ceased to apply.<sup>71</sup> The entity's further announcement about the transaction should clearly disclose this fact.

It should be noted that the fact that ASX allows an announcement to be released to the market indicating that the transaction is proceeding, and/or allows an entity's securities to resume trading following the steps above, does not prevent ASX from subsequently raising concerns that the entity may not have a structure and operations suitable for a listed entity or that might cause ASX to exercise its discretion to refuse admission to the official list. Among other reasons, this is because the full range of issues with an entity's application for re-admission to the official list will often not be apparent until the entity lodges its application for re-admission along with its prospectus or PDS for the transaction.

It should also be noted that if ASX reinstates the entity's securities to quotation after the sixth step above and the entity subsequently materially changes the terms of the proposed transaction, ASX will immediately suspend trading in its securities<sup>72</sup> and they will remain suspended until the entity has re-complied with ASX's admission and quotation requirements or the requirement to re-comply has ceased to apply.

<sup>68</sup> Where the entity announces that it is no longer proceeding with the transaction, ASX may consider reinstating its securities to trading at this point, provided ASX is satisfied that the entity is in compliance with its obligations under the listing rules (including, in particular its continuous and periodic disclosure obligations in chapters 3 and 4, and its ongoing obligations in chapter 12) and there is no other reason to continue the suspension.

<sup>69</sup> To put this another way, an entity proposing a transaction requiring re-compliance under Listing Rule 11.1.3 loses the right to be considered for reinstatement to trading at this interim stage if it has, within the preceding 12 months, announced any other proposed transaction under Listing Rule 11.1 which required re-compliance pursuant to Listing Rule 11.1.3 and which, for any reason, did not proceed to completion. This applies even where the entity is able to provide all of the information about the transaction referred to in Annexure A. ASX does not consider it appropriate to reinstate an entity's securities to trading at this interim stage if the entity is announcing serial transactions requiring re-compliance under Listing Rule 11.1.3.

<sup>70</sup> Note that if the entity's securities are reinstated to trading at this interim stage, ASX will subsequently suspend trading in the entity's securities at the date its security holders vote in favour of the resolution approving the transaction under Listing Rule 11.1.2 (see '5.4 Suspensions on the day of a security holder vote to approve the transaction' on page 30).

<sup>71</sup> For example, because the entity announces that it has decided not to, or is not able to, proceed with the transaction or its security holders vote against the resolution to approve the transaction under Listing Rule 11.1.2 with the result that it can no longer proceed.

<sup>72</sup> Under Listing Rule 11.3.

### 2.11 Announcements under Listing Rule 11.1 are generally treated as market-sensitive

An announcement by a listed entity under Listing Rule 11.1 will usually be regarded by ASX as being market sensitive and should be indicated as such by the lodging party on ASX Online. ASX will place the entity's securities into a 10 minute trading halt under ASX Operating Rule 3301, to allow the market time to absorb and react to the information in the announcement.

### 2.12 Requests for further information

ASX may request an entity to provide further information about a proposed transaction that has been notified to ASX under Listing Rule 11.1.<sup>73</sup> Depending on the nature of the information requested, ASX may or may not require that information to be released to the market. ASX's request for the information will make it clear whether ASX is intending to release, or reserves the right to release, the information to the market so that the entity will have the opportunity to respond in a suitable form.<sup>74</sup>

If ASX becomes aware of an actual or proposed transaction that has not been formally notified to it under Listing Rule 11.1 which ASX considers may involve a significant change to the nature or scale of a listed entity's activities, ASX may require the entity to provide it with information about the transaction to enable ASX to be satisfied that the entity has complied with its obligations under the Listing Rules.<sup>75</sup>

## 3. Listing Rules 11.1.2 and 11.1.3: ASX's discretionary powers

### 3.1 The policy objectives of Listing Rules 11.1.2 and 11.1.3

Listing Rule 11.1.2 confers on ASX the discretion<sup>76</sup> to require a significant change to the nature or scale of a listed entity's activities to be approved by the holders of its ordinary securities. As mentioned previously, the rule was primarily designed to allow ASX to regulate "back door listings". While ASX can exercise its discretion in other circumstances, it is generally reluctant to do so, unless there are clear and compelling reasons to justify that course of action. This reflects the following considerations:

- The Corporations Act and the Listing Rules already specify an extensive range of transactions that are deemed to be significant enough that they warrant the approval of security holders. In the case of the Corporations Act, these include name changes, changes to company type, constitutional changes, alteration of class rights, schemes of arrangement, reductions of capital, a voluntary winding up, capital reconstructions, most buybacks, the giving of some financial assistance in relation to an acquisition of shares, some acquisitions and partial takeovers, some retirement benefits and some related party transactions.<sup>77</sup> To this catalogue, the Listing Rules add a disposal of a main undertaking, various transactions with persons in a position of influence, some security issues and some option reconstructions.<sup>78</sup>
- Under the Corporations Act and the constitution of most listed entities,<sup>79</sup> the directors are charged with the responsibility and the authority to manage the business of the entity and to make decisions on its behalf on

<sup>73</sup> Listing Rule 11.1.1.

<sup>74</sup> Listing Rule 18.7A.

<sup>75</sup> Listing Rule 18.7.

<sup>76</sup> This is to be compared and contrasted with Listing Rule 11.2, which requires a disposal by a listed entity of its main undertaking, in all cases, to be subject to security holder approval.

<sup>77</sup> See respectively sections 157; 162; 136(2) and 601GC(1)(a); 246B(2); 411(4); 256B(1)(c); 491; 254H; 257B-257D; 260B; 611 (item 7) and 648D-648H; 200E; and 208 of the Corporations Act.

<sup>78</sup> See respectively Listing Rules 11.2; 10.1, 10.11, 10.17 and 10.19; 7.1 and 7.1A; and 6.23.

<sup>79</sup> In the case of listed companies, see the replaceable rule in section 198A of the Corporations Act, which invariably has its counterpart in the constitutions of most listed companies. *Strong v J Brough & Son (Strathfield) Pty Ltd* (1991) 5 ACSR 296 confirms that the inclusion of such a provision in a listed company's constitution would, in the absence of Listing Rule 11.2, empower its directors to dispose of its assets, including its main undertaking, without reference to security holders.

all matters other than those that are specifically reserved to security holders under the Act, the Listing Rules or its constitution.<sup>80</sup>

- Given that responsibility and authority, most listed entity security holders would expect their directors to be proactively managing the entity's portfolio of businesses including, where the directors deem it appropriate, expanding or culling that portfolio, in the interests of the entity and its security holders.
- The imposition by ASX of a requirement that a commercial transaction otherwise within the authority of the directors must be submitted to security holders for approval will invariably introduce additional transaction costs, as well as delays and uncertainties that add risk to the transaction. In some cases, it could even threaten the transaction's viability or success. For ASX to unilaterally impose these added costs and risks could well be contrary to the interests of the entity and its security holders.
- Security holders elect directors to run the entity's business on their behalf.<sup>81</sup> If security holders as a body do not approve a proposed significant change to the nature or scale of an entity's activities proposed by its directors, they can always remove and replace the directors. Typically, the resolution needed to do this will require the same majority as a resolution under Listing Rule 11.1.2.

Listing Rule 11.1.3 empowers ASX to require an entity that is proposing to make a significant change to the nature or scale of its activities to meet the requirements in Chapters 1 and 2 of the Listing Rules as if it were applying for admission to the official list. It is a discretion that ASX can exercise in an appropriate case:

- to ensure that the important controls and protections that are built into ASX's requirements for the admission of an entity to the official list and the quotation of its securities are not circumvented by parties seeking to undertake a back door listing;
- to ensure that security holders in a listed entity and the market generally receive sufficient information about a proposed significant change to the nature or scale of its activities for trading in its securities to occur on a reasonably informed basis (through the requirement for the entity to issue a fresh prospectus or PDS under Listing Rule 1.1 condition 3); and
- otherwise, to verify that an entity which is about to undergo a significant change to the nature or scale of its activities will continue to satisfy the requirements of:
  - Listing Rules 12.1 and 12.2, which oblige a listed entity to have a level of operations which in ASX's opinion is sufficient, and a financial condition which in ASX's opinion is adequate, to warrant its continued listing and the continued quotation of its securities;
  - Listing Rule 12.4, which obliges a listed entity to maintain a spread of security holdings in its main class which in ASX's opinion is sufficient to ensure there is an orderly and liquid market in those securities; and
  - Listing Rule 12.5, which obliges a listed entity to have a structure and operations appropriate for a listed entity.

<sup>80</sup> In the case of listed trusts, this authority and responsibility is effectively conferred on the directors of the responsible entity through section 601FB of the Corporations Act.

<sup>81</sup> The directors of a listed company are accountable to its security holders through the board election process (Listing Rules 14.4 and 14.5) and, in the case of companies formed in Australia, through the capacity of security holders to remove a director under section 203D of the Corporations Act. The directors of the responsible entity of a listed trust are accountable to the security holders in the trust through the capacity of security holders to remove the responsible entity under section 601FM.

### 3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3

There are four main circumstances<sup>82</sup> in which ASX will usually exercise its discretion to require a significant change to the nature or scale of a listed entity's activities to be approved by the holders of its ordinary securities under Listing Rule 11.1.2. They are:

- (1) the entity is proposing to be party to a transaction which, in ASX's opinion, is a back door listing of another undertaking (this applies whether the undertaking is of the same nature as, or a different nature to, its existing business activities);
- (2) the entity announces a significant transaction soon after its admission or re-admission to the official list or a recapitalisation<sup>83</sup> and the transaction is not consistent with the representations<sup>84</sup> about the nature and scale of its business in any prospectus, PDS or information memorandum it lodged in connection with its admission, re-admission or recapitalisation (again, this applies whether the transaction involves a business of the same nature as, or a different nature to, its existing business activities);<sup>85</sup>
- (3) the entity has previously disposed of, abandoned or ceased pursuing<sup>86</sup> its main undertaking and it is proposing to acquire a business, or to make a series of acquisitions of businesses,<sup>87</sup> that will result in it having a new main undertaking (this applies whether the new main undertaking is of the same nature as, or a different nature to, its former main undertaking); or
- (4) the entity is proposing to acquire a business, or to make a series of acquisitions of businesses,<sup>88</sup> that do not involve a back door listing but will result in a major change to the nature of its main undertaking.<sup>89</sup>

In cases (1), (2) and (3) above, ASX will invariably exercise its discretion under Listing Rule 11.1.3 to require the entity also to re-comply with ASX's admission and quotation requirements.

The reasons for requiring security holder approval and re-compliance with ASX's admission and quotation requirements in case (1) are explained above in section 1.1.

<sup>82</sup> This is not to say that these are the only circumstances in which ASX will exercise its discretions under Listing Rules 11.1.2 and 11.1.3 – simply that these are the main circumstances that arise in practice where ASX will usually do so. ASX reserves the right, where it considers that there are clear and compelling reasons to do so, to exercise its discretion under Listing Rules 11.1.2 and 11.1.3 to require that a significant change to the nature or scale of a listed entity's activities is approved by security holders and/or that the entity re-comply with ASX's admission and quotation requirements.

<sup>83</sup> A "recapitalisation" refers to an entity undertaking a significant capital raising for the purposes of funding its existing main business activity. It therefore is not a transaction that falls within case (3) or (4) mentioned in the text. Often an entity undertaking a recapitalisation will have undergone a deed of company arrangement or a creditors' scheme of arrangement or otherwise substantially dissipated its working capital and will be undertaking the capital raising to save or resurrect its existing main business activity.

<sup>84</sup> This includes being inconsistent with the disclosures by the entity in its listing prospectus, PDS or information memorandum about its business objectives (Listing Rule 1.3.3(a)), its commitments and expenditure program (Listing Rule 1.3.2(b)) and the proposed use of funds from any capital raising it is undertaking.

<sup>85</sup> ASX has, for example, exercised this power where a listed entity has announced a major acquisition shortly after its admission or re-admission to the official list that plainly was being negotiated at the time of its admission/re-admission but was not disclosed in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3. ASX has also exercised this power where an entity has entered into a share buyback with a controlling shareholder shortly after its admission that had the effect of replacing the equity capital the shareholder had subscribed for in the entity's initial public offering with a materially smaller secured loan.

<sup>86</sup> For example, a mining exploration entity that ceases its exploration activities or a mining producing entity that ceases its production activities. The fact that an entity has ceased pursuing its main undertaking will usually be apparent from the low level of expenditure on its main undertaking (disregarding for these purposes unavoidable expenses, such as tenement fees, and expenditure on administration and corporate costs).

<sup>87</sup> This applies regardless of the size of each individual acquisition. It also applies notwithstanding that, in the case of a previous disposal of the entity's main undertaking, its security holders will most likely have already approved that disposal under Listing Rule 11.2.

<sup>88</sup> Again, this applies regardless of the size of each individual acquisition.

<sup>89</sup> This change in the nature of the entity's main undertaking may arise because, at the same time as proposing to acquire the new undertaking, the entity is also proposing to dispose of some or all of its existing undertaking. Alternatively, it may arise because the new undertaking being acquired dwarfs its existing undertaking.

Case (2) raises serious concerns about the veracity of the prospectus, PDS or information memorandum lodged in connection with the entity's admission, re-admission or recapitalisation and whether investors who subscribed for shares under, or purchased them on-market relying on the disclosures in, that document have been misled. In these circumstances, ASX considers that it should have the opportunity to consider afresh whether the entity is suitable for admission or re-admission to the official list. If ASX does not change its decision in that regard, ASX also considers that ordinary security holders should have a vote on whether the entity pursues the new transaction and they and the market should have the benefit of an updated prospectus, PDS or information memorandum reflecting the new transaction.

In case (3) above, as the entity will be embarking on a brand new business venture from scratch, it is appropriate not only that security holders have a say in whether it pursues the new venture<sup>90</sup> but also that the entity re-comply with ASX's admission and quotation requirements in relation to the new venture.<sup>91</sup>

Case (4) above involves a fundamental change in the nature of an entity's main undertaking. This raises similar policy considerations to a disposal of an entity's main undertaking and, by analogy with Listing Rule 11.2, at a minimum warrants security holder approval. ASX may also exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with ASX's admission and quotation requirements unless ASX is satisfied that:

- the entity unequivocally meets, and after the transaction will continue to meet, Listing Rules 12.1, 12.2, 12.4 and 12.5; and
- security holders in the entity and the market generally have received sufficient information about the proposed transaction for trading in its securities to be occurring on a reasonably informed basis.<sup>92</sup>

The factors that ASX will take into account in case (4) in determining whether it should exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with ASX's admission and quotation requirements include (but are not limited to) the relative sizes of the "old" business or businesses retained by the entity and the new main undertaking being acquired, the disclosure history of the entity in relation to its "old" business or businesses, and the amount and quality of information that has been provided to security holders about the new main undertaking.<sup>93</sup>

In relation to case (1) above, ASX will carefully examine any proposed transaction notified to it under Listing Rule 11.1 that involves a listed entity acquiring a business from, or merging or amalgamating with, a non-ASX listed entity which is likely to result in a doubling (or more) of any of the following measures for the listed entity:

- consolidated total assets;
- consolidated total equity interests;
- consolidated annual revenue or, in the case of a mining exploration entity, oil and gas exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure;
- consolidated EBITDA;
- consolidated annual profit before tax; or
- total securities on issue (on a fully diluted basis),

to determine whether, in ASX's opinion, it exhibits the hallmarks of a back door listing to which ASX ought to apply its discretions to require security holder approval and re-compliance with ASX's admission and quotation

<sup>90</sup> Security holders, for example, may prefer that the entity is wound up and any surplus cash returned to them.

<sup>91</sup> Note that if the entity is pursuing a transaction with a value that substantially exceeds the value of its remaining assets, the transaction is likely to be a back door listing and therefore caught by case (1) as well as case (3).

<sup>92</sup> The disclosure of such information could occur via the announcement lodged about the acquisition or acquisitions under Listing Rule 11.1, the notice of meeting sent to security holders seeking a resolution approving the acquisition or acquisitions under Listing Rule 11.1.2, or a prospectus or PDS lodged in relation to a capital raising to fund the acquisition or acquisitions.

<sup>93</sup> See note 92 above.

requirements. A transaction that does not result in a doubling (or more) of any of the above measures will not be regarded by ASX as a back door listing.

ASX will usually use the entity's most recent published accounts or, in the case of securities on issue, its Appendix 3B filings with ASX as the reference point for these particular measures to determine whether the "doubling up" threshold will be exceeded. If an entity has more up to date information about these financial measures, it is free to provide that information to ASX with its notification about the transaction under Listing Rule 11.1.

Again, this "doubling up" benchmark is solely for the purposes of giving clear guidance to listed entities as to what transactions ASX considers clearly are not back door listings and what transactions ASX will examine more closely to determine whether or not they involve a back door listing. The fact that a transaction may result in a doubling (or more) of any of the above measures does not necessarily mean that ASX will regard the transaction as a back door listing.

In cases (3) and (4) above, where the proposed change involves a series of acquisitions of businesses, the individual acquisitions do not have to be inter-related or cross-conditional. It is sufficient that they happen in reasonable proximity to each other and are part of a concerted plan that, if successful, will result in the entity embarking upon a new main undertaking (in case (3)) or a change to the nature of the entity's main undertaking (in case (4)). Where a listed entity proposes to embark upon such a plan, it should include that information in the notice it gives under Listing Rule 11.1 in relation to the first transaction in the series so that ASX can apply the requirement for security holder approval before it embarks upon any of the planned transactions.

Occasionally, an entity may move into a new business activity without initially planning to change the nature of its main undertaking but, by virtue of making a series of acquisitions of similar businesses over time, that activity evolves to become its main undertaking. ASX will not generally exercise its discretion under Listing Rule 11.1.2 to require security holder approval to changes in the nature of an entity's main undertaking that do not involve a back door listing<sup>94</sup> and that evolve gradually over time, where security holders have a reasonable opportunity to assess the cumulative effect of those changes. ASX will generally treat 24 months (2 full accounting cycles) as a reasonable period for these purposes. However, if within a 24 month period, an entity has made one or more acquisitions without security holder approval under Listing Rule 11.1.2 and is proposing to make a further acquisition that will have the result that its main undertaking is something different in nature to what it was at the commencement of that period, ASX will generally treat the proposed transaction as falling within case (4) above and require security holder approval to the proposed transaction.

It will be noted that each of cases (1)–(4) above involves an acquisition of some sort. With one exception, ASX would rarely, if ever, exercise its discretion under Listing Rule 11.1.2 to require security holder approval to a disposal by an entity of something less than its main undertaking.<sup>95</sup> The one exception is where there is a difference of opinion between ASX and a listed entity as to whether a disposal or series of disposals involves its main undertaking and therefore requires security holder approval under Listing Rule 11.2. In that case, ASX may resolve that difference by exercising its power under Listing Rule 11.1.2 to require the disposal or series of disposals to be subject to security holder approval, regardless of whether Listing Rule 11.2 technically applies.

### **3.3 The effect of ASX exercising its discretion under Listing Rule 11.1.2 and/or 11.1.3**

Where ASX exercises its discretion under Listing Rule 11.1.2 to require security holder approval to a significant change to the nature or scale of a listed entity's activities, or under Listing Rule 11.1.3 to require an entity to re-comply with ASX's admission and quotation requirements, the proposed transaction must not be consummated

<sup>94</sup> If an entity is proposing to be party to a transaction which, in ASX's opinion, is a back door listing of another undertaking, ASX will require security holder approval and re-compliance with ASX's admission and quotation requirements regardless of any prior acquisitions of similar undertakings that the entity may have made, whether in the preceding 24 months or otherwise.

<sup>95</sup> A disposal by a listed entity of its main undertaking requires security holder approval under Listing Rule 11.2 in any event and therefore does not require ASX to exercise its discretion under Listing Rule 11.1.2. A disposal by a listed entity of something less than its main undertaking does not raise the sorts of policy considerations that a disposal of its main undertaking raises.

until ASX's requirements have been met. This includes any security issue that is proposed as part of, or in connection with, the proposed transaction (see section 3.4 below).

If an entity has taken, or is proposing to take, any steps towards consummating a transaction before ASX's requirements have been met, ASX may require the entity to unwind, or not to proceed with, those steps.<sup>96</sup>

Where an entity is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements and it is not able to do so, depending on the circumstances, one consequence could well be its removal from the official list.<sup>97</sup>

### 3.4 Pre-emptive capital raisings

Where a listed entity is proposing to raise capital as part of or in connection with a transaction in relation to which ASX has exercised its discretion to require security holder approval under Listing Rule 11.1.2 and/or re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3, the entity should not proceed with that capital raising before those requirements have been met. To do otherwise effectively pre-empts the decision required from security holders under Listing Rule 11.1.2 or from ASX under Listing Rule 11.1.3 on whether the transaction should proceed.

ASX will regard a pre-emptive capital raising as a serious breach of the Listing Rules and may take appropriate remedial action in relation to that breach. This may include ASX:

- suspending the quotation of the entity's securities until the breach has been rectified;<sup>98</sup>
- directing the entity to unwind, or not to proceed with, the capital raising;<sup>99</sup>
- exercising its discretion not to quote any securities issued as part of the capital raising;<sup>100</sup>
- where Listing Rule 11.1.3 applies, exercising its discretion not to re-admit the entity to the official list;<sup>101</sup> or
- terminating the entity's listing on ASX for breach of the Listing Rules.<sup>102</sup>

ASX will carefully examine any capital raising that occurs in the lead up to, or after, the announcement of a proposed transaction under Listing Rule 11.1 to determine whether it is in the nature of a pre-emptive capital raising.

ASX is alive to parties who seek to disguise a pre-emptive capital raising by issuing securities in an entity that the listed entity is proposing to acquire or merge with, which then become securities in the listed entity when the acquisition or merger is consummated. Again, ASX will carefully examine any capital raising by such an entity that occurs in the lead up to, or after, the announcement of a proposed transaction under Listing Rule 11.1 to determine whether it is in the nature of a pre-emptive capital raising.

ASX acknowledges that a listed entity which is short of working capital may need to issue securities to raise cash to cover the costs of getting a transaction to the stage of security holder approval under Listing Rule 11.1.2 and/or achieving re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3,<sup>103</sup> plus its

<sup>96</sup> Listing Rule 18.8(c) and (d).

<sup>97</sup> Listing Rule 17.12. Whether this occurs will depend on whether the entity is able to meet the requirements for the continued quotation of its securities and its continued listing under Listing Rules 12.1 (sufficient level of operations), 12.2 (adequate financial condition), 12.4 (sufficient spread) and 12.5 (appropriate structure and operations), given that it will not be able to pursue the transaction in relation to which Listing Rule 11.1.3 was applied. It will also depend on whether the entity is a long term suspended entity that was otherwise facing removal from the official list under ASX's policy in that regard set out in section 3.4 of Guidance Note 33 *Removal of Entities from the ASX Official List*.

<sup>98</sup> Listing Rule 17.3.1.

<sup>99</sup> Listing Rules 18.8(c) and (d).

<sup>100</sup> Listing Rule 2.9.

<sup>101</sup> Listing Rule 1.19.

<sup>102</sup> Listing Rule 17.12.

<sup>103</sup> Such as due diligence costs, advisory fees and the costs of convening and holding a meeting of security holders.

ongoing operating costs over that period. ASX will not regard such an issue as a pre-emptive capital raising, provided the capital raised is not substantially more than is reasonably needed for these purposes<sup>104</sup> and the issue otherwise complies with the Listing Rules.<sup>105</sup> ASX will, however, look carefully at the type and terms of the capital raising undertaken to see if it meets the principle set out in the introduction to the Listing Rules that securities should be issued in circumstances that are fair to new and existing security holders. If the capital raising involves an issue to existing security holders via a pro rata offer, under a security purchase plan or some other form of broad-based offer, ASX is unlikely to have any concerns with it. However, if the capital raising takes the form of a placement of securities to related parties, promoters, professional advisers involved in the transaction, or their family, friends and associates<sup>106</sup> at advantageous prices, ASX will look closely at whether it should apply escrow conditions to those securities.<sup>107</sup>

### 3.5 Pre-emptive loans

Occasionally, a listed entity that is proposing a significant transaction (such as an acquisition or merger) with another entity, will lend money<sup>108</sup> to that entity (or an associated entity) ahead of the transaction completing. These loans can raise particular issues where ASX exercises its discretion to require security holder approval to the transaction under Listing Rule 11.1.2 and/or re-compliance with ASX's admission and quotation requirements under Listing Rule 11.1.3. This is especially so if those requirements are not subsequently met.

If the listed entity has entered into such a loan before notifying ASX of the transaction under Listing Rule 11.1, ASX expects the entity to disclose full details of the loan in that notification for release to the market.<sup>109</sup> If the entity enters into the loan after notifying ASX of the transaction under Listing Rule 11.1, ASX expects the entity to issue a market announcement with full details of the loan immediately upon entering into the loan.<sup>110</sup>

If the amount of the loan is material and the transaction is one where ASX has exercised, or may exercise, its discretions under Listing Rule 11.1.2 or 11.1.3, upon learning of the loan, ASX is likely to make enquiries of the entity (to the extent not already disclosed in its market announcements) as to:

- its reasons for making the loan;
- when the loan is expected to be repaid;
- what due diligence the entity has undertaken to satisfy itself of the borrower's capacity to repay the loan;
- for what purposes can the borrower use the proceeds of the loan and what (if any) safeguards has the entity put in place to ensure that the borrower does not use the loan for other purposes; and
- what (if any) safeguards has the entity put in place to ensure that the loan will be repaid in full if the transaction ultimately does not proceed.

ASX is likely to publish these queries and the entity's response to the market.<sup>111</sup>

<sup>104</sup> Under Listing Rules 18.7 and 18.7A, ASX may require the entity to disclose to ASX and to the market how the entity intends to use any funds raised so as to satisfy ASX that the entity is not seeking to conduct a pre-emptive capital raising in breach of the spirit and intent of Listing Rules 11.1.2 and/or 11.1.3.

<sup>105</sup> Including Listing Rules 7.1, 7.1A and 10.11.

<sup>106</sup> The reference to "family, friends and associates" is intended to be interpreted broadly and includes officers and employees of a corporate promoter or professional adviser involved in the transaction and their related parties.

<sup>107</sup> See '8.7 Escrow requirements for restricted securities' on page 46.

<sup>108</sup> The reference here to "lending money" to another entity includes subscribing for debt securities issued by, or providing other forms of financial accommodation to, the other entity.

<sup>109</sup> On the basis that the loan is a material part of the transaction being notified to ASX (and therefore to the market) under Listing Rule 11.1.

<sup>110</sup> On the basis that this is information required to be disclosed under Listing Rule 3.1 or is a material change to the information notified to the market under Listing Rule 11.1.

<sup>111</sup> Or at least reserve the right to do so under Listing Rule 18.7A.



If ASX forms the view that the loan is being used as a means of passing across some of the consideration for the transaction ahead of security holder approval under Listing Rule 11.1.2 or re-compliance under Listing Rule 11.1.3, or otherwise is seeking to pre-empt a decision required from security holders or ASX under those rules, ASX will regard this as a serious breach of the Listing Rules and take appropriate remedial action. This may include:

- suspending the quotation of the entity's securities until the breach has been rectified;<sup>112</sup>
- directing the entity to cancel or demand repayment of the loan;<sup>113</sup>
- where Listing Rule 11.1.3 applies, exercising its discretion not to re-admit the entity to the official list;<sup>114</sup> and/or
- terminating the entity's listing on ASX for breach of the Listing Rules.<sup>115</sup>

## 4. Listing Rule 11.2: disposal of an entity's main undertaking

### 4.1 The policy objective of Listing Rule 11.2

The principle underlying Listing Rule 11.2 is that a disposal by a listed entity of its main undertaking is such a transformative transaction, and results in such a major change to the nature of the security holders' investment in the entity, that in all cases it is appropriate for security holders to have to approve it.

### 4.2 The application of Listing Rule 11.2

Listing Rule 11.2 only applies to a disposal of an entity's "main undertaking".<sup>116</sup>

If an entity is proposing to dispose of all, or substantially all, of its assets and businesses, ASX will regard that as a disposal of its main undertaking, regardless of the make-up of those assets and businesses.

If an entity is proposing to dispose of something less than all, or substantially all, of its assets and businesses, Listing Rule 11.2 will only apply if what is being disposed of constitutes its main undertaking.<sup>117</sup>

Accordingly, in the case of a listed entity that conducts a number of conglomerate businesses where no one of those businesses is identifiable as its "main business", Listing Rule 11.2 will only apply if the entity is proposing to dispose of all, or substantially all, of its businesses. It will not apply to a disposal of only one or some of its businesses, even in the latter case where the businesses being disposed of in aggregate account for more than 50% of its scale (referencing the 50% "rule of thumb" mentioned previously<sup>118</sup>).

In the case of a listed entity that conducts a business of trading in financial products,<sup>119</sup> its main undertaking is the business of trading in financial products, not the individual investments it holds. In such a case, Listing Rule 11.2 will only apply if the entity is proposing to dispose of its business of trading in financial products. It will not apply to

<sup>112</sup> Listing Rule 17.3.1.

<sup>113</sup> Listing Rules 18.8(c) and (d).

<sup>114</sup> Listing Rule 1.19.

<sup>115</sup> Listing Rule 17.12.

<sup>116</sup> See the discussion in sections 1.2 and 1.3 above of the significance and meaning of an entity's main undertaking.

<sup>117</sup> Although, as noted previously, if there is a difference of opinion between ASX and a listed entity as to whether a disposal or series of disposals involves its main undertaking and therefore requires security holder approval under Listing Rule 11.2, ASX may resolve that difference by exercising its power under Listing Rule 11.1.2 to require the disposal or series of disposals to be subject to the security holder approval, regardless of whether Listing Rule 11.2 technically applies.

<sup>118</sup> See '1.3 The meaning of "main undertaking" on page 6.

<sup>119</sup> An entity conducting a business of trading in financial products is to be differentiated from an entity whose business consists of holding strategic investments in other entities. In the latter case, depending on the circumstances, it is possible that one of those strategic investments could amount to the main undertaking of the entity.

a disposal of some or even all of its investments, provided that happens because of a trading decision to convert those investments to cash rather than a strategic decision to exit the trading business.

By necessary implication, Listing Rule 11.2 does not apply to an *in specie* distribution of an entity's main undertaking to the holders of its ordinary securities on a *pari passu* basis.<sup>120</sup>

### 4.3 What constitutes a “disposal” of a main undertaking?

The term “dispose” is defined expansively in Listing Rule 19.12 to include not only direct disposals but also indirect disposals through another person. It also captures disposals effected by any means, include granting, being granted or exercising an option; declaring a trust over an asset; using an asset as collateral; decreasing an economic interest; and disposing of part of an asset.

It is not necessary for an entity to dispose of all of the assets used in its main undertaking<sup>121</sup> for it to dispose of its main undertaking. If it disposes of the key assets needed to conduct its main undertaking and the commercial outcome is that it will no longer continue to conduct its main undertaking, ASX will regard that as a disposal of its main undertaking. For example, a mining exploration entity that disposes of all of its mining tenements will be regarded as having disposed of its main undertaking, even though it may retain some or all of its mining exploration equipment.

An entity can dispose of its main undertaking for the purposes of Listing Rule 11.2 in one transaction or through a series of transactions. In the latter case, the transactions do not have to be inter-related or cross-conditional. It is sufficient that they happen in reasonable proximity to each other and are part of a concerted plan that, if successful, will result in a disposal of the main undertaking.

### 4.4 Partial disposals of an entity's main undertaking

Where an entity is proposing to dispose of part only of its main undertaking, ASX will apply Listing Rule 11.2, as it is required to do under Listing Rule 19.2, looking beyond form to substance and in a way that best promotes the principles on which the Listing Rules are based. ASX will have regard to whether or not the disposal will cause a change in the nature of the entity's main undertaking. If the nature of the entity's main undertaking will remain the same after the disposal as it was before the disposal, the transaction will not usually be regarded as a disposal of its main undertaking. This applies even where the assets or businesses being disposed of in aggregate account for more than 50% of its scale (referencing the 50% “rule of thumb” mentioned previously<sup>122</sup>). On the other hand, if the entity's main undertaking after the proposed disposal will be different in nature to what it was before the disposal, the transaction will be regarded as a disposal of its main undertaking.

The following examples illustrate the approach ASX is likely to take:

**Example 1:** *entity A owns and operates shopping centres at 10 different locations. It does not have any other substantive business operations. It is in serious financial difficulty and is proposing to sell 8 of its shopping centres to raise funds to repay debt. It will continue to operate its remaining 2 shopping centres.*

*This is not a disposal of A's main undertaking. A's main undertaking after the disposal (owning and operating shopping centres) is the same as its main undertaking before the disposal, even though the scale of its business will be much smaller as a result of the disposal and debt repayment.*

**Example 2:** *entity B is a mining exploration entity that has succeeded in proving up ore reserves on one of its tenements and now wants to develop and operate a mine on the tenement. Rather than seek to raise capital to do this itself, it proposes to joint venture the development with an established mining entity and to dispose of a 75% undivided interest in the tenement to the other entity in return for the other entity providing capital and know-how to develop the mine.*

<sup>120</sup> *Quancorp Pty Ltd v MacDonald* [1999] WASCA 33.

<sup>121</sup> Indeed, it is quite common for an entity that disposes of a business to retain some of the assets (such as cash and receivables) used in, or generated by, that business.

<sup>122</sup> See ‘1.3 The meaning of “main undertaking” on page 6.

*This is not a disposal of B's main undertaking. B's main undertaking after the disposal (mining production) is the same as its main undertaking before the disposal, albeit it will be conducting that undertaking as a 25% joint venturer rather than as a 100% owner.*

**Example 3:** *entity C is a mining exploration entity and it has interests in three exploration tenements, each of which accounts for around a third of its value. It wants to get out of the mining exploration business altogether and do something else, however, the pre-emption arrangements in the joint venture agreement for one of the tenements effectively makes it uneconomical for it to dispose of that interest. It proposes to sell its interests in the other two tenements and invest the proceeds until it can identify a better use for them.*

*ASX is likely to treat this as a disposal of C's main undertaking, notwithstanding that it proposes to retain one of its mining tenements. C's main undertaking after the disposal (investment activities) is different from its main undertaking before the disposal (mining exploration).<sup>123</sup>*

**Example 4:** *entity D operates an airline business. It is proposing to re-engineer its balance sheet by entering into a sale and leaseback of its entire aircraft fleet.*

*This is not a disposal of D's main undertaking. The sale and leaseback does not result in any change to the nature of D's main undertaking (operating an airline).<sup>124</sup>*

**Example 5:** *entity E is an industrial conglomerate. It is proposing to enter into a major credit facility with a syndicate of banks to fund an acquisition. A condition of the funding is that E grant a fixed and floating charge over all of its assets in favour of a security agent for the banking syndicate.*

*Even though the definition of "dispose" includes using an asset as collateral,<sup>125</sup> this is not a disposal of E's main undertaking. The granting of the fixed and floating charge does not result in any change to the nature of E's main undertaking (industrial conglomerate).*

#### 4.5 Agreement to dispose of main undertaking must be conditional on security holder approval

Listing Rule 11.2 provides that an entity must not enter into an agreement to dispose of its main undertaking unless the agreement is conditional on the entity getting security holder approval. This requirement effectively means that the disposal must not be consummated until security holder approval has been obtained.

If an entity is proposing to dispose of its main undertaking through a series of transactions, each of the agreements for those transactions must be conditional on the entity obtaining security holder approval.

If an entity has taken, or is proposing to take, any steps towards consummating a disposal of its main undertaking before security holder approval has been obtained, ASX may require the entity respectively to unwind, or not to proceed with, those steps.<sup>126</sup>

#### 4.6 Disposals by a receiver, administrator or liquidator

ASX does not regard Listing Rule 11.2 as applying to a disposal of a listed company's main undertaking by a receiver acting on behalf of a secured creditor or creditors under a charge or other security instrument, or by an administrator or liquidator acting under their statutory powers, even though technically they may be acting as agent for and on behalf of the company in undertaking the disposal. This is on the general principle that once a listed entity is approaching insolvency, the interests of its creditors take precedence over the interests of its security holders and it would be inappropriate for an entity's security holders to be able to exercise a veto over the disposal

<sup>123</sup> Listing Rule 12.3 may also apply to C once it is holding more than half of its assets in cash or in a form readily convertible to cash.

<sup>124</sup> See also the observations of Windeyer J in *ASC v Cracow Resources Ltd*, note 16 above, that:

*"For instance the main asset of a bus company may be its buses; but its undertaking is I consider the business operation of a bus company. If the directors determined for the purposes of the business of a bus company to sell all its buses and then to lease them back that would not I think amount to a disposal of its main undertaking; it would still be operating the same business."*

<sup>125</sup> Listing Rule 19.12.

<sup>126</sup> Listing Rule 18.8.

of its main undertaking in these circumstances. In any event, a receiver, administrator or liquidator has a statutory power to dispose of the company's main undertaking<sup>127</sup> that would override any requirement in the Listing Rules for the transaction to be approved by security holders.

Hence a receiver, administrator or liquidator acting in accordance with their statutory powers is free to dispose of a listed company's main undertaking without security holder approval under Listing Rule 11.2.

However, Listing Rule 11.2 does apply to a voluntary disposal by a listed entity of its main undertaking as part of a plan to pay down debt or recapitalise its balance sheet. This applies even where the transaction may be instigated to avoid or cure a default under its financing agreements or to avoid insolvency and hence to avoid the appointment of a receiver, administrator or liquidator.

#### 4.7 Other Listing Rule issues

Depending on the circumstances, a disposal by a listed entity of its main undertaking can also raise issues under Listing Rules 12.1 and/or 12.2, which oblige a listed entity to satisfy ASX on an ongoing basis that the level of its operations is sufficient, and its financial condition adequate, to warrant its continued listing and the continued quotation of its securities. It can also raise issues under Listing Rule 12.3, which provides:

*If half or more of an entity's total assets is cash or in a form readily convertible to cash, ASX may suspend quotation of the entity's securities until it invests those assets or uses them for the entity's business. The entity must give holders of ordinary securities in writing details of the investment or use. This rule does not apply to the following:*

- a bank or a non-bank financial institution; or
- a mining exploration entity or oil and gas exploration entity, unless ASX decides otherwise.

Often, the disposal by a listed entity of its main undertaking will effectively convert it into a "cash box".

Sometimes this may be a precursor to the entity being wound up, with any surplus cash remaining after the payment of creditors being distributed to security holders. Other times it may be a precursor to the entity embarking on a new business venture, either immediately or once a suitable business has been identified and acquired.<sup>128</sup> In either case, notwithstanding Listing Rule 12.3, ASX will generally continue quoting<sup>129</sup> the entity's securities for a period of up to six months from the date of the agreement to dispose of its main undertaking. This is to allow the entity time to complete the disposal of its main undertaking and (in the former case) to commence the legal process for its winding up or (in the latter case) to identify and make an announcement of its intention to acquire a new business.

If an entity is not able (in the former case) to commence the legal process for its winding up or (in the latter case) to make an announcement of its intention to acquire a new business, within that six month period, ASX will generally suspend the quotation of its securities<sup>130</sup> at the end of that six month period. The suspension will continue until the entity makes an announcement acceptable to ASX about its future.

<sup>127</sup> See section 420(2)(g) (receivers), 437A(1)(c) (administrators) and 477(2)(c) and 506(1)(b) (liquidators) of the Corporations Act. A similar analysis applies to a disposal by someone winding up a managed investment scheme under Part 5C.9 of the Corporations Act.

Also, in the case of an administrator disposing of a listed company's main undertaking under a deed of company arrangement, such an arrangement, when approved by the creditors of the company in the manner required under the Corporations Act, is binding on the company and its members, without the need for any separate approval by members (see section 444G of the Corporations Act).

<sup>128</sup> This situation falls within case (3) above. ASX therefore will generally exercise its discretion under Listing Rule 11.1.2 to require security holder approval to the acquisition of the new business and under Listing Rule 11.1.3 to require the entity to re-comply with the conditions for admission and quotation.

<sup>129</sup> In the absence of any reason to suspend quotation of the entity's securities.

<sup>130</sup> Exercising its discretion to suspend the quotation of the entity's securities under Listing Rules 12.3, 17.3.2 and/or 17.3.4.

Where an entity is pursuing a winding up, ASX will normally suspend trading in the entity's securities as soon as ASX is notified that the winding up process has been initiated<sup>131</sup> and will terminate the entity's admission to the official list once the entity has formally been placed into liquidation.<sup>132</sup>

## 5. Listing Rule 11.3: suspension of quotation

### 5.1 The policy objectives of Listing Rule 11.3

Listing Rule 11.3 empowers ASX to suspend the quotation of an entity's securities until the entity has satisfied the requirements of Listing Rules 11.1 or 11.2. It is a discretion that ASX can exercise to secure compliance with Listing Rules 11.1 or 11.2 and to ensure that the market is supplied with sufficient information about a proposed significant change to the nature or scale of a listed entity's activities for trading in its securities to take place on a reasonably informed basis.

The following sections outline the main circumstances in which ASX will typically exercise its discretion under Listing Rule 11.3 to suspend the quotation of an entity's securities.

### 5.2 Suspensions in case (2) situations

In a case (2) situation,<sup>133</sup> ASX will invariably suspend trading in the entity's securities under Listing Rule 11.3 at the same time as it exercises its discretions under Listing Rules 11.1.2 and 11.1.3 to require security holder approval and re-compliance with ASX's admission and quotation requirements. The suspension will continue until the entity has satisfied those requirements.

### 5.3 Suspensions in other cases at the time of announcement

In a case (1), (3) or (4) situation,<sup>134</sup> Listing Rule 11.3 usually will only come into play if ASX forms the view that:

- the announcement under Listing Rule 11.1 does not include sufficient information about the transaction for trading in the entity's securities to take place on a reasonably informed basis (including, in the case of a transaction that requires re-compliance with ASX's requirements for admission and quotation under Listing Rule 11.1.3, the information referred to in Annexure A);
- the transaction is one where ASX is likely to exercise its discretion to require security holder approval under Listing Rule 11.1.2 and/or re-compliance with its admission and quotation requirements under Listing Rule 11.1.3 and the announcement under Listing Rule 11.1 does not inform readers of the likelihood and consequences of that happening;
- the transaction involves a disposal of the entity's main undertaking and the announcement under Listing Rule 11.1 does not inform readers of the requirement for security holder approval under Listing Rule 11.2; or
- the entity announces a material change to a transaction requiring re-compliance under Listing Rule 11.1.3, after having made an announcement to the market under Listing Rule 11.1 that resulted in a resumption of trading in its securities in accordance with section 2.10 above.

In the first three cases above, ASX will usually contact the entity and suggest that it request a trading halt, or if ASX considers the matter is unlikely to be resolved within two trading days a voluntary suspension, pending the release of a further announcement about the transaction that corrects the deficiency. If the entity does not co-operate with

<sup>131</sup> For example, by the entity or another person making an application to the court for an order to wind up the entity under section 459A, or the entity dispatching a notice of meeting proposing a special resolution to wind up the entity under section 491, of the Corporations Act (or their equivalent under overseas law).

<sup>132</sup> For example, by the making of a court order for an involuntary winding up under section 459A, or the passing of a special resolution approving a voluntary winding up under section 491, of the Corporations Act (or their equivalent under overseas law).

<sup>133</sup> See '3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3' on page 20.

<sup>134</sup> See '3.2 The main circumstances in which ASX will apply Listing Rules 11.1.2 and 11.1.3' on page 20.

ASX in requesting a halt or suspension, ASX will impose a suspension under Listing Rule 11.3. The suspension will continue until the entity has corrected the deficiency to ASX's satisfaction.

In the last case above, ASX is likely to suspend the quotation of the entity's securities until the entity has re-complied with ASX's admission and quotation requirements or the requirement to re-comply has ceased to apply.<sup>135</sup>

#### 5.4 Suspensions on the day of a security holder vote to approve the transaction

Where a transaction requires security holder approval under Listing Rule 11.1.2 or 11.2, Listing Rule 11.3 will come into play on the day on which the meeting of security holders is due to be held to consider the resolution to approve the transaction. On that day, the following procedures should be followed:

- (i) The entity should request a trading halt under Listing Rule 17.1 to apply from the start of trading on the day of the security holders' meeting and to last until the result of the security holder vote is announced to the market. If the entity does not request the halt, ASX will generally suspend trading in the entity's securities under Listing Rule 11.3 before trading starts on that day.
- (ii) If ASX has not exercised its discretion under Listing Rule 11.1.3 to require re-compliance with the admission requirements and security holders approve the transaction, the entity should immediately announce the results of the security holder vote to the market,<sup>136</sup> confirm as a consequence that it is proceeding to complete the transaction and outline the remaining steps and timetable for completion. In the absence of any other reason to halt or suspend trading in the entity's securities, ASX will generally lift the trading halt or suspension referred to in (i) above upon the release of that announcement to the market.
- (iii) If ASX has exercised its discretion under Listing Rule 11.1.3 to require re-compliance with the admission and quotation requirements and security holders approve the transaction, the entity should immediately announce the results of the security holder vote to the market<sup>137</sup> and request a voluntary suspension under Listing Rule 17.2 pending its re-compliance with ASX's admission and quotation requirements. If it does not, ASX will suspend trading in the entity's securities under Listing Rule 11.3. In either case, the suspension will continue until those requirements have been satisfied or are no longer applicable.<sup>138</sup>

ASX will expect the entity to make an announcement to the market promptly confirming the result of the security holder vote and, where applicable, the remaining steps that need to be satisfied for the entity to re-comply with ASX's admission and quotation requirements and the timetable for the completion of those steps.

- (iv) If security holders do not approve the transaction, the entity should immediately announce the results of the security holder vote to the market<sup>139</sup> and confirm as a consequence that it will not be proceeding with the transaction. In the absence of any other reason to halt or suspend trading in the entity's securities, ASX will generally lift the trading halt or suspension referred to in (i) above upon the release of that announcement to the market.

#### 5.5 Other circumstances where ASX may exercise its suspension power

ASX may also exercise its discretion to suspend trading in an entity's securities under Listing Rule 11.3 if it considers that:

- the entity is in breach of Listing Rule 11.1 or 11.2 – in which case, ASX may impose a suspension until the entity remedies the breach; or

<sup>135</sup> See the text accompanying note 72 above.

<sup>136</sup> See Listing Rule 3.13.2.

<sup>137</sup> See Listing Rule 3.13.2.

<sup>138</sup> For example, because the entity announces that it has decided not to, or is not able to, proceed with the transaction.

<sup>139</sup> See Listing Rule 3.13.2.

- the entity is taking an unreasonable time to comply with the requirements of Listing Rule 11.1 or 11.2 – in which case ASX may impose a suspension until the entity completes all of the steps required to comply fully with the requirements of Listing Rules 11.1 and 11.2.

## 6. Requirements for agreements

### 6.1 Conditionality of agreements

As mentioned above, Listing Rule 11.2 provides that an entity must not enter into an agreement to dispose of its main undertaking unless the agreement is conditional on the entity obtaining security holder approval.

Unlike Listing Rule 11.2, there is no express requirement in Listing Rule 11.1 that an agreement relating to a transaction which will result in a significant change to the nature or scale of a listed entity's activities must be subject to the approval of its security holders or to the entity re-complying with ASX's admission and quotation requirements.<sup>140</sup> This is in keeping with the fact that Listing Rules 11.1.2 and 11.1.3 simply confer on ASX the discretion to impose these conditions, rather than mandate that all such changes must be subject to these conditions.

Clearly, however, it would be prudent for a listed entity that is proposing to enter into an agreement which will result in a significant change to the nature or scale of its activities, either:

- to seek in-principle advice from ASX in advance of entering into the agreement that ASX will not exercise its discretion to require security holder approval or re-compliance with ASX's admission and quotation requirements; or
- to include in the agreement appropriate safeguards to protect the interests of the entity and its security holders in the event that ASX does exercise that discretion.<sup>141</sup>

An appropriate safeguard would be making the agreement conditional on ASX not requiring security holder approval or re-compliance with ASX's admission and quotation requirements or, if it does, the satisfaction of those requirements.

A failure by an entity to include such a condition in an agreement will not deter ASX, in an appropriate case, from exercising its discretion under Listing Rules 11.1.2 and 11.1.3 to require security holder approval or re-compliance with ASX's admission and quotation requirements, or its power under Listing Rule 18.8 to impose any other requirement it considers fit to ensure compliance with the Listing Rules.

### 6.2 Break fees

ASX has no objection to an agreement for a transaction which will result in a significant change to the nature or scale of a listed entity's activities, including a disposal of its main undertaking, incorporating a reasonable break fee in the event that the entity is not able to obtain security holder approval or to re-comply with ASX's admission and quotation requirements where it is required to do so, provided the triggers for the break fee are reasonable in the circumstances and do not include a naked "no vote" from security holders. Reasonable triggers for a break fee might include:

- a change of directors' recommendation (except where the change of recommendation occurs because an expert opines that the transaction is not fair and reasonable to security holders);
- a competing transaction that successfully completes;

<sup>140</sup> This is to be compared and contrasted with Listing Rule 11.2, which requires all agreements for the disposal of a main undertaking by a listed entity to be conditional on security holder approval.

<sup>141</sup> A failure to take these precautions could well raise issues for the directors and other officers of the listed entity in terms of their statutory and common law obligations to exercise due care and diligence: see, in particular, section 180 (officers of listed companies) and section 601FD (officers of responsible entities of listed trusts) of the Corporations Act.

- a material condition precedent within the entity's control not being satisfied; or
- a material breach by the entity of the transaction agreements.

ASX will apply the guidance in Takeovers Panel Guidance Note 7 *Lock-up devices*<sup>142</sup> in determining what constitutes a reasonable break fee for these purposes and when the triggers for a break fee are unreasonable or coercive.<sup>143</sup>

A break fee that is unreasonably high or that has unreasonable triggers would be inconsistent with the spirit and intent of Listing Rules 11.1 and 11.2 and will not be allowed.

### 6.3 Option arrangements

ASX has no objection to a listed entity entering into an option which, if exercised, will result in a disposal of its main undertaking, provided the exercise of the option is conditional on the entity obtaining security holder approval to the disposal under Listing Rule 11.2.

Similarly, ASX has no objection to a listed entity entering into an option which, if exercised, will result in any other significant change to the nature or scale of a listed entity's activities, provided, if ASX exercises its discretion under Listing Rule 11.1.2 or 11.1.3 to require security holder approval or re-compliance with ASX's admission and quotation requirements, those requirements are met before the option is exercised.

In either case above, the payment of a more than nominal option fee in advance of obtaining security holder approval or re-complying with ASX's admission and quotation requirements (as applicable) would be inconsistent with the spirit and intent of Listing Rules 11.1 and 11.2 and will not be allowed.

ASX will expect any such option to be announced to the market as a "proposed transaction" under Listing Rule 11.1 as soon as the option is entered into and then a further announcement to be made to the market if and when the option is exercised, the option lapses or the entity determines that it will not be exercising the option.

ASX is alive to entities seeking to use option arrangements to avoid ASX's policy of suspending trading in an entity's securities when it announces a transaction that requires re-compliance under Listing Rule 11.1.3. ASX may suspend trading in the entity's securities from the date it announces an option to enter into such a transaction.<sup>144</sup> The suspension will last until ASX decides to reinstate the entity's securities to quotation following its re-compliance with ASX's admission and quotation requirements or the entity announces that the option has lapsed or is not being exercised.

## 7. Requirements for notices of meeting

### 7.1 The form of resolution

The resolution required to approve a transaction for the purposes of Listing Rule 11.1.2 or 11.2 is an ordinary resolution passed at a general meeting of the holders of the entity's ordinary securities.<sup>145</sup>

Listing Rules 11.1.2 and 11.2 do not dictate the specific terms of the resolution required under those rules. In each case, a resolution to the following effect will suffice:

"That the [*name/description of transaction*] is approved under and for the purposes of Listing Rule [11.1.2/11.2]."

Where multiple approvals are required under the Listing Rules (eg where the transaction requires approval under Listing Rule 7.1, 10.1 or 10.11, as well as under Listing Rule 11.1.2 or 11.2), ASX has no objection to the approvals

<sup>142</sup> This is available on the Takeovers Panel's website: <http://www.takeovers.gov.au/>.

<sup>143</sup> See, in particular, paragraphs 9 and 10 of Takeovers Panel Guidance Note 7 *Lock-up devices*.

<sup>144</sup> Under Listing Rule 11.3 or 17.3.

<sup>145</sup> Listing Rule 14.9.



being combined in the one resolution and being expressed in terms that the transaction “is approved under and for the purposes of the Listing Rules”, provided:

- the notice of meeting or explanatory statement given to security holders for the meeting makes it clear which elements of the transaction are being approved under which Listing Rules; and
- the voting exclusion statements required under the Listing Rules in respect of each of the resolutions are not substantively different.

The requirement to include a voting exclusion statement for a resolution under Listing Rule 11.1.2 or 11.2 will generally make it inappropriate to combine that resolution with any other resolution required in relation to the transaction under the Corporations Act.<sup>146</sup>

### 7.2 The information to be included in the notice of meeting

A notice of meeting proposing a resolution to approve a transaction for the purposes of Listing Rules 11.1.2 or 11.2 must include a summary of the relevant rule and what will happen if security holders give, or do not give, the approval sought under that rule.<sup>147</sup>

In the case of a resolution seeking an approval under Listing Rule 11.1.2, a summary modelled along the following lines will suffice:

*“[Name of entity] is proposing to [insert a description of the proposed transaction, defining it as the “Transaction” (or something similar)].*

Listing Rule 11.1.2 empowers ASX to require a listed [company/trust] to obtain the approval of its [shareholders/unitholders] to a significant change to the nature or scale of its activities. The Transaction will involve a significant change to the nature or scale of [name of entity]’s activities for these purposes and, as is its usual practice, ASX has imposed a requirement under Listing Rule 11.1.2 that [name of entity] obtain [shareholder/unitholder] approval to the Transaction.

Resolution [n<sup>o</sup>] seeks the required [shareholder/unitholder] approval to the Transaction under and for the purposes of Listing Rule 11.1.2.

If resolution [n<sup>o</sup>] is passed, [name of entity] will be able to proceed with the Transaction and [outline the consequences that will follow].

If resolution [n<sup>o</sup>] is not passed, [name of entity] will not be able to proceed with the Transaction and [outline the consequences that will follow].”

In the case of a resolution seeking approval under Listing Rule 11.2, a summary modelled along the following lines will suffice:

*“[Name of entity] is proposing to [insert a description of the proposed transaction, defining it as the “Transaction” (or something similar)].*

Listing Rule 11.2 requires a listed [company/trust] to obtain the approval of its [shareholders/unitholders] to a disposal of its main undertaking. The Transaction is a disposal of [name of entity]’s main undertaking for these purposes.

Resolution [n<sup>o</sup>] seeks the required [shareholder/unitholder] approval to the Transaction under and for the purposes of Listing Rule 11.2.

<sup>146</sup> For example, a resolution under the Corporations Act approving a scheme of arrangement, reduction of capital or share buy-back, where there generally are no comparable voting exclusions.

<sup>147</sup> Listing Rule 14.1A.

If resolution [n<sup>o</sup>] is passed, [name of entity] will be able to proceed with the Transaction and [outline the consequences that will follow].

If resolution [n<sup>o</sup>] is not passed, [name of entity] will not be able to proceed with the Transaction and [outline the consequences that will follow].”

A notice of meeting proposing a resolution to approve a transaction for the purposes of Listing Rules 11.1.2 or 11.2 must also include a voting exclusion statement.<sup>148</sup> Otherwise, the Listing Rules do not specify what information needs to be included in the notice of meeting.

As a matter of general law, a notice of meeting must include such material as will fully and fairly inform security holders of the matters to be considered at the meeting and enable them to make a properly informed judgment on those matters.<sup>149</sup>

Where the notice relates to a resolution by security holders approving a transaction under Listing Rule 11.1.2 that also requires re-compliance with ASX’s requirements for admission and quotation under Listing Rule 11.1.3, ASX will expect the notice to include the information set out in Annexure A.

Where the notice relates to a resolution by security holders approving a transaction under Listing Rule 11.1.2 that does not require re-compliance with ASX’s requirements for admission and quotation under Listing Rule 11.1.3, or approving a disposal of the entity’s main undertaking under Listing Rule 11.2, ASX will expect the notice to include a reasonable level of detail about the transaction, including:

- the parties to, and material terms of, the transaction;
- an assessment of the financial effect of the transaction on the entity and on the interests of security holders in the entity,<sup>150</sup> including information about the likely effect of the transaction on the entity’s consolidated total assets, total equity interests, annual revenue, annual expenditure and annual profit before tax;
- details of any changes the entity will be making to its business model in light of the transaction;
- in the case of an acquisition, details of how the entity intends to pay for the acquisition;
- in the case of a disposal, details of what the entity intends to do with the proceeds of the disposal;
- any changes proposed to the entity’s board or senior management in connection with, or as a consequence of, the transaction;
- the timetable for implementing the transaction; and
- a statement that ASX takes no responsibility for the contents of the notice.

This information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>151</sup>

Where an entity is required both to obtain security holder approval to a proposed transaction under Listing Rule 11.1.2 and to re-comply with ASX’s admission and quotation requirements under Listing Rule 11.1.3, ASX will generally expect all material information about the transaction to be included in any prospectus or PDS lodged to re-comply with the admission requirement in Listing Rule 1.1 condition 3, also to be included in the notice of meeting to security holders seeking their approval. This is on the basis that if the information is sufficiently material to require disclosure to investors in a prospectus or PDS, it is likely also to be sufficiently material to require disclosure to security holders in the notice of meeting.

<sup>148</sup> See the second sentence in each of Listing Rules 11.1.2 and 11.2 and ‘7.5 Voting exclusions’ on page 37.

<sup>149</sup> See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

<sup>150</sup> *ENT v Sunraysia* [2007] NSWSC 270.

<sup>151</sup> Listing Rule 14.1.

Having said this, ASX recognises that an entity in this situation may not want to go to the effort and expense of preparing a prospectus or PDS under Listing Rule 1.1 condition 3 unless and until it knows that its security holders approve the transaction. It therefore may not have available to it at the time it prepares and dispatches the notice of meeting seeking security holder approval all of the information that will ultimately find its way into the prospectus or PDS. Where that is the case, the entity should nonetheless include in the notice of meeting all material information that is known to it and its directors at the time of dispatching the notice.

Thus, for example, if at the time the entity prepares and dispatches the notice of meeting seeking security holder approval, it already has in its possession audited or reviewed accounts or a completed review by a registered company auditor or independent accountant of the pro forma statement of financial position that it will be lodging to re-comply with ASX's admission and quotation requirements,<sup>152</sup> those documents should be included with the notice of meeting.

Listed entities and their advisers should note the comments of Austin J in *ENT v Sunraysia*<sup>153</sup> that:

*"the level of disclosure [under Listing Rule 11.2] is influenced by the nature of the decision that the shareholders are being asked to make. Under a typical corporate constitution (and see the replaceable rule in s 198A), the directors are empowered to manage or direct the management of the business of the company. Therefore, the decision to dispose of the company's main undertaking is the directors' decision. The Listing Rule gives shareholders the function of approving the directors' decision (or their proposed decision), and so the shareholders' meeting supplements the directors' decision rather than usurping the directors' power.*

*The shareholders do not need to have all of the information required by the primary decision-makers, the directors. For example, they do not need to be presented with information about the range of alternative proposals that would need to be considered before a particular transaction is chosen. Reviewing all the alternatives is a task for the primary decision-makers.<sup>154</sup> The shareholders' task is limited to approving or rejecting the particular proposal that the directors present to the meeting, and it is not their role to choose or advocate a transaction of some other kind. The question for the shareholders is not whether the directors have selected the best possible transaction, but whether the transaction they have selected should be approved. However, **the shareholders are entitled to receive all of the information that is material to the question of whether the transaction proposed by the directors should be approved, including all the commercial information that is material to that question. That includes the material commercial information known to the directors, and also other commercial information that is material and accessible to the directors even if they are not aware of it.**" [Emphasis added]*

While these comments were made specifically in relation to a resolution under Listing Rule 11.2, ASX considers that they apply with equal force to a resolution under Listing Rule 11.1.2.

In relation to the comment highlighted above that a notice of meeting should include commercial information that is material and accessible to directors, ASX would expect the directors of a listed entity that is proposing a significant acquisition of or merger with another entity or undertaking to have overseen an appropriate due diligence program that gives them confidence that the acquisition/merger is in the interests of the listed entity and its security holders

<sup>152</sup> See note 231 below and the accompanying text.

<sup>153</sup> See note 150 above.

<sup>154</sup> Even though the courts have determined that it is not necessary for security holders to be given information about the range of alternative proposals that the board has considered before selecting the particular transaction being put to security holders for approval under Listing Rule 11.1.2 or 11.2, there is nothing to prevent a listed entity providing that information to security holders so that they are better informed on that matter.

before they put the proposal to security holders for approval.<sup>155</sup> Any material information derived from that due diligence program should be included in the notice of meeting seeking security holder approval to the transaction.

Listing Rules 11.1.2 and 11.2 empower ASX to impose additional requirements in relation to a notice of meeting. If there is a difference of opinion between ASX and a listed entity as to whether certain material is required to be included in a notice of meeting relating to a resolution under one of those rules, ASX may resolve that difference by exercising its power under the relevant rule to require that material to be included in the notice of meeting.

### 7.3 The requirement to give a draft notice to ASX for review

Before a listed entity sends out a notice of meeting that includes a resolution by security holders approving a transaction for the purposes of Listing Rule 11.1.2 or 11.2, it must give ASX a copy of the draft notice for review. It must not finalise the notice until ASX tells it that ASX does not object to it.<sup>156</sup>

In most situations, ASX tries to review and notify the entity whether it objects to a draft notice of meeting within 5 business days of receipt.<sup>157</sup> Draft notices relating to transactions where ASX has exercised its discretion both to require security holder approval under Listing Rule 11.1.2 and the entity to re-comply with ASX's admission and quotation requirements under Listing Rule 11.1.3, however, are particularly complex. ASX is likely to take closer to 15 business days to review such notices and may take longer if:

- new information has emerged that causes ASX to reconsider any in-principle advice it has given on the suitability of the entity for re-admission to the official list under Listing Rule 1.1 condition 1 or Listing Rule 1.19;
- the draft notice is incomplete or of a poor standard; or
- the entity is tardy in responding to any requests by ASX for further information or documents required to process the draft notice.

ASX may object to a draft notice of meeting if it appears to ASX that it does not meet the requirements of the Listing Rules or the required standard of disclosure mentioned above.

Any financial information included in a draft notice of meeting must be based on up-to-date audited or reviewed accounts of the entity. If an entity has been suspended for failing to lodge its accounts with ASX, ASX will usually require it to lodge all outstanding accounts with ASX before ASX will approve a draft notice of meeting seeking approval to a transaction for the purposes of Listing Rule 11.1.2 or 11.2.

The fact that ASX does not object to a draft notice of meeting does not preclude ASX from raising Listing Rule issues at a later stage of the transaction (for example, when an Appendix 1A listing application and accompanying documents are provided to ASX), or from reconsidering the application of the Listing Rules to matters disclosed in the draft notice of meeting.<sup>158</sup>

### 7.4 Fee for reviewing draft notices under Listing Rules 11.1.2 and 11.1.3

ASX charges a fee of \$10,000 (plus GST) for reviewing a draft notice of meeting proposing a resolution of security holders approving a transaction under Listing Rule 11.1.2 where the transaction is one where ASX will also require

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<sup>155</sup> Where ASX has concerns about the extent or quality of the due diligence undertaken by an entity in relation to a transaction subject to security holder approval under Listing Rule 11.1.2, ASX may ask for a description of the entity's due diligence program (or lack thereof) to be included in the notice of meeting.

A failure to oversee a proper due diligence program is likely to raise issues for the directors and other officers of the entity in terms of their statutory and common law obligations to exercise due care and diligence: see, in particular, section 180 (officers of listed companies) and section 601FD (officers of responsible entities of listed trusts) of the Corporations Act.

<sup>156</sup> Listing Rules 15.1 and 15.1.4.

<sup>157</sup> Listing Rule 15.1. ASX will tell an entity within 5 business days if it needs more time to examine a draft notice of meeting.

<sup>158</sup> Among other reasons, this is because the full range of issues with an entity's attempt to re-comply with ASX's admission and quotation requirements will often not be apparent until the entity lodges its admission application with the accompanying prospectus or PDS.

the entity to re-comply with ASX's admission and quotation requirements under Listing Rule 11.1.3.<sup>159</sup> Payment must be made at the time of lodging the notice with ASX for review.<sup>160</sup> ASX will not commence its review of the draft notice until the fee has been paid.

This fee is in addition to any fee paid to ASX for any in-principle advice sought by the entity on the application of Listing Rule 1.1 condition 1 and Listing Rule 1.19<sup>161</sup> and the fee for reviewing any Appendix 1A application and accompanying documents that the entity may subsequently lodge in connection with its re-compliance with ASX's admission and quotation requirements.<sup>162</sup> If the entity is successful in re-complying with ASX's admission and quotation requirements, all three fees will be off-set against the entity's initial listing fee.

ASX does not charge a fixed fee for reviewing a draft notice of meeting proposing a resolution of security holders approving a transaction under Listing Rule 11.1.2 where ASX does not require the entity to re-comply with ASX's admission and quotation requirements under Listing Rule 11.1.3. Nor does it charge a fixed fee for reviewing a draft notice of meeting proposing a resolution of security holders approving the disposal of an entity's main undertaking under Listing Rule 11.2. ASX may, however, charge a time-based fee if the time involved in the review is likely to exceed 10 hours.<sup>163</sup>

### 7.5 Voting exclusions

A notice of meeting proposing a resolution by security holders to approve a transaction for the purposes of Listing Rule 11.1.2 or 11.2 must include a voting exclusion statement.<sup>164</sup>

A voting exclusion statement is a statement to the effect that the entity will disregard any votes cast in favour of the resolution by or on behalf of an excluded person or an associate<sup>165</sup> of an excluded person, save where it is cast by:

- a person as proxy or attorney for another person who is entitled to vote on the resolution, in accordance with directions given to the proxy or attorney to vote on the resolution in that way;
- the chair of the meeting as proxy or attorney for a person who is entitled to vote on the resolution, in accordance with a direction given to the chair to vote on the resolution as the chair decides; or
- a holder acting solely in a nominee, trustee, custodial or other fiduciary capacity on behalf of a beneficiary provided the following conditions are met:
  - the beneficiary provides written confirmation to the holder that they are not excluded from voting, and are not an associate of a person excluded from voting, on the resolution; and
  - the holder votes on the resolution in accordance with directions given by the beneficiary to the holder to vote in that way.<sup>166</sup>

<sup>159</sup> See Listing Rule 16.7 and Schedule 3 of Guidance Note 15A *Schedule of ASX Listing Fees*.

<sup>160</sup> Payment can be made either by cheque made payable to ASX Operations Pty Ltd or by electronic funds transfer to the following account:

Bank: National Australia Bank  
Account Name: ASX Operations Pty Ltd  
BSB: 082 057  
A/C: 494728375  
Swift Code (Overseas Customers): NATAAU3302S

If payment is made by electronic funds transfer, the entity should email its remittance advice to [ar@asx.com.au](mailto:ar@asx.com.au) or fax it to (612) 9227-0553, describing the payment as "fee for reviewing draft notice of meeting" and including the name of the listed entity, its home branch (ie Sydney, Melbourne or Perth) and the amount paid.

<sup>161</sup> See '2.7 Seeking in-principle advice from ASX' on page 12.

<sup>162</sup> See '8.1 The steps involved in re-compliance with ASX's admission and quotation requirements' on page 38.

<sup>163</sup> Again, see Listing Rule 16.7 and Schedule 3 of Guidance Note 15A *Schedule of ASX Listing Fees*.

<sup>164</sup> See Listing Rules 11.1.2 (second sentence) and 11.2 (second sentence) and the table in Listing Rule 14.11.1.

<sup>165</sup> Guidance Note 35 *Security Holder Resolutions* has guidance on who is an associate of an excluded person for these purposes.

<sup>166</sup> Listing Rule 14.11.

In the case of Listing Rule 11.1.2, the excluded persons are a counterparty to the transaction that, of itself or together with one or more other transactions, will lead to a significant change to the nature or scale of the entity's activities and any other person who will obtain a material benefit as a result of the transaction (except a benefit solely by reason of being a holder of ordinary securities in the entity).

In the case of Listing Rule 11.2, the excluded persons are the acquirer of the entity's main undertaking and any other person who will obtain a material benefit as a result of the disposal of the entity's main undertaking (except a benefit solely by reason of being a holder of ordinary securities in the entity).

For these purposes, ASX considers a "material benefit" to be one that is likely to induce the recipient of the benefit to vote in favour of the transaction regardless on its impact on ordinary security holders. Examples include:

- a professional adviser or other person who will be paid a success fee if the transaction proceeds; and
- if the transaction involves or includes an issue of securities:
  - an underwriter or sub-underwriter of the issue who will be paid an underwriting or sub-underwriting fee in relation to the issue; and
  - a lead manager of, or broker to, the issue who will be paid a fee or commission on the proceeds of the issue.

ASX also has a general discretion to designate any other person whose votes, in ASX's opinion, should be disregarded. This discretion may be exercised both before<sup>167</sup> and after<sup>168</sup> the notice of meeting has been sent to security holders. One example of where ASX is likely to exercise this discretion is where an entity issues securities in the lead up to, or following, the announcement of a re-compliance listing and an associated capital raising to related parties, promoters, professional advisers involved in the transaction, or their family, friends and associates,<sup>169</sup> at a significant discount to the anticipated offer price for the capital raising. ASX is likely to require a voting exclusion be applied to the recipients of those securities in relation to all of the securities they hold (and not just those received in the issue).<sup>170</sup> This is on the basis that the issue to them at a significant discount to the anticipated offer price for the capital raising has given them an interest in the transaction different to other security holders.

Guidance Note 35 *Security Holder Resolutions* has further guidance on voting exclusions and the procedures that should be followed at a meeting of security holders where a resolution under Listing Rule 11.1.2 or 11.2 is being considered.

## 8. Re-compliance with ASX's admission and quotation requirements

### 8.1 The steps involved in re-compliance with ASX's admission and quotation requirements

Where ASX exercises its discretion under Listing Rule 11.1.3 to require a listed entity to re-comply with ASX's admission and quotation requirements in Chapters 1 and 2 of the Listing Rules, ASX treats that as if it were a *de novo* application by the entity to be admitted to the official list. Where the discretion is exercised in relation to a proposed acquisition of or proposed merger with another entity or undertaking, ASX will apply the Listing Rules as

<sup>167</sup> See the final entry in the table in Listing Rule 14.11.1. If ASX exercises this discretion, the person must be named or described in the voting exclusion statement in the notice of meeting.

<sup>168</sup> Listing Rule 14.11.2. If ASX exercises this discretion, it is not necessary for the entity to send a further notice of meeting naming the person in the voting exclusion statement (see the note to Listing Rule 14.11.2). However, ASX will generally expect the entity to make an announcement to the market of ASX's determination.

<sup>169</sup> Again, the reference to "family, friends and associates" is intended to be interpreted broadly and includes officers and employees of a corporate promoter or professional adviser involved in the transaction and their related parties.

<sup>170</sup> If the voting exclusion is applied by ASX under the final entry in the table in Listing Rule 14.11.1, it will automatically extend to the associates of the recipients of those securities under Listing Rule 14.11. If the voting exclusion is applied by ASX under Listing Rule 14.11.2, ASX will generally stipulate that the associates of those recipients are also excluded from voting in favour of the transaction.

if the acquisition or merger had been completed and look to ensure that the resulting combination meets ASX's requirements for admission and quotation.

Re-complying with ASX's admission and quotation requirements involves (among other things):

- completing an Appendix 1A *Application for Admission to the ASX Official List (ASX Listing)* and the accompanying Information Form and Checklist (ASX Listings) and paying the applicable initial listing fee;<sup>171</sup>
- having a structure (including a capital structure) and operations that are appropriate for a listed entity;<sup>172</sup>
- issuing a prospectus or PDS;<sup>173</sup>
- meeting ASX's minimum free float requirement;<sup>174</sup>
- meeting ASX's minimum spread requirement;<sup>175</sup>
- meeting the profit test or assets test;<sup>176</sup>
- complying with Chapter 9 of the Listing Rules in relation to any "restricted securities" it has on issue or is proposing to issue;<sup>177</sup>
- unless ASX chooses not to apply this requirement (see below), having the entity's quoted securities (except options) issued or sold for at least 20 cents in cash;<sup>178</sup>
- unless ASX chooses not to apply this requirement (see below), having any options the entity has issued exercisable for at least 20 cents in cash;<sup>179</sup>
- satisfying ASX that each director or proposed director, the CEO or proposed CEO, and the CFO or proposed CFO at the date of admission is of good fame and character;<sup>180</sup> and
- having any securities issued under a prospectus or PDS admitted to quotation within the time limits prescribed under the Corporations Act.<sup>181</sup>

Having to re-comply with ASX's admission and quotation requirements also enlivens ASX's ability to impose such conditions on admission and/or quotation as it considers appropriate<sup>182</sup> and its absolute discretion to decide whether or not to admit an entity to the official list and to quote its securities.<sup>183</sup> ASX may exercise this discretion at any time. It may do so notwithstanding that the entity is currently admitted to the official list and even where the

<sup>171</sup> Listing Rule 1.7. See also sections 2.3 and 2.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>172</sup> Listing Rule 1.1 condition 1. See also section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>173</sup> Listing Rule 1.1 condition 3. See also sections 3.3 and 3.4 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>174</sup> Listing Rule 1.1 condition 7. See also section 3.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>175</sup> Listing Rule 1.1 condition 8. See also section 3.9 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>176</sup> Listing Rule 1.1 condition 9. See also sections 3.10 and 3.11 of Guidance Note 1 *Applying for Admission – ASX Listings*.

An entity which re-complies with ASX's admission and quotation requirements on the basis of the assets test and its "commitments" under Listing Rule 1.3.2(b) must also comply with the ongoing requirements that apply to such entities. Listing Rules 4.7B and 4.7C require the entity to lodge quarterly activity reports and quarterly cash flow reports for the first eight quarters after satisfying the admission test. Listing Rule 4.10.19 requires the entity to include in its annual reports for the first 2 years after satisfying the admission test a statement about whether it used its cash in a way consistent with its objectives.

<sup>177</sup> Listing Rule 1.1 condition 10. See also section 3.13 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>178</sup> Listing Rule 2.1 condition 2.

<sup>179</sup> Listing Rule 1.1 condition 12.

<sup>180</sup> Listing Rule 1.1 condition 20. See also section 3.21 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>181</sup> See sections 723(3) and 724 (securities offered under a prospectus) and sections 1013H and 1016D (securities offered under a PDS). See also section 2.7 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>182</sup> Listing Rules 1.19 and 2.9.

<sup>183</sup> Listing Rules 1.19 and 2.9. See section 2.9 of Guidance Note 1 *Applying for Admission – ASX Listings*.

entity otherwise meets, or is expected to meet, the specific conditions set out in the Listing Rules for listing and quotation.

Detailed guidance on the requirements mentioned above can be found in Guidance Note 1 *Applying for Admission – ASX Listings*, Guidance Note 4 *Foreign Entities Listing on ASX* and Guidance Note 11 *Restricted Securities and Voluntary Escrow*. Entities pursuing transactions that have a connection with an emerging or developing market should note, in particular, the additional spread requirements that ASX may impose in relation to those transactions mentioned in Guidance Note 1.

The commentary under the subheadings below provides additional guidance on issues that often arise in the context of Listing Rule 11.1.3.

## 8.2 Processing time

ASX Listings Compliance aims to process re-compliance applications as quickly as it reasonably can, given its workloads at the time. Typically, a re-compliance application will take ASX around six weeks to process, from the time a properly completed application for admission to the official list and all other required documents are lodged with ASX, until a decision is made on whether or not to reinstate the entity's securities to quotation following its re-compliance.<sup>184</sup> It may take longer, however, if:

- new information has emerged that causes ASX to reconsider any in-principle advice it has given on the suitability of the entity for re-admission to the official list under Listing Rule 1.1 condition 1 or Listing Rule 1.19;
- the application is incomplete or of a poor standard;
- the entity is tardy in responding to any requests by ASX for further information or documents required to process the application; or
- the documentation provided to satisfy ASX that the entity has met ASX's minimum spread requirement<sup>185</sup> is incomplete or of poor quality.

In each case above, ASX Listings Compliance will liaise with the entity and keep it apprised of the impact this may have on its timetable for re-admission.

Where an entity is making a non-underwritten offer of securities in connection with its re-admission that is subject to a minimum subscription condition, ASX may defer finalising its review of the application until it is advised by the applicant that the minimum subscription condition has been, or is close to being, satisfied. If it does delay finalising its review of the application, ASX will advise the applicant of that fact. Whether or not ASX does this, the entity should keep ASX apprised of its progress in satisfying any minimum subscription condition for a non-underwritten offer of securities.

The time it takes ASX to process an application for re-admission is very much a function of the quality of the application. The better the quality of the application, the more quickly and efficiently ASX is likely to be able to process it. ASX would therefore strongly encourage an entity applying for re-admission to engage professional advisers who are experienced in ASX listings and to seek their advice and assistance in preparing its application for re-admission.

Subject to the comments above, ASX Listings Compliance will generally try to process a re-compliance application within a timeframe that is consistent with the timetable outlined in any prospectus or PDS the entity issues in

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<sup>184</sup> Note that the fast track process for offers proceeding by pathfinder prospectus or PDS mentioned in section 2.6 of Guidance Note 1 *Applying for Admission – ASX Listings* is not available for back door listings. The 6 weeks' timetable mentioned in the text above assumes that the entity has already applied for and received favourable in-principle advice in accordance with in section 2.7 above on its suitability for re-admission to the official list under Listing Rule 1.1 condition 1 and Listing Rule 1.19 if it proceeds with the transaction. It also assumes that the entity has applied and received any listing rule waivers or confirmations essential to the transaction proceeding in accordance with in section 2.10 above.

<sup>185</sup> See section 3.9 of Guidance Note 1 *Applying for Admission – ASX Listings*.



connection with its re-admission. That said, if an entity intends to specify in its prospectus or PDS a timetable that is shorter than six weeks from the date of lodgement of the application with ASX, it should discuss the matter with ASX Listings Compliance at the earliest opportunity to determine whether its proposed timetable can be accommodated.

### 8.3 Prospectus or PDS

Unless ASX agrees to accept an information memorandum in lieu of a prospectus or PDS, an entity that is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements must issue a prospectus or PDS and lodge it with ASIC.<sup>186</sup>

It is common for an entity proposing to make a significant change to the nature or scale of its activities to be making an offer of securities as part of, or in connection with, the transaction.<sup>187</sup> In that case, the entity may, and generally will, use the prospectus or PDS it prepares for that offer to satisfy this requirement.

Given the obvious intent of the requirement to produce a prospectus or PDS for a listing, ASX will not accept for these purposes a prospectus or PDS that has been prepared relying on the abridged content requirements applicable to offers of continuously quoted securities in sections 713 or 1013FA of the Corporations Act.<sup>188</sup> The document must comply with the detailed content requirements in section 710 (in the case of a prospectus) and sections 1013D and 1013E (in the case of a PDS).

It should be noted that the circumstances in which ASX will agree to accept an information memorandum in lieu of a prospectus or PDS are very limited<sup>189</sup> and generally will not apply to an entity that is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements. This means that such an entity will need to make an offer of securities pursuant to a prospectus or PDS, even though it might not otherwise need to raise capital or to issue securities to meet ASX's requirements for re-admission to the official list. The size of the offer is a matter for the entity concerned but it should be further noted that in exercising its discretion to determine whether or not to re-admit the entity to the official list, ASX may have regard to the level of investor support for the listing. From this perspective, the larger the offer and the broader the base of investors who accept it, the stronger the indication of investor support for the listing.<sup>190</sup>

### 8.4 Minimum free float

An entity must have a free float at the time of its re-admission to the official list of not less than 20%.<sup>191</sup>

"Free float" means the percentage of the entity's main class of securities that:

- are not "restricted securities"<sup>192</sup> or subject to voluntary escrow;<sup>193</sup> and

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<sup>186</sup> Listing Rule 1.1 condition 3.

<sup>187</sup> The purpose of the capital raising may be to raise the money required for the entity to pay the purchase price for an acquisition that will result in a significant change in the nature or scale of its activities. In the case of a back door listing, it may also be to replenish the assets of the entity so that it meets the assets test in Listing Rule 1.1 condition 9 and Listing Rule 1.3, the minimum free float requirement in Listing Rule 1.1 condition 7, or the minimum spread requirements in Listing Rule 1.1 condition 8.

<sup>188</sup> Where ASX requires an entity that is undergoing a significant change to the nature or scale of its activities to re-comply with ASX's listing requirements, one of the reasons will generally be to ensure that the market has sufficient information about the entity and the transaction for trading in the entity's securities to occur on a reasonably informed basis. Allowing an entity to produce an abridged prospectus or PDS in satisfaction of Listing Rule 1.1 condition 3 would run counter to that objective.

<sup>189</sup> See section 3.5 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>190</sup> Where an offer of securities is relatively small compared to the existing capital of the entity, ASX will also look closely at whether the offer price is a fair measure of the market value of the entity's securities for the purposes of determining whether it meets ASX's minimum spread requirement (see '8.5 Minimum spread' on page 42). This is particularly the case if the offer price is materially higher than the entity's NTA per security or the price at which its securities have traded in recent times.

<sup>191</sup> Listing Rule 1.1 condition 7.

<sup>192</sup> The concept of "restricted securities" is explained in greater detail in Guidance Note 11 *Restricted Securities and Voluntary Escrow*.

<sup>193</sup> As defined in Listing Rule 19.12.

- are held by non-affiliated security holders.<sup>194</sup>

“Non-affiliated security holders” means security holders who are not:

- (a) a related party<sup>195</sup> of the entity;
- (b) an associate<sup>196</sup> of a related party of the entity; or
- (c) a person whose relationship to the entity or to a person referred to in (a) or (b) above is such that, in ASX’s opinion, they should be treated as affiliated with the entity.<sup>197</sup>

Securities held by or for an employee incentive plan are not regarded by ASX as forming a part of an entity’s free float.<sup>198</sup>

### 8.5 Minimum spread

To meet ASX’s minimum spread requirement, an entity must have at least 300 non-affiliated security holders,<sup>199</sup> each of whom holds a parcel of the entity’s main class of securities<sup>200</sup> that are not “restricted securities”<sup>201</sup> or subject to voluntary escrow with a value of at least \$2,000.

Where an entity is undertaking a material capital raising in connection with its re-admission, ASX will normally use the offer price under the prospectus or PDS for that capital raising to determine whether a holder’s securities have a value of at least \$2,000. ASX may, however, use a different measure to determine the value of a holder’s securities if the entity is not undertaking a material capital raising in connection with its re-admission or if ASX is concerned that the issue price under the prospectus or PDS does not fairly reflect the market value of its main class of securities.<sup>202</sup>

Security holders can ordinarily be counted for spread purposes regardless of when and how they acquired their securities (provided it did not involve the use of artificial means<sup>203</sup>). However, one of the purposes of the minimum spread test in this context is to demonstrate that there is sufficient investor interest in the entity to justify its re-admission. This purpose is facilitated if the investors counted for spread purposes have subscribed for \$2,000 worth of securities in the capital raising the entity is conducting in connection with its re-admission, indicating that they support the re-admission of the entity at the capital raising price.

If an entity is conducting a material capital raising in connection with its re-admission,<sup>204</sup> ASX may exercise its discretion under Listing Rule 1.19 to impose a condition of re-admission that a person is only to be counted for spread purposes if they have obtained a holding of the entity’s main class of securities with a value of at least \$2,000 as a result of participating in that capital raising.<sup>205</sup>

<sup>194</sup> Listing Rule 19.12.

<sup>195</sup> As defined in Listing Rule 19.12.

<sup>196</sup> As defined in Listing Rule 19.12. It should be noted that a related party of a director or officer of the entity or of a child entity is to be taken to be an associate of the director or officer unless the contrary is established.

<sup>197</sup> Listing Rule 19.12.

<sup>198</sup> If they do not fall within paragraph (a) or (b) of the definition of non-affiliated security holder in Listing Rule 19.12, ASX will regard them as falling within paragraph (c) of that definition.

<sup>199</sup> As defined in ‘8.4 Minimum free float’ on page 41.

<sup>200</sup> If CDIs are issued over securities in the main class, holders of the CDIs are included for these purposes. If securities or CDIs are registered in the name of a nominee or custodian, they are to be taken to be held by the underlying beneficial owner.

<sup>201</sup> See note 192 above.

<sup>202</sup> See the note to Listing Rule 1.1 condition 8.

<sup>203</sup> See section 3.9 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>204</sup> See ‘8.3 Prospectus or PDS’ on page 41.

<sup>205</sup> ASX is looking to amend the Listing Rules to formalise this position.

There is no specific requirement in the Listing Rules for a minimum number of Australian-resident security holders at the point of listing. However, ASX does encourage entities seeking re-admission to have at the time of their re-admission a reasonable number of security holders resident in Australia with a reasonable level of security holdings, to promote local interest and liquidity in its securities. ASX may exercise its discretion under Listing Rule 1.19 to impose a condition of re-admission that the entity has a minimum number of Australian resident security holders with a minimum size or value of security holding. ASX will generally exercise this discretion where the entity, post its re-admission, will be incorporated in, have its main business operations in, or have a majority of its board or a controlling shareholder resident in, an emerging or developing market.<sup>206</sup> Typically, in such a case, ASX will require 100% of the minimum spread to come from investors resident in Australia or other jurisdictions acceptable to ASX.<sup>207</sup>

Section 3.9 of Guidance Note 1 *Applying for Admission – ASX Listings* has more detailed guidance about the requirements for meeting the spread test.

### 8.6 Satisfying the profit test or assets test

Generally speaking, it would be uncommon (although not out of the question) for an entity required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements to do so by complying with the profit test. Among other things, this would require it to have:

- conducted the same main business activity during the last 3 full financial years and through to the date it is re-admitted;<sup>208</sup>
- aggregated profit from continuing operations for the last 3 full financial years of at least \$1 million;<sup>209</sup> and
- consolidated profit from continuing operations for the 12 months to a date no more than 2 months before the date it applied for admission of at least \$500,000.<sup>210</sup>

It is more common for an entity required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements to do so by complying with the assets test. To do this, an entity that is not an "investment entity"<sup>211</sup> must meet the following requirements:

- it must have at the time it is re-admitted:
  - net tangible assets of at least \$4 million after deducting the costs of fund raising; or
  - a market capitalisation of at least \$15 million;<sup>212</sup>

<sup>206</sup> In ASX's experience, these types of entities tend to target or attract investors from the emerging or developing market, making it less likely that they will trade on ASX and more difficult for ASX to conduct its usual checks to verify that minimum spread has been obtained without using artificial means. For these purposes, ASX regards any country that is on the list of developing countries declared by the Minister for Foreign Affairs for the purposes of the Overseas Aid Gift Deduction Scheme established by the Income Tax Assessment Act 1997 (available online at <https://www.dfat.gov.au/sites/default/files/list-developing-countries.pdf>) as an emerging or developing market.

<sup>207</sup> Again, ASX is looking to amend the Listing Rules to formalise this position.

<sup>208</sup> Listing Rule 1.2.2.

<sup>209</sup> Listing Rule 1.2.4.

<sup>210</sup> Listing Rule 1.2.5.

<sup>211</sup> An "investment entity" is one which in ASX's opinion has as a principal part of its activities investing (directly or through a child entity) in listed or unlisted securities or derivatives and whose objectives do not include exercising control over or managing any entity, or the business of any entity, in which it invests: see Listing Rule 19.12.

<sup>212</sup> Listing Rule 1.3.1. Where an entity is undertaking a material capital raising in connection with its re-admission, ASX will normally use the offer price under the prospectus or PDS for that capital raising to calculate the entity's market capitalisation. ASX may, however, use a different price to determine market capitalisation if the entity is not undertaking a material capital raising in connection with its re-admission or if ASX is concerned that the offer price under the prospectus or PDS does not fairly reflect the value of its main class of securities (see the note to the definition of "market capitalisation" in Listing Rule 19.12). In an appropriate case, ASX may require an entity's market capitalisation to be verified by an independent expert (Listing Rule 1.17).

- either:
  - less than half of its total tangible assets (after raising any funds) are cash or in a form readily convertible to cash;<sup>213</sup> or
  - it has commitments consistent with its stated business objectives<sup>214</sup> to spend at least half of its cash and assets readily convertible to cash – in this case, the entity’s listing prospectus, PDS or information memorandum must include an expenditure program setting out these commitments;<sup>215</sup>
- its prospectus or PDS must:
  - state the objectives the entity is seeking to achieve from its re-admission and any capital raising undertaken in connection with its re-admission;<sup>216</sup>
  - include an express statement (a “working capital statement”) from its directors that the entity will have enough working capital<sup>217</sup> to carry out its stated objectives, or else the entity must give ASX an equivalent statement from an independent expert;<sup>218</sup> and
- its working capital,<sup>219</sup> as shown in its reviewed pro forma statement of financial position under Listing Rule 1.3.5(d), must be at least \$1.5 million.<sup>220</sup>

If the entity is an “investment entity”,<sup>221</sup> it must at the time it is re-admitted:

- have net tangible assets of at least \$15 million after deducting the costs of fund raising; or
- be a pooled development fund and have net tangible assets of at least \$2 million after deducting the costs of fund raising.<sup>222</sup>

As part of demonstrating its compliance with the profit test or the assets test, an entity seeking to be admitted to the official list for the first time ordinarily must provide to ASX:

- audited accounts for its last 3 full financial years (in the case of the profits test)<sup>223</sup> or 2 full financial years (in the case of the assets test);<sup>224</sup> and

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<sup>213</sup> Listing Rule 1.3.2(a).

<sup>214</sup> As set out in its listing prospectus, PDS or information memorandum pursuant to Listing Rule 1.3.3(a): see note 216 below and the accompanying text.

<sup>215</sup> Listing Rule 1.3.2(b).

<sup>216</sup> Listing Rule 1.3.3(a).

<sup>217</sup> “Working capital” is defined in Listing Rule 19.12 to mean the difference between the entity’s current assets and its current liabilities.

<sup>218</sup> Listing Rule 1.3.3(b). It should be noted that a working capital statement is a forward-looking statement and must be based on reasonable grounds. If ASX has concerns about the accuracy or basis of the working capital statement, ASX may require the statement to be confirmed by an independent expert under Listing Rule 1.17 or it may refuse to re-admit the entity to the official list.

<sup>219</sup> See note 217 above.

<sup>220</sup> Listing Rule 1.3.3(c).

<sup>221</sup> See note 211 above.

<sup>222</sup> Listing Rule 1.3.4.

<sup>223</sup> Listing Rule 1.2.3(a). If the entity applies for admission less than 90 days after the end of its last financial year and it does not have audited accounts for its latest full financial year, ASX will accept audited accounts for the 3 years to the end of the previous financial year along with the entity’s audited or reviewed accounts for its most recent half year.

<sup>224</sup> Listing Rule 1.3.5(a). If the entity applies for admission less than 90 days after the end of its last financial year and it does not have audited accounts for its latest full financial year, ASX will accept audited accounts for the 2 years to the end of the previous financial year along with the entity’s audited or reviewed accounts for its most recent half year.

- if the entity applies for admission more than 6 months and 75 days after the end of its last financial year, audited or reviewed accounts for its most recent last half year (or longer period if available).<sup>225</sup>

Where an entity is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements, it ordinarily will have been lodging with ASX audited annual accounts and audited or reviewed half year accounts under Chapter 4 of the Listing Rules.<sup>226</sup> ASX will accept those lodgements (and, if the entity has been listed for less than 3 full financial years (in the case of the profits test) or 2 full financial years (in the case of the assets test), any accounts it lodged with its original listing application), as satisfying the requirement to lodge those accounts as part of the re-admission process. In other words, the entity will not be required to re-lodge any accounts it has already lodged with ASX.

If the entity has failed to lodge any accounts required under Chapter 4 in the period prior to its re-admission, or if the accounts it has lodged with ASX have not been properly audited or reviewed as required by Chapter 4, ASX will insist that default is cured prior to its re-admission taking effect.<sup>227</sup>

If the entity is applying for re-admission under the assets test and it has in the 12 months prior to applying for admission acquired, or is proposing in connection with its application for re-admission to acquire, another entity or business that is significant in the context of the entity then, unless ASX agrees otherwise,<sup>228</sup> the entity must also provide to ASX:

- audited accounts for the last 2 full financial years for that other entity or business;<sup>229</sup> and
- if the entity applies for re-admission more than 6 months and 75 days after the end of the last financial year for that other entity or business, audited or reviewed accounts for that other entity or business for its most recent half year (or longer period if available).<sup>230</sup>

In each case above, the entity must provide the audit report or review to ASX and the audit report or review must not contain a modified opinion, emphasis of matter or other matter paragraph that ASX considers unacceptable.

As part of demonstrating its compliance with the profit test or the assets test, an entity seeking to be admitted to the official list for the first time must provide to ASX a reviewed pro forma statement of financial position showing the effect of any material transactions (including any acquisitions, disposals or issues of securities) expected to occur in connection with the entity's admission to the official list.<sup>231</sup> The review must be conducted by a registered company auditor<sup>232</sup> or an independent accountant. Typically, the reviewed pro forma statement of financial position would be included in the prospectus or PDS lodged by the entity with ASX under Listing Rule 1.1 condition 3, on the basis that it is material information for investors.

Where an entity is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements, it must provide to ASX a reviewed pro forma statement of financial position as if it were being admitted to the official list for the first time. The reviewed pro forma statement of financial position must show the effect if the proposed transaction or transactions that led to ASX imposing the requirement to re-comply with ASX's admission

<sup>225</sup> Listing Rules 1.2.3(b) (profit test) and 1.3.5(b) (assets test).

<sup>226</sup> Listing Rules 4.2A (half year accounts) and 4.5 (annual accounts).

<sup>227</sup> To allow otherwise would run counter to the clear policy objective reflected in Listing Rule 17.5 that the securities of a listed entity should only be allowed to trade on ASX where it meets its periodic reporting obligations.

<sup>228</sup> Section 3.11 of Guidance Note 1 *Applying for Admission – ASX Listings* has guidance on when ASX may agree to accept less than 2 full financial years of audited accounts for these purposes. Any agreement by ASX to accept less than 2 full financial years of audited accounts may be conditional on the entity providing additional financial information about the relevant entity or business under Listing Rule 1.17. ASX may require that additional financial information to be audited or reviewed or otherwise opined upon by an expert.

<sup>229</sup> Listing Rule 1.3.5(c) first bullet point. If the entity applies for admission less than 90 days after the end of the last financial year for that other entity or business and the other entity or business does not have audited accounts for its latest full financial year, ASX will accept audited accounts for the 2 years to the end of the previous financial year along with the entity's audited or reviewed accounts for its most recent half year.

<sup>230</sup> Listing Rule 1.3.5(c) second bullet point.

<sup>231</sup> Listing Rules 1.2.3(c) (profit test) and 1.3.5(d) (assets test).

<sup>232</sup> If the entity is a foreign entity, the review can be conducted by an overseas equivalent of a registered company auditor.

and quotation requirements are consummated. Again, ASX would expect the reviewed pro forma statement of financial position to be included in the prospectus or PDS the entity lodges with ASX to meet Listing Rule 1.1 condition 3, on the basis that it is material information for investors.

Sections 3.10 and 3.11 of Guidance Note 1 *Applying for Admission – ASX Listings* have more detailed guidance about the requirements for meeting the profit test and assets test.

### 8.7 Escrow requirements for restricted securities

Where ASX exercises its discretion under Listing Rule 11.1.3 to require an entity to re-comply with ASX's admission and quotation requirements and it is not one that is excluded from escrow under Listing Rule 9.2, ASX will consider afresh whether any of its securities should be treated as "restricted securities" subject to the escrow requirements in Chapter 9 and Appendices 9A, 9B and 9C of the Listing Rules.

If the discretion is exercised in relation to a transaction that involves the entity acquiring a classified asset:<sup>233</sup>

- (a) from a related party or promoter, or an associate of a related party or promoter, of the entity, the consideration for the acquisition must be securities in the entity only and those securities must be restricted securities and subject to escrow for 24 months from the date the entity is re-admitted to quotation; or
- (b) from someone who is not a related party or promoter, or an associate of a related party or promoter, of the entity and part or all of the consideration for the acquisition is to be securities in a class quoted on ASX, those securities must be restricted securities and subject to escrow for 12 months from their date of issue.<sup>234</sup>

Paragraphs (a) and (b) above do not apply if under Listing Rule 9.2<sup>235</sup> the entity is not required to apply the restrictions in Appendix 9B. Paragraph (a) above also does not apply if, and to the extent that, the consideration was or is reimbursement of expenditure incurred by the related party, promoter or associate in developing the classified asset.<sup>236</sup>

Restricted securities are placed in escrow and not quoted on ASX until the expiry of the escrow period.<sup>237</sup>

If an entity subject to re-compliance has any restricted securities on issue, as a condition of its re-admission, it will be required to give ASX evidence of its compliance with Chapter 9 and Appendices 9A, 9B and 9C of the Listing Rules.<sup>238</sup>

Guidance Note 11 *Restricted Securities and Voluntary Escrow* has detailed guidance on how ASX applies the escrow provisions in the Listing Rules where ASX has exercised its discretion under Listing Rule 11.1.3 to require re-compliance with ASX's admission and quotation requirements.

There are two points dealt with in that Guidance Note that ASX would emphasise here.

The first is that ASX will look very closely at issues of securities in the lead up to, or following, the announcement of a re-compliance listing and an associated capital raising. If ASX finds that securities have been issued to related parties, promoters, professional advisers involved in the transaction, or their family, friends and associates,<sup>239</sup> at a significant discount to the anticipated offer price for the capital raising, it will question whether the purpose of the

<sup>233</sup> As defined in note 7 above.

<sup>234</sup> Listing Rule 1.1 conditions 11(a) and (b) respectively.

<sup>235</sup> Listing Rule 9.2 provides that unless ASX decides otherwise, the escrow restrictions in Appendix 9B of the Listing Rules do not apply to an entity that is admitted under the profit test in Listing Rule 1.2, that otherwise has a track record of profitability acceptable to ASX or that, in the opinion of ASX, has a substantial proportion of its assets as tangible assets or assets with a readily ascertainable value.

<sup>236</sup> For guidance on what ASX will permit by way of cash reimbursement, see section 4.4 of Guidance Note 11 *Restricted Securities and Voluntary Escrow*.

<sup>237</sup> Listing Rules 2.8.5 and 2.12.

<sup>238</sup> Listing Rule 9.3.

<sup>239</sup> Again, the reference to "family, friends and associates" is intended to be interpreted broadly and includes officers and employees of a corporate promoter or professional adviser involved in the transaction and their related parties.

issue was to raise genuinely needed seed capital or rather to confer a benefit on the recipients through the prospective re-pricing of their securities if the transaction is successful. In ASX forms the view that it is the latter, at a minimum, ASX is likely to classify the securities as restricted securities,<sup>240</sup> making them subject to the escrow requirements in Chapter 9 and Appendices 9A, 9B and 9C of the Listing Rules. ASX is also likely to designate the recipients as promoters,<sup>241</sup> requiring them and their controllers to execute a restriction deed subjecting their securities to escrow for 2 years from the date the entity is re-admitted to the official list. In an egregious case, ASX may exercise its discretion<sup>242</sup> not to re-admit the entity to the official list or not to quote the securities in question.

The second relates to “look through” relief. In an initial public offering (IPO), seed capitalists can take advantage of the “cash formula”<sup>243</sup> to relieve them from escrow on a proportion of their securities equal to the proportion of the IPO price<sup>244</sup> they paid for them, whereas vendors of classified assets cannot.<sup>245</sup> Where ASX exercises its discretion under Listing Rule 11.1.3 in relation to an acquisition of another entity or undertaking that is a classified asset, in certain instances, ASX may be prepared to grant a waiver from Listing Rule 9.1 (referred to as “look-through” relief) to permit the owners of the entity or undertaking to be treated as seed capitalists rather than as vendors. This relief is provided on the basis that if the entity or undertaking had applied for listing in its own right, its owners would have been treated as seed capitalists rather than as vendors.

Where look-through relief is granted, the applicable escrow period for an owner who is not a related party or promoter or an associate of a related party or promoter<sup>246</sup> will start at the time the owner paid cash to acquire their ownership interests in the entity or undertaking being acquired, rather than the date they acquired their securities in the listed entity. This upholds the principle of the Listing Rule escrow regime that seed capitalists who are not related parties or promoters should be subject to escrow only for a period of 12 months beginning when they contribute their capital.

Look through relief is explained in further detail in section 10.6 of Guidance Note 11.

The application of ASX’s escrow requirements to re-compliance listings can be complex. The Listing Rules also confer substantial discretions on ASX in terms of imposing or modifying escrow requirements. ASX would therefore strongly recommend that an entity contemplating a re-compliance listing that may be subject to escrow<sup>247</sup> have early discussions with ASX on how ASX is likely to apply the escrow requirements in the Listing Rules in its particular circumstances.

### 8.8 The 20 cent rule

As mentioned above, it is usual for an entity proposing to make a significant change to the nature or scale of its activities to be making an offer of securities as part of, or in connection with, the transaction. If those securities are in its main class of securities and ASX has exercised its discretion under Listing Rule 11.1.3 to require re-compliance with ASX’s admission and quotation requirements then, to comply with Listing Rule 2.1 condition 2 (the “20 cent rule”),<sup>248</sup> that offer would ordinarily have to be undertaken at a minimum issue price or sale price of 20 cents in cash per security.

<sup>240</sup> Using its powers in that regard under paragraph (b) of the definition of “restricted securities” in Listing Rule 19.12 (if they are not already restricted securities under paragraph (a) of that definition).

<sup>241</sup> Using its powers in that regard under paragraph (c) of the definition of “promoter” in Listing Rule 19.12 (if they are not already promoters under paragraphs (a) and (b) of that definition).

<sup>242</sup> Under Listing Rules 1.19 and 2.9 respectively.

<sup>243</sup> As defined in Listing Rule 19.12.

<sup>244</sup> In the context of a transaction requiring re-compliance, ASX will usually treat an offer of securities under a prospectus or PDS lodged with ASX under Listing Rule 1.1 condition 3 as the equivalent of an IPO.

<sup>245</sup> Compare rows 1 and 2 of Appendix 9B with rows 3 and 4.

<sup>246</sup> Where the owner is a related party or promoter, or an associate of a related party or promoter, the relevant escrow period starts from the date of re-admission rather than the date they acquired their securities.

<sup>247</sup> Because it will not fall within the exceptions to escrow in Listing Rule 9.2.

<sup>248</sup> Listing Rule 2.1 condition 2 requires the issue price or sale price of all the securities for which an entity seeks quotation (except options) to be at least 20 cents in cash. Listing Rule 2.1 condition 2 only applies at the point of listing. Thereafter, a listed entity is free under the

As a practical matter, this means that if the entity's main class of securities have been trading on ASX at materially less than 20 cents each, the entity will usually need to consolidate those securities or undertake some other form of capital restructure to boost their value to something around 20 cents<sup>249</sup> so as to ensure that the relative value of the entity's existing securities (as measured by their current market price) and the issue price or sale price for the new securities are not out of kilter.<sup>250</sup>

ASX recognises that where an entity's securities have been trading on ASX at less than 20 cents, having to undertake a consolidation or other restructure to facilitate compliance with the 20 cent rule prior to, or in connection with, a capital raising can impose structural, timing and other impediments to the completion of a transaction that might otherwise be in the interests of an entity and its security holders. In such a case, ASX will consider a request<sup>251</sup> from the entity not to apply the 20 cent rule (commonly referred to as a "2 cent waiver" for reasons which will become apparent) provided:

- the offer price for any securities being issued or sold as part of, or in connection with, the transaction:
  - is not less than 2 cents each;<sup>252</sup> and
  - is specifically approved by security holders as part of the approval(s) obtained under Listing Rule 11.1.2;
- either:
  - the price at which the entity's securities traded on ASX over the last 20 trading days on which the entity's securities have actually traded on ASX preceding the date of the announcement of the proposed transaction (or, if the entity was already suspended at the time of the announcement, the last 20 trading days on which the entity's securities have actually traded on ASX prior to its suspension) was not less than the offer price; or
  - the entity announces at the same time that it announces the proposed transaction that it intends to consolidate its securities at a specified ratio that will be sufficient, based on the lowest price at which the entity's securities traded over the 20 trading days referred to previously, to achieve a market value for its securities of not less than the offer price;
- the entity has not undergone a deed of company arrangement or a creditors' scheme of arrangement in the two years preceding the date of the announcement of the proposed transaction and been continuously suspended since the deed or scheme was effectuated; and
- ASX is otherwise satisfied that the entity's proposed capital structure after the transaction will satisfy Listing Rules 1.1 condition 1 and 12.5 (appropriate structure for a listed entity).

An entity that does not meet the conditions above will not be granted relief from the 20 cent rule.

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Listing Rules to pursue a capital raising at any price that its directors consider appropriate (subject, in the case of a placement under Listing Rule 7.1A, to the price floor specified in Listing Rule 7.1A.3).

<sup>249</sup> Of course, if the proposed issue price or sale price for the new securities is higher than the 20 cent minimum under the Listing Rules, the entity will usually need to consolidate its existing securities or undertake some other form of capital restructure to boost their value to something around that higher price.

<sup>250</sup> For the entity not to undertake such a consolidation or restructure and to issue securities to new investors at a materially higher price than their current market price is likely to raise issues under the principle set out in the introduction to the Listing Rules that "securities should be issued in circumstances ... that are fair to new and existing security holders". ASX may take this into consideration in determining whether it should exercise its absolute discretion under Listing Rule 1.19 not to re-admit the entity to the official list.

<sup>251</sup> The request should take the form of an application for a waiver or a request for in-principle advice. For further guidance, see Guidance Note 17 *Waivers and In-Principle Advice*.

<sup>252</sup> The 2 cent floor means that an entity's securities can fall in value by as much as 95%, or 19 price steps, before they reach the minimum price step for trading securities on ASX of 0.1 cents per security. Allowing securities to be issued at a lower price than this would be likely to raise concerns regarding potential volatility and whether the entity's capital structure after the issue will satisfy Listing Rule 1.1 condition 1 (appropriate structure for a listed entity).



ASX also recognises that practical difficulties can arise, in those cases where this relief is not granted and an entity undertakes a consolidation to facilitate compliance with the 20 cent rule using a consolidation ratio based on the market price of its securities on a particular date, if there is a subsequent material drop in market price.<sup>253</sup> Again, in these circumstances, ASX will consider a request<sup>254</sup> from the entity for ASX not to apply the 20 cent rule provided the entity has made a bona fide attempt to comply with the rule. To show this, the entity must demonstrate to ASX that the consolidation ratio would have been sufficient, based on the lowest price at which the entity's securities traded on ASX over the 20 trading days on which the entity's securities have actually traded on ASX<sup>255</sup> preceding the date that it sent its notice of meeting to security holders seeking approval to the consolidation, to achieve a market value for its securities of not less than 20 cents each.<sup>256</sup>

ASX would encourage an entity that is proposing to issue securities as part of, or in connection with, a transaction to which Listing Rule 11.1.3 has been or may be applied, to consult with ASX at the earliest opportunity in relation to potential application of the 20 cent rule.

It should be noted that ASX will closely examine any capital raising the entity undertakes in the lead-up to, or following, the announcement of a transaction that requires re-compliance under Listing Rule 11.1.3, to ensure that it does not conflict with the general principle set out in the introduction to the Listing Rules that securities "should be issued in circumstances, and have rights and obligations attaching to them, that are fair to new and existing security holders". If the capital raising involves an issue to existing security holders via a pro rata offer, under a security purchase plan or some other form of broad-based offer, ASX is unlikely to have any concerns with it, regardless of the price at which it occurs. However, if the capital raising takes the form of a placement of securities to related parties, promoters, professional advisers involved in the transaction, or their family, friends and associates<sup>257</sup> at an effective price that is less than the offer price, ASX is likely to deny an application for a 2 cent waiver.<sup>258</sup> This includes an issue of convertible securities by the entity that convert into the class of securities being issued or sold as part of, or in connection with, the transaction at a price lower than the offer price.

ASX will also closely examine any capital raising in the lead-up to, or following, the announcement of the transaction by an entity the listed entity is proposing to acquire or merge with as part of the transaction that, upon consummation of the acquisition or merger, will be exchanged for securities in the listed entity. Again, if the capital raising involves an issue to existing security holders via a pro rata offer, under a security purchase plan or some other form of broad-based offer, ASX is unlikely to have any concerns with it, regardless of the price at which it occurs. However, if the capital raising takes the form of a placement of securities to related parties, promoters, professional advisers involved in the transaction, or their family, friends and associates, that will convert to securities in the listed entity at an effective price that is less than the offer price, ASX is likely to deny an application for a 2 cent waiver.

### 8.9 Minimum option exercise price

Closely related to the 20 cent rule is the requirement in Listing Rule 1.1 condition 12 for any options on issue to be exercisable for at least 20 cents in cash (the "minimum option exercise price rule").

The minimum option exercise price rule only applies at the time of listing and therefore it is possible for an entity that is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements to have

<sup>253</sup> For the reasons outlined in the preceding paragraph, ASX will not grant this relief if the market price of the entity's securities has fallen to less than 2 cents each or if ASX is not satisfied that the entity's proposed capital structure after the transaction will satisfy Listing Rules 1.1 condition 1 and 12.5 (appropriate structure for a listed entity).

<sup>254</sup> Again, the request should take the form of an application for a waiver or a request for in-principle advice. For further guidance, see Guidance Note 17 *Waivers and In-Principle Advice*.

<sup>255</sup> If the entity's securities are trading in the period up to the date that it sends its notice of meeting to security holders seeking approval to the consolidation, this will be the last 20 trading days on which its securities traded prior to the dispatch of the notice of meeting. If the entity's securities are suspended from trading in the lead up to that date, this will be the last 20 trading days on which its securities traded prior to the date of the suspension.

<sup>256</sup> Of course, the need for such a waiver will not apply in those cases where ASX has decided not to apply the 20 cent rule in the first place.

<sup>257</sup> Again, the reference to "family, friends and associates" is intended to be interpreted broadly and includes officers and employees of a corporate promoter or professional adviser involved in the transaction and their related parties.

<sup>258</sup> See '8.7 Escrow requirements for restricted securities' on page 46.

existing options on issue with an exercise price of less than 20 cents. Where that is the case, ASX will not generally apply Listing Rule 1.1 condition 12 so as to require the entity to restructure those options to increase their exercise price to at least 20 cents.<sup>259</sup>

If an entity is proposing to issue options over ordinary securities as part of, or in connection with, the transaction that has caused ASX to apply Listing Rule 11.1.3 and its ordinary securities have been trading at less than 20 cents, ASX will consider a request<sup>260</sup> from the entity for ASX not to apply the minimum option exercise price rule, provided:

- the exercise price for the options:
  - is not less than 2 cents each;<sup>261</sup> and
  - is specifically approved by security holders as part of the approval(s) obtained under Listing Rule 11.1.2;
- the entity has not undergone a deed of company arrangement or a creditors' scheme of arrangement in the two years preceding the date of the announcement of the proposed transaction and been continuously suspended since the deed or scheme was effectuated; and
- ASX is otherwise satisfied that the proposed capital structure of the entity after the transaction in question will satisfy Listing Rule 1.1 condition 1 (appropriate structure for a listed entity).

ASX may have concerns on this latter issue if, for instance, the number of options to be issued is disproportionate to the number of ordinary securities on issue.<sup>262</sup>

ASX may refuse to grant relief from the minimum option exercise price rule for options that are in the money if it considers that they are being used to circumvent the spirit and intent of the 20 cent rule or the policy considerations that underpin when ASX will consider granting relief from that rule.

### 8.10 Directors, CEO and CFO must be of good fame and character

Listing Rule 1.1 condition 20 requires an entity seeking admission to the official list to satisfy ASX:

- if it is a body corporate, that each director or proposed director of the entity, its CEO or proposed CEO, and its CFO or proposed CFO; or
- if it is a trust, that each director or proposed director of the responsible entity of the trust, the CEO or proposed CEO of the responsible entity of the trust, and the CFO or proposed CFO of the responsible entity of the trust,

at the date of listing (together, "relevant officers") is of good fame and character.

To satisfy this requirement, the entity is required to provide to ASX for each relevant officer:

- a police/Australian Criminal Intelligence Commission national criminal history check (or an overseas equivalent);
- a search of the Australian Financial Security Authority National Personal Insolvency Index (or an overseas equivalent); and

<sup>259</sup> Noting that if as part of, or in connection with, the transaction that has caused ASX to apply Listing Rule 11.1.3, the entity is consolidating its securities (for example, to comply with the 20 cent rule mentioned above), its existing options will have be adjusted accordingly: see Listing Rule 6.16 and 7.22.1.

<sup>260</sup> Again, the request should take the form of an application for a waiver or a request for in-principle advice. For further guidance, see Guidance Note 17 *Waivers and In-Principle Advice*.

<sup>261</sup> See note 252 above.

<sup>262</sup> See Listing Rule 7.16.

- a completed statutory declaration at the date of listing confirming various matters (including that the relevant officer has not been the subject of relevant disciplinary or enforcement action by an exchange or securities market regulator) or, if the relevant officer is not able to give such confirmation, a statement to that effect and a detailed explanation of the circumstances involved.

It may also be required to provide to ASX additional information about its relevant officers, if ASX requires.<sup>263</sup>

The same requirements apply to an entity that has to re-comply with ASX's admission requirements under Listing Rule 11.1.3, even for directors who may have been appointed or elected to the board of the entity, or a CEO or CFO appointed to that position, prior to the transaction giving rise to the application of that rule.

Guidance Note 1 *Applying for Admission – ASX Listings* has more detailed guidance about ASX's "good fame and character" requirements.

### 8.11 Requirements for additional information

ASX may require an entity that is required under Listing Rule 11.1.3 to re-comply with ASX's admission and quotation requirements to disclose additional information over and above that required under Appendix 1A and the accompanying Information Form and Checklist (ASX Listings).<sup>264</sup>

ASX may submit, or require the entity to submit, any information given to ASX to the scrutiny of an expert selected by ASX.<sup>265</sup>

ASX may also impose a condition on re-admission that the entity disclose certain information to the market before its re-admission takes effect.<sup>266</sup>

## 9. ASX's enforcement powers

ASX has a range of enforcement powers it can exercise if an entity engages in a transaction in breach of Listing Rule 11.1 or 11.2 proposes to do so.

ASX may:

- \* suspend the quotation of the entity's securities until the matter has been dealt with to ASX's satisfaction;<sup>267</sup>
- \* if the transaction has not yet taken place, direct the entity not to proceed with the transaction;<sup>268</sup>
- \* if the transaction has already taken place, direct the entity to cancel or reverse the transaction;<sup>269</sup> and/or
- \* direct the entity to convene a meeting of security holders to approve the transaction under Listing Rule 11.1.2 or 1.2 (as applicable).<sup>270</sup>

More generally, where an entity engages in a transaction in breach of Listing Rule 11.1 or 11.2 and ASX considers the breach to be an egregious one, ASX may:

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<sup>263</sup> Listing Rule 1.17.

<sup>264</sup> Listing Rule 1.17.

<sup>265</sup> Listing Rule 1.17. The costs of the expert must be paid for by the entity.

<sup>266</sup> Listing Rules 1.19 and 2.9.

<sup>267</sup> Listing Rules 11.3 and 17.3.1.

<sup>268</sup> Listing Rule 18.8(c).

<sup>269</sup> Listing Rule 18.8(d).

<sup>270</sup> Listing Rule 18.8(e). Where ASX imposes such a requirement and security holders do not approve the transaction, ASX may impose such further requirements as it considers appropriate under Listing Rule 18.8.

- \* censure the entity for breaching the Listing Rules;<sup>271</sup> and/or
- \* terminate the entity's admission to the official list.<sup>272</sup>

The type of action ASX will take will depend on the nature and severity of the breach.

Whenever ASX takes enforcement action against an entity for breaching Listing Rule 11.1 or 11.2, ASX will usually require the entity to make an announcement to the market explaining that action and why it was taken.

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<sup>271</sup> Listing Rule 18.8A.

<sup>272</sup> Listing Rule 17.12.

### Annexure A

#### Information to be disclosed about transactions that trigger Listing Rule 11.1.3

An entity announcing a merger with, or acquisition of, another business or entity (the *target*) that requires it to re-comply with ASX's admission and quotation requirements under Listing Rule 11.1.3 must disclose the following information in its announcement or else its securities will be suspended from quotation:

- the parties to, and material terms of, the transaction;
- information about the likely effect of the transaction on the entity's consolidated total assets, total equity interests, annual revenue, annual expenditure and annual profit before tax;
- a capital table showing the issued capital of the entity before and after the transaction and explaining any capital restructure that will be conducted;<sup>273</sup>
- if in the preceding 6 months the entity or the target has issued any securities, the following information about the issue:
  - the nature of the issue (eg placement, pro rata offer, public offer under a prospectus or PDS or offer to professional or sophisticated investors under an information memorandum);
  - the consideration provided for the securities;
  - whether the issue was underwritten and, if so, by whom and the amount of their underwriting fee; and
  - the amount raised by the issue and the purposes for which the funds raised were or will be used;
- if the entity or the target is proposing to issue securities prior to the entity's re-admission (whether as part of, or in connection with, the transaction or otherwise), the following information about the issue:
  - the nature of the issue (eg placement, pro rata offer, public offer under a prospectus or PDS or offer to professional or sophisticated investors under an information memorandum);
  - the consideration to be provided for the securities;
  - any minimum subscription proposed;
  - whether the issue will be underwritten and, if so, by whom and the amount of their underwriting fee; and
  - the amount proposed to be raised by the issue and the purposes for which the funds raised will be used;
- details of any person who will acquire control<sup>274</sup> of, or voting power<sup>275</sup> of 20% or more in, the entity as a result of the transaction;
- if there are any changes proposed to the entity's board or senior management, details of those changes;
- the timetable for implementing the transaction, including the process and timetable for seeking the approval of security holders to the transaction and for re-complying with ASX's requirements for admission and quotation;

<sup>273</sup> See '8.8 The 20 cent rule' on page 47.

<sup>274</sup> As defined in Listing Rule 19.12.

<sup>275</sup> As defined in section 610 of the Corporations Act.

- a summary of the target's principal activities and the jurisdictions in which it operates;
- a description of the target's business model, including any key dependencies and key risks;
- a copy of the target's accounts, being accounts that would meet the requirements in Listing Rule 1.3.5(b) if the entity were applying for admission to the official list under the assets test on the date of the announcement, or a link to where they can be viewed and downloaded;
- details of any regulatory approvals or waivers required or other material conditions that must be satisfied for the transaction to proceed;
- details of any fees<sup>276</sup> paid or payable by the entity to any person for finding, arranging or facilitating the transaction;
- confirmation that the entity has undertaken appropriate enquiries into the assets and liabilities, financial position and performance, profits and losses, and prospects of the target for the board (or, in the case of a listed trust, the responsible entity) of the entity to be satisfied that the transaction is in the interests of the entity and its security holders or, if it hasn't, an explanation of why it hasn't;
- the outcome of any applications the entity has made to ASX for in-principle advice or for waivers of, or confirmations under, the Listing Rules;
- a prominent statement:
  - if Listing Rule 11.1.2 applies, that the transaction requires security holder approval under the Listing Rules and therefore may not proceed if that approval is not forthcoming;
  - that:
    - the entity is required to re-comply with ASX's requirements for admission and quotation and therefore the transaction may not proceed if those requirements are not met; and
    - ASX has an absolute discretion in deciding whether or not to re-admit the entity to the official list and to quote its securities and therefore the transaction may not proceed if ASX exercises that discretion; and
  - investors should take account of these uncertainties in deciding whether or not to buy or sell the entity's securities;
- a statement that ASX takes no responsibility for the contents of the announcement; and
- a statement that the entity is in compliance with its continuous disclosure obligations under Listing Rule 3.1.

If the transaction requires approval from security holders under Listing Rule 11.1.2, the notice of meeting seeking such approval must also include the information set out above, apart from the last two bullet points immediately above, plus a statement that ASX takes no responsibility for the contents of the notice.

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<sup>276</sup> This includes the amount of the fees, the name of the person to whom they were paid or are payable and a description of the services for which they were paid or are payable.