

## RESTRICTED SECURITIES AND VOLUNTARY ESCROW

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>• To assist entities wishing to apply for admission to the official list as an ASX Listing to understand ASX's escrow requirements for new listings</li> <li>• To assist entities already admitted to the official list as an ASX Listing to understand the escrow requirements that apply to re-compliance listings under Listing Rule 11.1.3 and to the acquisition of substantial classified assets from persons in a position of influence under Listing Rule 10.7</li> <li>• To assist entities generally to understand how the Listing Rules apply to voluntary escrow arrangements</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>• ASX's escrow requirements for "restricted securities"</li> <li>• How ASX escrow is applied to different holdings</li> <li>• Cash formula relief</li> <li>• Permitted transfers of restricted securities</li> <li>• Waivers commonly granted in relation to ASX escrow</li> <li>• The difference between ASX escrow and voluntary escrow</li> <li>• How the Listing Rules apply to voluntary escrow</li> <li>• Notification obligations regarding restricted securities and securities subject to voluntary escrow</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 12 <i>Significant Changes to Activities</i></li> <li>• Guidance Note 17 <i>Waivers and In-Principle Advice</i></li> <li>• Guidance Note 24 <i>Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence</i></li> <li>• Guidance Note 30 <i>Notifying Changes in Issued Securities and Applying for Quotation of New or Additional Securities</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:

- entities wishing to apply for admission to the official list of ASX Limited ("ASX") as an ASX Listing<sup>1</sup> to understand ASX's escrow requirements for new listings;
- entities already admitted to the official list as an ASX Listing to understand the escrow requirements that apply to re-compliance listings under Listing Rule 11.1.3 and to the acquisition of substantial classified assets from persons in a position of influence under Listing Rule 10.7; and
- entities generally to understand how the Listing Rules apply to voluntary escrow arrangements.

The term "re-compliance listing" above refers to a listed entity that is required by ASX under Listing Rule 11.1.3 to re-comply with ASX's requirements for admission and quotation in Chapters 1 and 2 because it has engaged, or is proposing to engage, in a transaction that involves a significant change to the nature or scale of its activities.<sup>2</sup> For convenience, the application it lodges as part of this process is referred to as an "application for re-admission" and

<sup>1</sup> ASX's escrow regime does 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> See Guidance Note 12 *Significant Changes to Activities*.

the point at which it is reinstated to quotation having satisfied ASX's admission and quotation requirements is referred to as "re-admission".

### 1.1 What are "restricted securities"?

Securities that are subject to ASX's escrow requirements are referred to in the Listing Rules as "restricted securities". This term is defined to mean:

- (a) securities issued in the circumstances set out in Appendix 9B; and
- (b) securities that, in ASX's opinion, should be treated as restricted securities.<sup>3</sup>

Appendix 9B specifies the categories of securities that ordinarily are subject to ASX's escrow requirements by reference to the circumstances in which they were issued, that is:

- the type of party to whom they were issued – related party, promoter, seed capitalist, vendor or professional adviser or consultant;
- when they were issued – before, in connection with, or after listing; and
- for what consideration – cash, sale of classified assets, services rendered, an issue under an employee incentive scheme or some other type of consideration.

Appendix 9B also sets out the escrow period that ordinarily applies to the different categories of restricted securities.

Paragraph (b) of the definition of "restricted securities" above gives ASX the discretion to designate other securities as restricted securities, in addition to those issued in the circumstances set out in Appendix 9B. It is a discretion that ASX can (and does) use at any time<sup>4</sup> to ensure that the spirit and intent of ASX's escrow requirements are not undermined.

ASX is likely to exercise this discretion where it considers that parties have attempted to structure an issue of securities to circumvent its escrow requirements or to achieve a more favourable escrow outcome (for example, to take advantage of the shorter escrow period applying to a security holder who is not a related party or promoter, or an associate of a related party or promoter, compared to one who is). Examples include where an entity has issued securities in the circumstances outlined in Appendix 9B:

- to someone with a close connection with one of the parties mentioned in Appendix 9B (such as a close relative, or a company or trust which a close relative controls or has a material interest in);<sup>5</sup>
- to an apparently unrelated third party at the direction of, or by arrangement with, one of the parties mentioned in Appendix 9B;<sup>6</sup> or
- to an apparently unrelated third party and there is a pre-arrangement between that third party to hold the securities on trust for, or transfer them to, one of the parties mentioned in Appendix 9B or to someone with a close connection with one of those parties.

In each case above, ASX is likely to rule that the securities in question are "restricted securities" and should be subject to escrow to the same extent and for the same period as if they had been issued directly to the applicable party mentioned in Appendix 9B.

Sections 10.3, 10.8 and 10.10 below have further examples of when ASX may designate securities to be "restricted securities".

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<sup>3</sup> Listing Rule 19.12.

<sup>4</sup> ASX can designate securities to be "restricted securities" at any time, including after an entity has been admitted or re-admitted to the official list.

<sup>5</sup> See the note to the definition of "restricted securities" in Listing Rule 19.12.

<sup>6</sup> In other words, parties that would normally be subject to escrow restrictions in relation to particular securities cannot escape those restrictions by the simple expedient of directing the entity to issue the securities to someone else.

### 1.2 An overview of the ASX escrow requirements for “restricted securities”

The substantive requirements that apply to restricted securities are set out in Chapter 9 of the Listing Rules. Under that Chapter, an entity with restricted securities on issue must, at ASX’s election,<sup>7</sup> either:

- enter into a deed (a “restriction deed”) with the holder of the restricted securities and each controller in the form set in the Appendix 9A or in such other form as ASX requires or permits;<sup>8</sup> or
- give a notice in writing (a “restriction notice”) to the holder of the restricted securities in the form set out in Appendix 9C or in such other form as ASX requires or permits;<sup>9</sup>

in each case applying the escrow restrictions set out in Appendix 9B or such other restrictions as ASX, in its discretion, decides. Among other things, the restriction deed or restriction notice prohibits the holder from disposing of, or agreeing or offering to dispose of, their restricted securities except as permitted by the listing rules or by ASX.

These restrictions are underpinned by provisions that must be included in the entity’s constitution while it has restricted securities on issue<sup>10</sup> and are further reinforced by requirements that restricted securities must be kept:

- in the case of securities quoted on ASX, on an issuer sponsored subregister with a holding lock applied to them;<sup>11</sup> and
- in the case of securities not quoted on ASX, on a certificated subregister with the certificate for the security held in escrow by a bank or recognised trustee.<sup>12</sup>

ASX’s power to require or permit a restriction deed to be in a different form to Appendix 9A, or a restriction notice to be in a different form to Appendix 9C, is one that ASX can exercise to deal with the particular circumstances of an entity where, for whatever reason, the terms prescribed in those Appendices are not apt and need to be varied to achieve the underlying spirit and intent of Chapter 9.

Likewise, ASX’s discretion to apply different escrow restrictions to those set out in Appendix 9B is one that ASX can exercise to deal with the particular circumstances of an entity where, for whatever reason, the restrictions prescribed in that Appendix need to be varied to achieve the underlying spirit and intent of Appendix 9B.

It should be noted that restricted securities are excluded from the definition of “free float”<sup>13</sup> and therefore do not count towards the 20% minimum free float required for an entity to be admitted to the official list.<sup>14</sup> They also do not count towards ASX’s minimum spread requirement.<sup>15</sup>

### 1.3 When does ASX escrow apply?

With one exception, ASX’s escrow requirements only come into play for new and re-compliance listings.

Entities seeking to be admitted to the official list for the first time as an ASX Listing must comply with those requirements in relation to any securities that under the Listing Rules are, or are required to be, restricted securities.<sup>16</sup>

<sup>7</sup> Sections 6.1 – 6.11 of this Guidance Note set out the circumstances in which ASX will generally require escrow restrictions to be imposed via a restriction deed and when ASX will permit them to be imposed via a restriction notice.

<sup>8</sup> Listing Rule 9.1(b).

<sup>9</sup> Listing Rule 9.1(c).

<sup>10</sup> See ‘5.1 Constitutional requirements’ on page 20.

<sup>11</sup> See ‘5.5 Additional requirements for quoted securities’ on page 24.

<sup>12</sup> See ‘5.6 Additional requirements for unquoted securities’ on page 24.

<sup>13</sup> Listing Rule 19.12.

<sup>14</sup> Listing Rule 1.1 condition 7.

<sup>15</sup> Listing Rule 1.1 condition 8.

<sup>16</sup> Listing Rule 1.1 condition 10.

Entities undertaking a re-compliance listing must comply with the same requirements as if they were applying for admission to the official list for the first time.<sup>17</sup> For these purposes, ASX treats a re-compliance listing as if it were a new listing<sup>18</sup> and disregards the fact that the entity has previously been admitted to the official list. ASX also treats any capital raising that the entity is undertaking in connection with its re-compliance listing as if it were an initial public offering (“IPO”) and disregards the fact that the entity most likely has previously undertaken an IPO.<sup>19</sup>

Further information about how ASX applies escrow in a re-compliance listing is set out below in section 10.3 below.

The one exception mentioned previously is where a listed entity acquires a substantial classified asset from a party to whom Listing Rule 10.1 applies. In that case, the entity must issue restricted securities as the consideration, save to the extent that the consideration is reimbursement of expenditure incurred by the vendor in developing the classified asset.<sup>20</sup>

### 1.4 Voluntary escrow

The term “voluntary escrow” is used to describe an arrangement where:

- an entity and the holder of securities have entered into an agreement restricting the right of the holder to dispose of the securities in a form similar to that set out in Appendix 9A<sup>21</sup> or in such other form as the entity and the holder agree; and
- they were not required to enter into the agreement under Chapter 9.<sup>22</sup>

Voluntary escrow is sometimes offered up in a new or re-compliance listing by a founder or promoter with a substantial holding to make the listing more attractive to investors. It serves to demonstrate their continuing commitment to the entity and to remove concerns about their holdings “overhanging” the post-listing market. It is also sometimes demanded by underwriters, lead managers or cornerstone investors as a condition of their involvement in a new or re-compliance listing.

A voluntary escrow agreement usually includes a term that the holder agrees to having a holding lock applied to its securities for the duration of the escrow period, to prevent the transfer of the securities in the CHESS settlement system during that period.<sup>23</sup>

An entity must meet certain initial and ongoing notification obligations in relation to securities subject to voluntary escrow, including notifying ASX of their impending release from escrow not less than 5 business days before the end of the escrow period.<sup>24</sup>

A voluntary escrow agreement must not contain terms which remove the holder’s rights to dividends or to vote in the event of a breach.<sup>25</sup>

Otherwise, the Listing Rules do not regulate voluntary escrow arrangements.

<sup>17</sup> Through the combination of Listing Rule 11.1.3 and Listing Rule 1.1 condition 10.

<sup>18</sup> As it is effectively required to do under Listing Rule 11.1.3.

<sup>19</sup> In the case of a new listing, a reference in this Guidance Note to an IPO generally means the capital raising undertaken by the entity pursuant to the prospectus or PDS lodged with ASX under Listing Rule 1.1 condition 3 in connection with its admission to the official list. In the case of a re-compliance listing, it should be read as referring to any equivalent capital raising undertaken by the entity pursuant to the prospectus or PDS lodged with ASX under Listing Rule 1.1 condition 3 in connection with its re-admission to the official list.

<sup>20</sup> Listing Rule 10.7. See ‘4. Escrow requirements for acquisitions of classified assets from 10.1 parties’ on page 18.

<sup>21</sup> A listed entity or applicant for listing that uses an adaptation of Appendix 9A to impose voluntary escrow must take particular care to ensure that it is modified to remove any inappropriate references to ASX or the ASX Listing Rules.

<sup>22</sup> Listing Rule 19.12. The securities are said to be “subject to voluntary escrow” while the agreement in question is still on foot. Securities issued under an employee incentive scheme that have restrictions on their transfer under the terms of the scheme are not regarded as being subject to voluntary escrow (see the note to the definition of “voluntary escrow” in Listing Rule 19.12).

<sup>23</sup> This is permitted under Listing Rule 8.10.1(i).

<sup>24</sup> See ‘8. Notification obligations’ on page 37.

<sup>25</sup> Such terms contravene the prohibition in Listing Rule 6.10 that a listed entity must not remove or change a security holder’s right to vote or receive dividends (in the case of a trust, distributions) except in the limited cases permitted in that rule. For that reason, a listed entity or applicant for listing that uses an adaptation of Appendix 9A to impose voluntary escrow must take particular care to remove clause 11(d).

Again, it should be noted that securities subject to voluntary escrow are excluded from the definition of “free float” and therefore do not count towards the 20% minimum free float required for an entity to be admitted to the official list.<sup>26</sup> They also do not count towards ASX’s minimum spread requirement.<sup>27</sup>

### 1.5 How ASX escrow compares to voluntary escrow

ASX escrow differs from voluntary escrow in a number of key respects.

The application of ASX escrow is rule-based. The terms and period of escrow are prescribed in the Listing Rules and are not able to be modified to suit the parties. Once in place, ASX escrow cannot be varied or terminated except with a consent or waiver from ASX, which are rarely given.

In contrast, the application of voluntary escrow is contract-based. Any decision to apply voluntary escrow, and the terms and period of escrow, are a matter for negotiation between the relevant parties (the entity, the holder and often an underwriter, lead manager or cornerstone investor). The terms of a voluntary escrow contract can generally be varied or terminated by mutual agreement.

In practice, ASX escrow often applies for longer periods and more restrictively to relevant holders than does voluntary escrow. However, voluntary escrow is often applied to entities where ASX escrow would not apply, including entities with a substantial track record of profitability.

Restricted securities are not quoted on ASX until the expiry of the applicable escrow period.<sup>28</sup> Securities subject to voluntary escrow are quoted by ASX in the ordinary course, even though the agreed escrow period may still be in effect.<sup>29</sup>

## 2. Key terms

ASX’s escrow requirements for new and re-compliance listings come into play for securities issued to “related parties”, “promoters”, “associates” of related parties and promoters, “seed capitalists”, vendors of “classified assets” and certain professional advisers and consultants.

ASX also has escrow requirements for listed entities that acquire a substantial “classified asset” from a “10.1 party”.

The meaning of each of the terms in quotation marks is explained below.

### 2.1 “Related party”

The term “related party” is defined in similar terms under the Listing Rules as it is under the Corporations Act 2001 (Cth).<sup>30</sup>

Where the listed entity is a body corporate, its related parties include:

- (i) an entity that controls the listed entity;
- (ii) if the listed entity is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iii) directors of the listed entity or of an entity that controls the listed entity;
- (iv) spouses and de facto spouses of anyone referred to in (ii) and (iii) above;
- (v) parents and children of anyone referred to in (ii), (iii) and (iv) above;

<sup>26</sup> See notes 13 and 14 above.

<sup>27</sup> See note 15 above.

<sup>28</sup> Listing Rules 2.8.5 and 2.12. Among other things, this means that the prohibition on interfering with transfers of quoted securities under Listing Rule 8.10 is not applicable.

<sup>29</sup> By virtue of Listing Rule 1.1 condition 6 and Listing Rule 2.4.

<sup>30</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.

- (vi) an entity controlled by anyone referred to in (i) – (v) above unless it is also controlled by the listed entity;
- (vii) anyone who has fallen within (i) – (vi) above within the past 6 months;
- (viii) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (vi) at any time in the future; and
- (ix) anyone acting in concert with someone referred to in (i) – (viii) above.<sup>31</sup>

Where the listed entity is an internally managed<sup>32</sup> trust, its related parties include:

- (i) an entity that controls the trust;
- (ii) if the trust is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iii) directors of the responsible entity<sup>33</sup> (“RE”) of the trust or of an entity that controls the trust;
- (iv) spouses and de facto spouses of anyone referred to in (ii) and (iii) above;
- (v) parents and children of anyone referred to in (ii), (iii) and (iv) above;
- (vi) an entity controlled by anyone referred to in (i) – (v) above unless it is also controlled by the RE of the trust in its capacity as RE of the trust;
- (vii) anyone who has fallen within (i) – (vi) above within the past 6 months;
- (viii) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (vi) above at any time in the future; and
- (ix) anyone acting in concert with someone referred to in (i) – (viii) above.<sup>34</sup>

Where the listed entity is an externally managed<sup>35</sup> trust, its related parties include:

- (i) the RE of the trust;
- (ii) an entity that controls the RE;
- (iii) if the RE is controlled by an entity that is not a body corporate, the persons making up that entity;
- (iv) directors of the RE or of an entity that controls the RE;
- (v) spouses and de facto spouses of anyone referred to in (iii) and (iv) above;
- (vi) parents and children of anyone referred to in (iii), (iv) and (v) above;
- (vii) an entity controlled by the RE of the trust other than in its capacity as RE of the trust;
- (viii) an entity controlled by anyone referred to in (ii) – (vii) above unless it is also controlled by the RE of the trust in its capacity as RE of the trust;
- (ix) anyone who has fallen within (ii) – (viii) above within the past 6 months;

<sup>31</sup> Paragraph (a) of the definition of “related party” in Listing Rule 19.12. This is essentially the same definition as in section 228 of the Corporations Act.

<sup>32</sup> As defined in Listing Rule 19.12.

<sup>33</sup> “Responsible entity” means: (a) in relation to a managed investment scheme registered under the Corporations Act, the responsible entity of that scheme under that Act; or (b) in relation to a trust that is not a registered managed investment scheme, the entity that in ASX’s opinion performs a substantially equivalent role in relation to the trust as the responsible entity performs in relation to a registered managed investment scheme (Listing Rule 19.12).

<sup>34</sup> Paragraph (b) of the definition of “related party” in Listing Rule 19.12.

<sup>35</sup> As defined in Listing Rule 19.12.



- (x) anyone who believes or has reasonable grounds to believe that they are likely to fall within (ii) – (viii) above at any time in the future; and
- (xi) anyone acting in concert with someone referred to in (i) – (x) above.<sup>36</sup>

### 2.2 “Promoter”

A person is a “promoter” of an entity if:

- (a) in ASX’s opinion, they have had a material involvement in the formation or promotion of the entity;
- (b) unless ASX decides otherwise, they:
  - (i) are; or
  - (ii) have been at any time in the 12 months before the date of the entity’s application for admission to the official list; or
  - (iii) will be at the date of the entity’s admission to the official list;
 a substantial (10%+) holder<sup>37</sup> in the entity; or
- (c) their relationship with the entity or with a person referred to in (a) or (b) above is, in ASX’s opinion, such that the person should be subject to the same escrow restrictions as a promoter of the entity.<sup>38</sup>

As has been observed judicially,<sup>39</sup> “the term promoter is a term not of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence.”

In the case of a new listing, paragraph (a) of the definition of “promoter” above will typically capture the founders of the entity’s business and any members of its key management personnel with material security holdings in the entity, particularly if they are the driving force behind the decision to list on ASX. It may also capture professional advisers and consultants with material security holdings in the entity if they are acting more like promoters rather than advisors.<sup>40</sup>

In relation to paragraph (b) of the definition of “promoter”, ASX will generally treat a substantial (10%+) holder of an entity undertaking a new listing as a promoter unless it is clear to ASX that they have had no material involvement in the formation or promotion of the entity. The onus is on the entity to establish this to ASX’s satisfaction. ASX is likely to accept that this onus has been discharged where:

- the holder is a professional venture capital enterprise that has subscribed genuine venture capital to the entity in one or more tranches and paid subscription prices for their securities comparable to the subscription prices paid by any other parties investing at or around the same time;
- before subscribing the initial tranche of venture capital, the holder had no material economic interest in, and the holder and its associates had no involvement in the management of, the entity; and

<sup>36</sup> Paragraph (c) of the definition of “related party” in Listing Rule 19.12. This is largely the same definition as in section 228 of the Corporations Act, as modified by section 601LA, but with the addition of paragraphs (i) and (vii), and the qualification of paragraph (viii) by the addition of the words “in its capacity as RE of the trust”.

<sup>37</sup> As defined in Listing Rule 19.12. Note that the Listing Rules use a 10% threshold for someone to be a substantial (10%+) holder for these purposes, rather than the 5% threshold used in the Corporations Act.

<sup>38</sup> See the definition of “promoter” in Listing Rule 19.12.

<sup>39</sup> *Whaley Bridge Calico v Green & Smith* (1879) 5 QBD 109, at 111, per Bowen J. In *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215, a promoter was described as someone involved in “getting up and starting a business undertaking.”

<sup>40</sup> If a person referred to in this paragraph of the text disputes the correctness of ASX’s opinion that they are a “promoter” under paragraph (a) of the definition of that term in Listing Rule 19.12, ASX can resolve that dispute by applying paragraph (c) of the definition instead.

- since subscribing the initial tranche of venture capital, the holder and its associates have had no involvement in the management of the entity beyond being represented on the board by no more than two non-executive directors.

It should be noted that the fact that a venture capitalist in these circumstances may not be regarded by ASX as a promoter does not mean that their securities will be free from escrow. They may still be subject to escrow as a seed capitalist if they acquired their securities at a price less than 80% of the entity's IPO price.<sup>41</sup> In this case, however, the escrow period will run for 12 months from when they acquired their restricted securities, rather than 24 months from the date of listing (as would be the case if they were regarded as a promoter).

In applying the definition of "promoter" to a re-compliance listing, ASX again treats the transaction as if it were a new listing and disregards the fact that the entity has previously been admitted to the official list. Hence, a person will be regarded by ASX as a promoter of an entity undertaking a re-compliance listing if:

- in ASX's opinion, they have had a material involvement in the formation or promotion of the transaction giving rise to the need for the entity to re-comply with ASX's admission and quotation requirements;
- unless ASX decides otherwise, they
  - are; or
  - have been at any time in the 12 months before the date of the entity's application for re-admission to the official list; or
  - will be at the date of the entity's re-admission to the official list;
 a substantial (10%+) holder<sup>42</sup> in the entity; or
- their relationship with the entity or with a person referred to in (a) or (b) above is, in ASX's opinion, such that the person should be subject to the same escrow restrictions as a promoter of the entity.

In the case of a re-compliance listing involving an acquisition by the listed entity of another entity or undertaking,<sup>43</sup> paragraph (a) of the definition of "promoter" will typically capture the founders and key management personnel with material ownership interests in the other entity or undertaking, particularly if they are the driving force behind the decision to undertake the re-compliance listing. It may also capture professional advisers and consultants with material security holdings in the listed entity or with material ownership interests in the entity or undertaking being acquired if they are acting more like promoters rather than advisors.

For the purposes of paragraph (b) of the definition of "promoter", ASX will generally treat a substantial (10%+) holder of an entity undertaking a re-compliance listing as a promoter unless it is clear to ASX that they have had no material involvement in the formation or promotion of the transaction giving rise to the need for the entity to re-comply with ASX's admission and quotation requirements. The onus is on the entity to establish this to ASX's satisfaction. ASX is likely to accept that this onus has been discharged where:

- the holder is someone who was a substantial (10%+) holder of the entity before the announcement of the transaction;
- the holder has not had any material involvement in the management of the entity in the 12 months leading up to that announcement; and
- the holder has not had any material interest in, and had no material involvement in the management of, the entity or undertaking being acquired by the listed entity in the 12 months leading up to that announcement.

Further information about how ASX applies escrow in a re-compliance listing is set out below in section 10.3 below.

<sup>41</sup> Under item 2 of Appendix 9B.

<sup>42</sup> See note 37 above.

<sup>43</sup> Listing Rule 19.12 defines the expression "undertaking" to include both assets and businesses.

For both new and re-compliance listings, paragraph (c) of the definition of “promoter” above gives ASX the discretion to treat a person as a promoter having regard to their relationship to the entity or to a promoter or substantial (10%+) holder. ASX sometimes comes across situations where an entity contemplating a new or re-compliance listing and an associated capital raising will undertake an issue of securities to related parties, promoters, professional advisers involved in the transaction, and their family, friends and associates,<sup>44</sup> at a significant discount to the anticipated offer price for the capital raising. If it has and ASX forms the view that the purpose of the issue was not to raise genuinely needed seed capital but rather to confer a benefit on the recipients through the prospective re-pricing of their securities if the transaction is successful, ASX is likely to classify those securities as restricted securities,<sup>45</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 under paragraph (c) of the definition of “promoter”, thereby requiring them and their controllers to execute a restriction deed subjecting their securities to escrow for 24 months from the date the entity is admitted or re-admitted to the official list. In an egregious case, ASX may exercise its discretion<sup>46</sup> not to admit or re-admit the entity to the official list or not to quote the securities in question.

In certain circumstances, ASX may also apply paragraph (c) of the definition of “promoter” to a vendor who has sold a classified asset to an entity in the lead up to the entity undertaking a new or re-compliance listing, even where the vendor has had no other specific involvement in the formation or promotion of the entity. This includes where it appears to ASX that the vendor has recently acquired the classified asset with a view to on-sale or is in the business of “packaging” assets for IPO. If ASX does so, this will have the likely consequence that the consideration for the acquisition must be restricted securities and can only include a cash component to the extent that it involves reimbursement of actual expenditure incurred by the vendor in developing the classified asset.<sup>47</sup>

### 2.3 “Associate”

Under the Listing Rules, a person’s associates include:

- if the person is a natural person, any entity<sup>48</sup> the person controls;
- if the person is an entity:<sup>49</sup>
  - any entity the person controls;
  - any entity that controls the person;
  - any entity that is controlled by an entity that controls the person;
- any person with whom the person has, or proposes to enter into, a relevant agreement<sup>50</sup> for the purpose of controlling or influencing the composition of the listed entity’s board<sup>51</sup> or the conduct of the listed entity’s affairs; and

<sup>44</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>45</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>46</sup> Under Listing Rules 1.19 and 2.9 respectively.

<sup>47</sup> Listing Rule 1.1 condition 11(a). See ‘6.2 Securities issued to a vendor of classified assets who is a related party, promoter or associate’ on page 26.

<sup>48</sup> “Entity” in this context means a body corporate, partnership, unincorporated body or a trust and includes, in the case of a trust, the RE of the trust (see the definition of “associate” in Listing Rule 19.12).

<sup>49</sup> See note 48 above.

<sup>50</sup> “Relevant agreement” has the same meaning as in section 9 of the Corporations Act (Listing Rule 19.3). It includes an agreement, arrangement or understanding: (a) whether formal or informal or partly formal and partly informal; (b) whether written or oral or partly written and partly oral; and (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.

<sup>51</sup> If the listed entity is an externally managed trust, the reference to controlling or influencing the composition of the listed entity’s board is taken to be a reference to controlling or influencing whether a particular entity becomes or remains the trust’s RE. If the listed entity is an internally managed trust, the reference to controlling or influencing the composition of the listed entity’s board is taken to be a reference to controlling or influencing the board of the trust’s RE.

- any person with whom the person is acting, or proposing to act, in concert in relation to the listed entity's affairs.<sup>52</sup>

Where the person is a natural person, their related parties are taken to be their associates unless the contrary is established. This provision exists as an evidentiary aid. It is based on the premise that because of the close connection between an individual and their related parties, it should be presumed that the individual is able to control a related party, or that a related party is acting in concert with the individual, unless the contrary is proven. Otherwise it is too easy for the individual and the related party simply to deny any association and to put others to the task of proving that they are associates.

The related parties of an individual include:

- (i) the individual's spouse or de facto spouse;
- (ii) the parents and children of the individual and the parents and children of the individual's spouse or de facto spouse;
- (iii) an entity controlled by the individual or anyone referred to in (i) or (ii) above;
- (iv) anyone who has fallen within (i) – (iii) above within the past 6 months;
- (v) anyone who believes or has reasonable grounds to believe that they are likely to fall within (i) – (iii) above at any time in the future; and
- (vi) a person who acts in concert with the individual or anyone referred to in (i) – (v) above.<sup>53</sup>

Where an individual is a related party or promoter, their associates will generally include any family company, family trust or self-managed superannuation fund they control.

### 2.4 “Seed capitalist”

A “seed capitalist” is a person who has been issued securities in an entity before or in connection with its admission to the official list, other than pursuant to the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3.<sup>54</sup>

In the case of a new listing, a seed capitalist is effectively any person who has received securities in the entity before or in connection with its listing, other than as part of its IPO.

In the case of a re-compliance listing, again ASX treats the transaction as if it were a new listing and disregards the fact that the entity has previously been admitted to the official list. Hence, a person will be regarded by ASX as a seed capitalist of an entity undertaking a re-compliance listing if they have been issued securities in the entity before

<sup>52</sup> See the definition of “associate” in Listing Rule 19.12. This definition is based on, but in some respects is broader than, the definition of “associate” in section 12 of the Corporations Act. For example, in the Listing Rules definition, the references to a body corporate in section 12(2)(a) have been replaced with references to an entity so as to capture trusts, partnerships and other unincorporated bodies (see note 48 above) and a new paragraph has been added specifying that if the primary person is a natural person, their associates include any entity they control.

The Listing Rules definition also includes a provision deeming a related party of a natural person to be their associate unless the contrary is proven. As mentioned in the text, this is intended to put the evidentiary burden on a person who asserts that they do not control and are not acting in concert with a related party to prove that is so.

The definition of “associate” in Listing Rule 19.12 has an equivalent carve-out to that provided in section 16 of the Corporations Act, which states that a person is not an associate of another person merely because of one or more of the following: (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship; (b) one, a client, gives specific instructions to the other, whose ordinary business includes dealing in financial products, to acquire financial products on the client's behalf in the ordinary course of that business; (c) one had sent, or proposes to send, to the other an offer under a takeover bid for securities held by the other; or (d) one has appointed the other, otherwise than for valuable consideration given by the other or by an associate of the other, to vote as a proxy or representative at a meeting of members, or of a class of members, of the listed entity.

<sup>53</sup> Paragraph (d) of the definition of “related party” in Listing Rule 19.12.

<sup>54</sup> Listing Rule 19.12.

or in connection with its re-admission, other than pursuant to the prospectus, PDS or information memorandum lodged with ASX in connection with its re-compliance listing.

Further information about how ASX applies escrow in a re-compliance listing is set out below in section 10.3 below.

### 2.5 “Classified asset”

Each of the following is a “classified asset”:

- (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 three years,<sup>55</sup> 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.<sup>56</sup>

As an illustration of how this definition applies in practice, category (d) in combination with:

- category (a) will generally capture most mining exploration entities and oil and gas exploration entities;
- category (b) will generally capture most early stage life science and technology companies; and
- category (c) will generally capture most other start-up or highly speculative businesses.

This list, however, is by no means exhaustive.

The fact that an entity is able to produce a valuation for an asset, including one by a recognised expert valuer, does not necessarily mean that the asset is not a classified asset under category (c) above. That category will apply if, in ASX’s opinion, the asset is not readily able to be valued. To be readily able to be valued means the asset must be one about which there is sufficient information available to determine, within a reasonable range, its fair value by reference to market prices or by using conventional valuation techniques. If the asset is of a character that, in ASX’s opinion, its fair value cannot readily be determined within a reasonable range in this way, then it falls within category (c).

### 2.6 “10.1 party”

Listing Rule 10.1 regulates, among other things, the acquisition of a “substantial asset”<sup>57</sup> by listed entities from persons in a position of influence. It applies whenever the party from whom the entity is acquiring the substantial asset is:

- a related party of the entity;
- a child entity of the entity;
- a person who is, or was at any time in the 6 months before the transaction, a substantial (10%+) holder in the entity;
- an associate of a person referred to in the bullet points above; or

<sup>55</sup> As to the meaning of “profitably exploited”, see note 67 below.

<sup>56</sup> Listing Rule 19.12.

<sup>57</sup> As defined in Listing Rule 10.2.

- a person whose relationship to the entity or a person referred to in the bullet points above is such that, in ASX's opinion, the transaction should be approved by security holders.<sup>58</sup>

For convenience, the parties in the bullet points above are referred to in this Guidance Note as "10.1 parties".

Guidance Note 24 *Acquisitions and Disposals of Substantial Assets Involving Persons in a Position of Influence* has detailed guidance on which parties are 10.1 parties and what constitutes a substantial asset for these purposes.

### 3. Escrow requirements for new and re-compliance listings

#### 3.1 Overview

The table below summarises ASX's escrow requirements for securities issued before or in connection with a new or re-compliance listing.

Recipient	Consideration given for securities	Escrow period		Cash formula relief
		Related party, promoter or associate	Other	
Seed capitalist who received securities not covered in the other rows of this table	Any consideration	No escrow for fully paid ordinary securities for which the recipient has paid a cash amount that is not less than the IPO <sup>59</sup> price Otherwise 24 months from quotation	No escrow for fully paid ordinary securities for which the recipient has paid a cash amount that is not less than 80% of the IPO <sup>60</sup> price Otherwise 12 months from issue	Yes
Vendor	Sale of classified asset	24 months from quotation	12 months from issue	No
Professional adviser or consultant	Services rendered to the entity relating to its IPO or its admission to the official list	24 months from quotation	24 months from quotation	No
Officer or employee	Employee incentive scheme	24 months from quotation	Not applicable	Yes

In the case of a re-compliance listing, the references in the table above to 24 months from quotation are to be read as 24 months from the date of re-admission.

The application of ASX's escrow requirements to new and 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 new or re-compliance listing that may be subject to escrow<sup>61</sup> have early discussions with ASX on how ASX is likely to apply the escrow requirements in the Listing Rules in its particular circumstances.

#### 3.2 The purpose of ASX's escrow requirements for new and re-compliance listings

By requiring escrowed parties to hold their restricted securities in a new or re-compliance listing for the nominated escrow period, ASX's escrow regime serves multiple purposes:

- it reduces the opportunity and incentive for related parties, promoters and their associates to vend a classified asset of dubious value into a new or re-compliance listing and make a windfall profit at the expense

<sup>58</sup> Listing Rules 10.1.1 – 10.1.5.

<sup>59</sup> As to the meaning of "IPO", see note 41 above.

<sup>60</sup> See note 59 above.

<sup>61</sup> That is, any entity that will not fall within the exceptions to escrow in Listing Rule 9.2.

of the incoming investors – it does so by requiring the entity to issue restricted securities as the consideration for the acquisition and restricting the vendor from selling those securities for 24 months from the date of the entity's admission or re-admission, when the market will have had a reasonable opportunity to value the asset and reflect that in the market price of the entity's securities;

- it reduces the opportunity and incentive for those who have provided seed capital to a new or re-compliance listing and who are likely to have paid a substantially lower price for their restricted securities than incoming investors, from making a windfall profit on those securities at the expense of the incoming investors – it does so by treating their securities as restricted securities (subject to the application of cash formula relief) and preventing them from selling those securities for 24 months from the date of the entity's admission or re-admission (in the case of a seed capitalist who is a related party, promoter or associate) or 12 months from the date of issue (in the case of other seed capitalists), giving the market a reasonable opportunity to value the entity and reflect that in the market price of the entity's securities;
- it aligns the economic interests of the entity's related parties, promoters and seed capitalists with those of the incoming investors for the duration of the escrow period; and
- it ensures that professional advisers and consultants who perform a quasi-promotional role by advising the entity on a new or re-compliance listing and who receive securities in the entity for services rendered are treated on the same footing as promoters.

Related parties, promoters and professional advisers or consultants who perform a quasi-promoter role are subject to a longer period of escrow than other parties – 24 months from the date of initial quotation in the case of a new listing or 24 months from the date of re-admission in the case of a re-compliance listing. Other parties are only subject to escrow for 12 months commencing on the date they received their securities. This difference in treatment reflects the fact that related parties, promoters and quasi-promoters are usually likely to have a bigger economic stake in, and have a closer and deeper understanding of the underlying value of, the undertaking being listed than other unrelated security holders and therefore a longer period of escrow is appropriate.

Seed capitalists who pay cash for fully paid ordinary securities in an entity undertaking a new or re-compliance listing get the benefit of having no escrow applied to securities where the price paid for them was equal to or greater than the IPO price (if they are related parties or promoters or associates of a related party or promoter) or 80% of the IPO price (if they are not related parties or promoters or associates of a related party or promoter). They also get the benefit of cash formula relief,<sup>62</sup> which relieves them from escrow on a proportion of their remaining securities equal to the proportion of the IPO price they paid for them. These concessions recognise that those providing seed capital to a new or re-compliance listing generally assume greater risk than subscribers to an IPO and should not be penalised for doing so. Apart from anything else, unlike subscribers to an IPO, seed capitalists are at risk of owning securities that may never be able to be traded on a licensed securities exchange.

### 3.3 Which new and re-compliance listings are subject to escrow

All entities being admitted to the official list for the first time are subject to ASX's escrow requirements unless they fall within the exceptions in Listing Rule 9.2 discussed in sections 3.4 – 3.6 below.

All listed entities required by ASX under listing rule 11.1.3 to re-comply with ASX's admission and quotation requirements are also subject to ASX's escrow requirements unless they fall within the exceptions in Listing Rule 9.2 discussed below.

### 3.4 The exceptions to escrow in Listing Rule 9.2

Listing Rule 9.2 excludes a new or re-compliance listing from ASX's escrow requirements if:

- it is admitted under the profit test;<sup>63</sup>

<sup>62</sup> See '7. Cash formula relief' on page 33.

<sup>63</sup> That is, under Listing Rules 1.1 condition 9 and 1.2.

- it has a track record of profitability or revenue acceptable to ASX; or
- in the opinion of ASX, it has a substantial proportion of its assets as tangible assets or assets with a readily ascertainable value,

and ASX has not decided, in its discretion, that escrow should apply to the entity.<sup>64</sup>

Conversely, an entity will be subject to escrow if:

- it is admitted under the assets test;<sup>65</sup>
- it does not have a track record of profitability or revenue acceptable to ASX; and
- in the opinion of ASX, it does not have a substantial proportion of its assets as tangible assets or assets with a readily ascertainable value,

or if ASX decides, in its discretion, that escrow should apply to the entity.<sup>66</sup>

Hence, escrow will ordinarily apply to most new or re-compliance listings of mining exploration entities, oil and gas exploration entities, early stage life science and technology companies, and other start-up or speculative businesses admitted under the assets test that do not have a track record of profitability or revenue acceptable to ASX. Escrow will not ordinarily apply to new or re-compliance listings of “investment entities” or other entities that have mostly tangible assets (such as developed land) or other assets (such as marketable securities) that have a readily ascertainable value, nor will it apply to entities that have a track record of profitability or revenue acceptable to ASX.

Notwithstanding these general propositions, ASX can exercise its discretion to apply escrow to an entity whenever it considers it appropriate to do so. So, for example, ASX may (and usually will) apply escrow to an entity whose primary asset is “greenfield” land to be used for speculative development purposes, even though the land in its greenfield state may be readily capable of being valued. This is especially so if the entity does not yet have the planning or environmental approvals needed to carry out the intended development.

### 3.5 What is an acceptable track record of profitability?

ASX regards the profit test in Listing Rule 1.2 as setting appropriate thresholds for what is an acceptable track record of profitability for escrow not to apply.<sup>67</sup> Consequently, to meet this requirement, the entity must:

- be a going concern or the successor of a going concern that has had continuing operations for at least 3 full financial years;<sup>68</sup>
- have aggregated profit for the last 3 full financial years of at least \$1 million;<sup>69</sup> and
- have consolidated profit 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>70</sup>

and the only reason the entity has not applied, or not been able to apply, for admission under the profit test is because it has not conducted the same main business activity during the last 3 full financial years and through to

<sup>64</sup> Listing Rule 9.2.

<sup>65</sup> That is, under Listing Rules 1.1 condition 9 and 1.3.

<sup>66</sup> The corollary of Listing Rule 9.2.

<sup>67</sup> ASX also regards these as appropriate thresholds for determining whether an interest in intangible property that is substantially speculative or unproven has been “profitably exploited for at least three years”, for the purposes of paragraph (b) of the definition of “classified asset” in Listing Rule 19.12. See the text accompanying note 55 above.

<sup>68</sup> Listing Rule 1.2.1.

<sup>69</sup> Listing Rule 1.2.4.

<sup>70</sup> Listing Rule 1.2.5.



the date it is admitted<sup>71</sup> or it is not able to provide the accounts required under Listing Rule 1.2 to be admitted under that test.<sup>72</sup>

Even where an entity meets these thresholds, ASX still retains a discretion to apply escrow if ASX considers it appropriate in the circumstances.<sup>73</sup>

### 3.6 What is an acceptable track record of revenue?

What constitutes an acceptable track record of revenue for escrow not to apply is considered by ASX on a case-by-case basis. Generally, for an entity to meet this requirement, it must:

- be a going concern or the successor of a going concern that has had continuing operations for at least 3 full financial years;
- have conducted the same main business activity during the last 3 full financial years and through to the date it is admitted;
- have aggregated revenue from continuing operations for the last 3 full financial years of at least \$20 million;
- have consolidated revenue 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 \$15 million;
- be raising at least \$20 million in its IPO; and
- have a market capitalisation at the date of listing of at least \$100 million.<sup>74</sup>

Again, even where an entity meets these thresholds, ASX still retains a discretion to apply escrow if ASX considers it appropriate in the circumstances.

### 3.7 Transactions entered into to avoid or reduce escrow

ASX has experienced situations where an entity applying for admission to the official list or undertaking a re-compliance listing enters into a transaction with the holder of securities in the entity to avoid the application of escrow. One such situation was where the entity, ahead of its admission or re-admission, entered into a buy-back of securities that would otherwise be subject to ASX-imposed escrow following its admission or re-admission, effectively cashing out those securities and avoiding the application of escrow to them.

If faced with this situation again, ASX is likely to request the entity to effectively reverse the buy-back by having the holder subscribe for new securities in the entity equal to the number of securities bought back and at an aggregate issue price equal to the buy-back proceeds received by the holder. The new securities will then be designated by ASX as restricted securities and escrow applied accordingly, but with two modifications.

First, if the price paid by the holder for the new securities is higher than the price they paid for the securities that were bought back, ASX will direct the entity to apply the cash formula on the basis of the price they paid for the securities that were bought back rather than the price of the new securities. However, if the price paid by the holder for the new securities is lower than the price they paid for the securities that were bought back, ASX will direct the entity to apply the cash formula on the basis of the price they paid for the new securities rather than the price they paid for the securities that were bought back.

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<sup>71</sup> Listing Rule 1.2.2.

<sup>72</sup> As set out in Listing Rule 1.2.3. The entity must have provided acceptable accounts to be admitted under the asset test, as set out in Listing Rule 1.3.5.

<sup>73</sup> ASX might exercise this discretion, for example, if it was concerned that an entity's profit may have been artificially inflated or the subject of "window dressing".

<sup>74</sup> For these purposes, an entity's market capitalisation is calculated by multiplying the number of securities in the entity's main class by the price determined by ASX to be a fair measure of the market value of those securities (Listing Rule 19.12). Where an entity is undertaking a material capital raising in connection with its listing, ASX will normally use the price at which the entity's main class of securities are offered under the prospectus, PDS or information memorandum for that capital raising as an acceptable proxy for the market value of those securities.

Secondly, if the securities bought back would have been subject to an escrow period of 12 months from the date of their issue (as opposed to 24 months from the date of their quotation), ASX will direct the entity to start the escrow period from the date of issue of the new securities, and not the date of issue of the securities bought back.

If the entity and/or the holder of the securities in question do not comply with ASX's request, ASX is likely to exercise its discretion<sup>75</sup> to reject the entity's application for admission or re-admission to the official list.

## 4. Escrow requirements for acquisitions of classified assets from 10.1 parties

### 4.1 Overview

Listing Rule 10.1 regulates, among other things, the acquisition by a listed entity of a substantial asset from a 10.1 party.

Listing Rule 10.7 provides:

*If an acquisition to which rule 10.1 applies is of a classified asset, the consideration must be securities in the entity only and those securities must be restricted securities. This requirement does not apply if, and to the extent that, the consideration is reimbursement of expenditure incurred by the vendor in developing the classified asset.*

In applying Listing Rule 10.7, ASX will look at the totality of what is being acquired and if it is in substance a classified asset, ASX will require the whole of the consideration for the acquisition to be restricted securities, save to the extent it involves a cash payment reimbursing the vendor for expenditure incurred in developing the classified asset). ASX will not entertain an argument that the acquisition involves some classified assets and some other non-classified assets and that the vendor ought to be able to pay cash for the non-classified assets. So for example, if an entity is acquiring a mining exploration business with a mining tenement and mining plant and equipment, ASX will require the whole of the consideration for the acquisition to be restricted securities and will not permit the entity to issue restricted securities for the mining tenement but pay cash for the plant and equipment, even though the plant and equipment, when viewed in isolation, might be argued not to be a classified asset.

### 4.2 The purpose of the escrow requirements in Listing Rule 10.7

Listing Rule 10.7 is intended to reduce the opportunity and incentive for 10.1 parties to make a windfall profit on the sale of a substantial classified asset of dubious value to the entity at the expense of other investors. Again, it does so by requiring the entity to issue restricted securities as the consideration for the acquisition and restricting the 10.1 party from selling those securities for 12 months after their issue, when the market will have had a reasonable opportunity to value the asset and reflect that in the market price of the entity's securities.

### 4.3 Which listed entities are subject to escrow under Listing Rule 10.7

All listed entities acquiring a substantial classified asset from a 10.1 party are subject to ASX's escrow requirements in Listing Rule 10.7.

The exceptions to escrow in Listing Rule 9.2 for new or re-compliance listings discussed in sections 3.4 – 3.6 above do not apply to existing listed entities acquiring a substantial classified asset from a 10.1 party.<sup>76</sup>

### 4.4 The exception for cash reimbursement of expenditure

To qualify under the second sentence of Listing Rule 10.7 permitting the consideration for a classified asset to include a cash component by way of reimbursement of expenditure incurred in developing the asset, the expenditure in question must meet two requirements:

- (1) it must have been incurred by the 10.1 party/vendor; and

<sup>75</sup> Listing Rule 1.19.

<sup>76</sup> The exceptions in Listing Rule 9.2 only apply to entities in the circumstances described in items 1, 2, 3, 4, 6 and 7 of Appendix 9B. The application of ASX's escrow requirements to entities in this category occurs under item 5 of Appendix 9B.

(2) it must have been incurred in developing the classified asset.

Expenditure incurred by someone else (such as a predecessor in title), or for some other purpose, does not qualify.

An entity that seeks to rely on the “reimbursement of expenditure” exception to pay a cash component to a 10.1 party for a classified asset must provide to ASX itemised details of the expenditure being reimbursed and may be required by ASX to produce evidence to substantiate the amounts actually paid<sup>77</sup> and their nexus to the development of the classified asset.

In relation to mining exploration entities, ASX has allowed cash reimbursement of expenditure “going into the ground”. This includes money paid by the 10.1 party for exploration licence fees, drilling expenses, assay reports, geologist reports, and pre-feasibility and feasibility studies. It does not include money paid by the 10.1 party to evaluate whether or not to acquire the relevant mining tenement, which ASX does not regard as expenditure on the “development” of the tenement.

In relation to early stage technology entities, ASX has allowed cash reimbursement of licence fees paid to acquire the right to use technology, patent and patent attorney fees paid to protect technology, payments to technical consultants or research and development contractors to develop a prototype or proof of concept, and the costs of acquiring hardware.

ASX generally does not allow cash payments to reimburse corporate expenses of a general nature, such as directors’ fees, staff salaries, administration costs and travel expenses unless the entity can show a direct nexus between the amount in question and the development of the classified asset.

## 5. How escrow is imposed

### 5.1 Constitutional requirements

For so long as an entity has any restricted securities on issue, its constitution must provide:

- a holder of restricted securities must not dispose<sup>78</sup> of, or agree or offer to dispose of, the securities during the escrow period applicable to those securities except as permitted by the Listing Rules or ASX;
- if the securities are in the same class as quoted securities,<sup>79</sup> the holder will be taken to have agreed in writing that the restricted securities are to be kept on the entity’s issuer sponsored subregister and are to have a holding lock applied for the duration of the escrow period applicable to those securities;
- the entity will refuse to acknowledge any disposal (including, without limitation, to register any transfer) of restricted securities during the escrow period applicable to those securities except as permitted by the Listing Rules or ASX;
- a holder of restricted securities will not be entitled to participate in any return of capital on those securities during the escrow period applicable to those securities except as permitted by the Listing Rules or ASX; and
- if a holder of restricted securities breaches a restriction deed or a provision of the entity’s constitution restricting a disposal of those securities, the holder will not be entitled to any dividend or distribution, or to exercise any voting rights, in respect of those securities for so long as the breach continues.<sup>80</sup>

These requirements provide the constitutional underpinning for ASX’s escrow regime.

<sup>77</sup> Under Listing Rule 1.17 or 18.7. The evidence may include bank statements and other books and records evidencing the expenditure.

<sup>78</sup> The term “dispose” has the expanded meaning set out in Listing Rule 19.12.

<sup>79</sup> The reference to restricted securities being “in the same class” as quoted securities (rather than being quoted securities) reflects the fact that restricted securities are not quoted until the end of the escrow period.

<sup>80</sup> Listing Rules 9.1(a) and 15.12.

The entity must not amend or remove any of these constitutional provisions while it has any restricted securities on issue unless ASX agrees in writing.<sup>81</sup>

The entity must also enforce its constitution to ensure compliance with the requirements for restricted securities.<sup>82</sup>

### 5.2 The requirement for a restriction deed or a restriction notice

Escrow restrictions must be imposed via a restriction deed or a restriction notice, at ASX's election.<sup>83</sup>

Once entered into, an entity must not vary or terminate a restriction deed or restriction notice unless ASX agrees in writing.<sup>84</sup> The entity must also comply with, and enforce, a restriction deed to ensure compliance with the requirements for restricted securities.<sup>85</sup>

Sections 6.1 – 6.11 below set out when ASX generally will require escrow restrictions to be imposed via a restriction deed and when it will permit them to be set out in a restriction notice.

### 5.3 The contents of a restriction deed

Where required, a restriction deed must be entered into by the entity, the holder of the restricted securities and each “controller”.

By executing the restriction deed, the controllers bind themselves not to dispose of or create security interests in their “controller interests”, in a similar manner to the way in which the holders of restricted securities bind themselves not to dispose of or create security interests in their restricted securities. This is to prevent those who have an economic interest in restricted securities from avoiding ASX's escrow regime by the simple expedient of using a chain of entities to hold that interest and then transferring the controller interests in an entity “up the chain”, rather than the restricted securities themselves, to dispose of that economic interest.

“Controller”, in relation to restricted securities, is defined to mean:

- (a) if the holder of the restricted securities holds them on its own account, a person who, or who in ASX's opinion, directly or indirectly controls,<sup>86</sup> or has a substantial economic interest in, the holder of the restricted securities; or
- (b) if the holder of the restricted securities holds them in a nominee, trustee, custodial or other fiduciary capacity on behalf of a beneficiary, that beneficiary and any other person who, or who in ASX's opinion, controls, or has a substantial economic interest in, the restricted securities.<sup>87</sup>

“Controller interests” means the securities or other rights or interests through which a controller controls, or has a substantial economic interest in, the restricted securities or the holder of restricted securities.<sup>88</sup>

ASX notes that the definition of “controller” above does not specifically mention discretionary trusts. ASX interprets and applies that definition as follows:

- (a) if the holder of restricted securities holds them on its own account, the holder is a “controller” of those securities;

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<sup>81</sup> Listing Rule 9.1(d)(i).

<sup>82</sup> Listing Rule 9.4.

<sup>83</sup> Listing Rule 9.1(b) and (c).

<sup>84</sup> Listing Rules 9.1(d)(ii) and (iii).

<sup>85</sup> Listing Rule 9.4.

<sup>86</sup> “Control” is defined in Listing Rule 19.12, in relation to an entity, to mean.

<sup>87</sup> Listing Rule 19.12.

<sup>88</sup> See the definition of “controller interests” in the pro forma restriction deed in Appendix 9A.

- (b) if the holder of restricted securities holds them in a nominee, trustee, custodial or other fiduciary capacity on behalf of a particular beneficiary or beneficiaries (ie in a fixed trust), that beneficiary is, or those beneficiaries are, a “controller” of those securities;
- (c) if the holder of restricted securities holds them as a trustee of a discretionary trust where there are no fixed beneficiaries (eg a family trust):
- the trustee;
  - any person who can appoint or remove the trustee; and
  - any person who controls the trustee,
- is a “controller” of those securities;<sup>89</sup> and
- (d) in all cases, any other person who, or who in ASX’s opinion, controls, or has a substantial economic interest in, restricted securities is a “controller” of those securities.

It is up to an entity to make appropriate enquiries with holders of restricted securities who will be executing restriction deeds to determine whether or not they have any controllers who should also be entering into the deed. Usually it will be self-evident whether or not a person or entity is a “controller” for these purposes. If the entity has any doubts in this regard, they should approach ASX for its opinion on the matter.

The prescribed form for a restriction deed is set out in Appendix 9A of the Listing Rules. An editable version of that Appendix can be downloaded from: <http://www.asx.com.au/regulation/compliance/compliance-downloads.htm>.

These are standard form deeds and ASX will not generally agree to any changes. Hence, any edits to a restriction deed should be confined to inserting the details required in the schedule, the date of the deed and an appropriate execution clause for the parties.

The details required to be inserted in the schedule to a restriction deed are:

1. the entity’s name and address;
2. the name and address of the holder of the restricted securities;
3. the name and address of each controller of the restricted securities;<sup>90</sup>
4. the start date for the escrow period applicable under Appendix 9B;
5. the end date for the escrow period applicable under Appendix 9B;
6. particulars of the restricted securities;
7. particulars of the controller interests;
8. particulars of any security interests over restricted securities;<sup>91</sup> and

<sup>89</sup> These being the parties who, in ASX’s opinion, will generally control restricted securities held by the trustee of a discretionary trust.

<sup>90</sup> If item 3 of the schedule is completed, the holder and each controller warrant that: (a) the holder has the controllers set out in item 3 of the schedule with the controller interests identified in item 6 of the schedule; (b) there are no other controllers or controller interests; and (c) the holder and each controller have provided ASX and the entity with all information necessary to properly form an opinion about who is a controller of the holder and who is required to execute the agreement (clause 4 of Appendix 9A).

If item 3 of the schedule is not completed or is marked “nil” or “n/a” (or something equivalent), the holder warrants that: (a) if the holder is one or more individuals, they are the legal and beneficial owner of the restricted securities; (b) if the holder is not one or more individuals, the holder has no controller; and (c) the holder has provided ASX and the entity with all information necessary to properly form an opinion that the holder falls within either (a) or (b) above (clause 5 of Appendix 9A).

<sup>91</sup> If item 8 of the schedule is completed, the holder warrants that full particulars of the security interests which have been created over the restricted securities are as set out in that item and, apart from those security interests, the holder has not done, or omitted to do, any act

### 9. particulars of any security interests over controller interests.<sup>92</sup>

If the holder of restricted securities is entitled to receive further restricted securities during the escrow period – for example, a vendor of a classified asset who is entitled to additional securities by way of contingent or deferred consideration if certain milestones are achieved – the further securities should be clearly included in the particulars of the restricted securities in item 6 of the schedule to the restriction deed. In such a case, where the transaction is occurring in connection with a new or re-compliance listing, ASX will generally impose a condition<sup>93</sup> on the entity's admission or re-admission that the entity immediately comply with ASX's escrow requirements, if and when those further securities are issued. Similarly, where the transaction is occurring under Listing Rule 10.7, ASX will generally require the entity to provide to ASX a written undertaking,<sup>94</sup> acceptable to ASX, that the entity will immediately comply with ASX's escrow requirements, if and when those further securities are issued.

In the case of a new or re-compliance listing, where ASX requires escrow restrictions to be set out in a restriction deed, ASX will impose as a standard condition of admission or re-admission that the entity must provide a copy of all executed restriction deeds to ASX (and, if any escrow deed was executed under a power of attorney, a copy of that power of attorney) no later than 5 business days prior to its anticipated date of admission to the official list. This is to allow ASX to satisfy itself that the entity has complied with its escrow obligations before quotation commences.

A scanned, faxed or photocopy of these documents will suffice for ASX's purposes.

Entities and their legal advisers should note that as the escrow deed takes the legal form of a deed, it will need to comply with the formalities for executing a deed under the law of the State of New South Wales, the governing law applicable to escrow deeds.<sup>95</sup> If the escrow deed is signed under a power of attorney, the power of attorney should itself be a deed.<sup>96</sup>

ASX will accept electronic signatures on escrow deeds and powers of attorney, provided the entity or its legal adviser certifies to ASX that the electronic signatures are sufficient for the escrow deed or power of attorney (as applicable) to take effect as a deed under New South Wales law.<sup>97</sup>

Where an escrow deed is executed on behalf of a holder under a general power of attorney<sup>98</sup> in favour of a related party or promoter, or an associate of a related party or promoter, ASX may require confirmatory evidence from the holder that they understand the nature of the escrow deed and approve the attorney executing it on their behalf. ASX will not require such confirmatory evidence where the escrow deed is executed under a power of attorney that specifically authorises the attorney to enter into an escrow deed on behalf of the grantor or under an enduring power of attorney.<sup>99</sup>

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which would breach clause 1 of the restriction deed if done or omitted during the escrow period. A release of those security interests must also be attached to the agreement (clause 6 of Appendix 9A).

If item 8 of the schedule is not completed or is marked "nil" or "n/a" (or something equivalent), the holder warrants that the holder has not created, or agreed to create, any security interests over the restricted securities (clause 7 of Appendix 9A).

<sup>92</sup> If item 9 of the schedule is completed, the holder and each controller warrant that full particulars of security interests which have been created over the controller interests are as set out in that item and, apart from those security interests, the controller has not done, or omitted to do, any act which would breach clause 2 of the restriction deed if done or omitted during the escrow period. A release of those security interests must also be attached to the agreement (clause 8 of Appendix 9A).

If item 9 of the schedule is not completed or is marked "nil" or "n/a" (or something equivalent), the holder and each controller warrant that the controller has not created, or agreed to create, any security interests over the controller interests (clause 9 of Appendix 9A).

<sup>93</sup> Under Listing Rule 1.19.

<sup>94</sup> Under Listing Rule 18.8.

<sup>95</sup> See section 38 of the *Conveyancing Act 1919* (NSW).

<sup>96</sup> *Powell v London and Provincial Bank* [1893] 2 Ch 555 at 563; *Butler v Duckett* (1891) 17 VLR 439.

<sup>97</sup> See section 38A of the *Conveyancing Act 1919* (NSW).

<sup>98</sup> A general power of attorney typically appoints an attorney to act on behalf of the principal in any and all matters.

<sup>99</sup> An enduring power of attorney appoints an attorney to act on behalf of a principal who is not able to make decisions for themselves.

### 5.4 The contents of a restriction notice

The prescribed form for a restriction notice is set out in Appendix 9C of the Listing Rules. An editable version of that Appendix can be downloaded from: <http://www.asx.com.au/regulation/compliance/compliance-downloads.htm>.

The notice must be completed and sent to each person who holds restricted securities and who, with ASX's agreement, is not entering into a restriction deed with the entity.

The notice informs the holder of restricted securities that those securities are subject to escrow for the nominated escrow period and that during that period:

- they must not dispose of, or agree or offer to dispose of, the restricted securities except as permitted by the Listing Rules or ASX;
- the securities will be kept on the entity's issuer sponsored subregister and will have a holding lock applied to them;
- they will not be entitled to participate in any return of capital on the restricted securities during the escrow period except as permitted by the Listing Rules or ASX; and
- if they breach the restrictions above they will not be entitled to any dividend or distribution, or to exercise any voting rights, in respect of the restricted securities for so long as the breach continues.

These are standard form notices and ASX will not generally agree to any changes. Hence, any edits to a restriction notice should be confined to inserting the name of the entity and the holder of the restricted securities at the start of the notice, the particulars of the restricted securities and escrow period in the schedule, the date of the notice and an appropriate execution clause for the entity.

If the holder of restricted securities is entitled to receive further restricted securities during the escrow period – for example, a vendor of a classified asset who is entitled to additional securities by way of contingent or deferred consideration if certain milestones are achieved – the further securities should be clearly included in the particulars of the restricted securities in the restriction notice. In such a case, ASX will generally impose a condition<sup>100</sup> on the entity's admission or re-admission that the entity immediately comply with ASX's escrow requirements, if and when those further securities are issued.

ASX will impose as a standard condition of admission or re-admission on all listings where ASX permits escrow restrictions to be set out in a restriction notice that the entity dispatch the restriction notice to affected holders by electronic mail or post no later than 5 business days prior to its anticipated date of admission to the official list and that, if they are sent by post, they must be sent in sufficient time to arrive in the ordinary course of the post no later than 2 business days prior to the entity's admission to the official list.

Restriction notices may be dispatched earlier than this, however if it is before ASX's decision in relation to the application of escrow restrictions is finalised and any restriction notice conveys inaccurate information because the applicant anticipated a different escrow treatment to that ultimately decided by ASX, a revised notice will need to be sent to the affected holder within the deadlines specified in the preceding paragraph.

ASX will also impose as a standard condition of admission or re-admission on all listings where ASX permits escrow restrictions to be set out in a restriction notice that the entity provide to ASX a sample of the restriction notice and a list with the names, addresses and security holdings of all recipients of the notice no later than 5 business days prior to its anticipated date of admission to the official list. This is to allow ASX to satisfy itself that the entity has complied with its escrow obligations before quotation commences.

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<sup>100</sup> Under Listing Rule 1.19.

### 5.5 Additional requirements for quoted securities

Subject to section 5.7 below, an entity that has restricted securities on issue in the same class as quoted securities must for the duration of the applicable escrow restrictions:

- enter and keep the restricted securities on its issuer sponsored subregister;
- identify in its issuer sponsored subregister the fact that the securities are restricted securities;
- apply a holding lock<sup>101</sup> to the restricted securities; and
- not register a transfer of, or acknowledge any other disposal of, the restricted securities.<sup>102</sup>

If the entity uses a third party (such as a share registry) to maintain its issuer sponsored subregister, it must also provide to ASX a written undertaking from that third party to comply with the requirements above.<sup>103</sup>

### 5.6 Additional requirements for unquoted securities

Subject to section 5.7 below, an entity that has restricted securities on issue that are not in the same class as quoted securities must for the duration of the applicable escrow restrictions:

- enter and keep the restricted securities on its certificated subregister;
- identify in its certificated subregister the fact that the securities are restricted securities;
- state on the certificate for the securities that they are restricted securities under the ASX Listing Rules and are not able to be transferred or otherwise disposed of by the holder except in accordance with those rules;
- provide to ASX an undertaking in writing from a bank or recognised trustee<sup>104</sup> to hold the certificate for the securities in escrow and not to deliver it up to any party until the expiry of those restrictions; and
- not register a transfer of, or acknowledge any other disposal of, the restricted securities.<sup>105</sup>

If the entity uses a third party (such as a share registry) to maintain its certificated subregister, it must also provide to ASX a written undertaking from that third party to comply with the requirements above.<sup>106</sup>

ASX would note the requirement above that an entity provide to ASX an undertaking in writing from a bank or recognised trustee to hold the certificate for restricted securities in escrow and not to deliver it up to any party until the expiry of those restrictions. This requirement is imposed on the premise that this step will be necessary, under the law where the entity is formed or established,<sup>107</sup> to perfect the restriction on the disposal of those securities. If this premise is not correct and ASX is provided with a written legal opinion from legal counsel in the entity's home jurisdiction which is acceptable to ASX confirming this,<sup>108</sup> ASX will give due consideration to granting a waiver of

<sup>101</sup> "Holding lock" has the meaning in section 2 of the ASX Settlement Operating Rules (Listing Rule 19.12), that is, a facility that prevents financial products from being deducted from, or entered into, a holding in a CHESS sponsored subregister or an issuer sponsored subregister pursuant to a transfer or conversion.

<sup>102</sup> Listing Rule 9.1(e). While ASX has the power to agree in writing that these requirements do not apply in a particular case, it would be relatively rare for ASX to do so.

<sup>103</sup> Listing Rule 9.1(f).

<sup>104</sup> As defined in Listing Rule 19.12.

<sup>105</sup> Listing Rule 9.1(g). Again, while ASX has the power to agree in writing that these requirements do not apply in a particular case, it would be relatively rare for ASX to do so.

<sup>106</sup> Listing Rule 9.1(h).

<sup>107</sup> As it would be under Australian law for certificated securities.

<sup>108</sup> For the avoidance of doubt, both the legal counsel and the terms of the opinion (including any assumptions or qualifications) must be acceptable to ASX. The opinion must specifically confirm that a statement on the certificate for the securities that they are restricted securities under the ASX Listing Rules and are not able to be transferred or otherwise disposed of by the holder except in accordance with those rules is valid and legally effective under the laws in the entity's home jurisdiction to prevent the restricted securities being transferred or otherwise disposed of in breach of those rules.



this requirement. This waiver may be given on conditions<sup>109</sup> requiring the entity to undertake any other steps advised by legal counsel that may be necessary or desirable under the law where the entity is formed or established to perfect the restriction on the disposal of the restricted securities in accordance with the ASX Listing Rules.

### 5.7 Additional requirements for CDIs

An entity that has restricted securities on issue which have CHESS Depositary Interests (“CDIs”)<sup>110</sup> issued over them must for the duration of the applicable escrow restrictions:

- if and to the extent that the holder holds CDIs for the restricted securities, comply with the additional requirements for quoted securities mentioned in section 5.5 above in relation to the CDIs; and
- if and to the extent that the holder holds the underlying securities, comply with the additional requirements for unquoted securities mentioned in section 5.6 above in relation to the underlying securities.

### 5.8 When these restrictions must be in place

An entity which has or will have restricted securities on issue must comply with the requirements summarised in sections 5.1 –5.6 above:

- in the case of a new listing, before it is admitted to the official list;
- in the case of a re-compliance listing, before it is re-admitted to the official list;<sup>111</sup> or
- in a case of a listed entity acquiring a substantial classified asset from a 10.1 party, before the 10.1 party gets the restricted securities or any rights in relation to them.<sup>112</sup>

ASX expects entities to resolve all issues concerning escrow by the deadlines above. Once securities have been designated as restricted securities and that information has been made known to the market (as it will be under the notification requirements mentioned in section 8 below), the fact that the market has traded on that basis will be a significant impediment to any reconsideration of the escrow treatment of the securities.

## 6. How escrow is applied to particular holdings

### 6.1 Overview

The table below summarises how ASX generally requires escrow to be applied to particular holdings (that is, whether it is to be imposed via a restriction deed or a restriction notice).

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<sup>109</sup> Listing Rule 18.1.

<sup>110</sup> Further guidance on CDIs can be found in found in Guidance Note 5 *CHESS Depositary Interests (CDIs)*.

<sup>111</sup> Listing Rule 9.3.

<sup>112</sup> This, however, does not prevent the entity agreeing with the vendor to issue restricted securities on condition that Listing Rule 9.1 is complied with before the securities are issued: see the note to Listing Rule 9.3.

Relationship of holder to entity	Appendix 9B item number(s)	Restriction Deed	Restriction Notice
Related party, promoter or associate	Any	X	
Substantial (10%+) holder <sup>113</sup>	Any	X	
Other seed capitalist	2		X
Vendor(s) of a classified asset where there are 10 or fewer vendors	3,4	X	
Vendors of a classified asset where there are more than 10 vendors (doesn't apply to a vendor who is a related party, promoter or associate or a substantial (10%+) holder)	4		X
10.1 party vending a classified asset	5	X	
Professional adviser or consultant	6	X	

As can be seen from the table above, the general rule applied by ASX is that related parties, promoters and their associates, substantial (10%+) holders, and professional advisers caught by item 6 of Appendix 9B should in all cases have escrow imposed upon them via a restriction deed rather than a restriction notice. The same applies to vendors of a classified asset where there are 10 or fewer of them. Other parties will be permitted to have escrow imposed upon them via a restriction notice.

### 6.2 Securities issued to a vendor of classified assets who is a related party, promoter or associate

Securities issued:

- by an entity undertaking a new or re-compliance listing that is not exempt from escrow under Listing Rule 9.2;
- before or in connection with<sup>114</sup> its admission or re-admission to the official list;
- as consideration for the acquisition by the entity of a classified asset, or for cash but under a "relevant agreement"<sup>115</sup> that the entity will use the cash received to pay for a classified asset;
- where the vendor of the classified asset is a related party or promoter, or an associate of a related party or promoter, at the time of the acquisition of the classified asset;

will be restricted securities and subject to escrow for 24 months commencing, in the case of a new listing, on the date the entity's securities are first quoted on ASX and, in the case of a re-compliance listing, on the date of the entity's re-admission.<sup>116</sup>

In this case, ASX will generally require the escrow restrictions to be imposed via a restriction deed rather than a restriction notice.

<sup>113</sup> As defined in Listing Rule 19.12. Note that this definition differs from the definition in the Corporations Act, which uses a 5% threshold compared to the 10% threshold in the Listing Rules.

<sup>114</sup> The reference here to an issue to a vendor of a classified asset occurring "before or in connection with" an entity's admission or re-admission caters for situations where an entity has agreed to acquire the classified asset before, but completes the acquisition after, its admission or re-admission to the official list. This may occur, for example, where the agreement by the vendor to dispose of the classified asset for securities in the entity is conditional on the entity's application for admission or re-admission being successful (usually expressed as the entity receiving a conditional letter from ASX approving its admission or re-admission to the official list). It should be noted that while ASX may agree in such a case to admit or re-admit the entity to the official list subject to a condition that the acquisition is duly completed, it generally will not admit the entity's securities to quotation and allow them to start trading on ASX until all securities that have been contemplated to be issued under the entity's listing prospectus, PDS or information memorandum have been issued and ASX's escrow requirements have been fully complied with.

<sup>115</sup> See note 50 above.

<sup>116</sup> See item 3 in Appendix 9B.

Cash formula relief does not apply in this case.

It should be noted that where an entity has in the 2 years prior to the date of the entity's application for admission or re-admission to the official list acquired, or in connection with a new or re-compliance listing is proposing to acquire, a classified asset from a related party or a promoter, or an associate of a related party or promoter, of the entity, it is a condition of its admission or re-admission to the official list that the consideration for the acquisition must have been, or be, equity securities issued by the entity and those securities must be restricted securities<sup>117</sup> unless:

- under Listing Rule 9.2, the entity is not required to apply the escrow restrictions in Appendix 9B; or
- the consideration is reimbursement of expenditure incurred by the related party, promoter or associate in developing the classified asset, which can be paid in cash.<sup>118</sup>

In applying these provisions, ASX will look at the totality of what has been or is being acquired and if it is in substance a classified asset, ASX will require the whole of the consideration for the acquisition to be restricted securities. ASX will not entertain an argument that the acquisition involved some classified assets and some other non-classified assets and that the vendor ought to be able to be paid cash for the non-classified assets. So for example, if an entity has acquired a mining exploration business with a mining tenement and mining plant and equipment, ASX will require the whole of the consideration for the acquisition to be restricted securities and will not permit the entity to issue restricted securities for the mining tenement but pay cash for the plant and equipment, even though the plant and equipment, when viewed in isolation, might be argued not to be a classified asset.

To qualify under the second limb above permitting the consideration for a classified asset to include a cash component by way of reimbursement of expenditure incurred in developing the asset, the expenditure in question must meet two requirements:

- (1) it must have been incurred by the related party, promoter or associate; and
- (2) it must have been incurred in developing the classified asset.

Expenditure incurred by someone else (such as a predecessor in title), or for some other purpose, does not qualify.

The guidance in section 4.4 above as to the type of expenditure that ASX will allow to be reimbursed in cash to a 10.1 party vending a substantial classified asset to a listed entity applies equally to a related party or promoter, or an associate of a related party or promoter, vending a classified asset to a new or re-compliance listing.

Again, an entity that seeks to rely on the "reimbursement of expenditure" exception to pay cash to a related party or promoter, or an associate of a related party or promoter, for a classified asset must provide to ASX itemised details of the expenditure being reimbursed and may be required by ASX to produce evidence to substantiate the amounts actually paid<sup>119</sup> and their nexus to the development of the classified asset.

### 6.3 Securities issued to a professional adviser or consultant

Securities issued:

- by an entity undertaking a new or re-compliance listing that is not exempt from escrow under Listing Rule 9.2;
- before or after<sup>120</sup> its admission or re-admission to the official list;
- to a professional adviser or consultant;

<sup>117</sup> Listing Rule 1.1 condition 11(a).

<sup>118</sup> See the concluding paragraph in Listing Rule 1.1 condition 11.

<sup>119</sup> Under Listing Rule 1.17 or 18.7. The evidence may include bank statements and other books and records evidencing the expenditure.

<sup>120</sup> The reference here to an issue to a professional adviser or consultant occurring "before or after" an entity's admission is intended to capture all issues made to a professional adviser or consultant for services rendered to the entity relating to its IPO or its admission or re-admission to the official list, regardless of when the issue takes place.

- for services rendered to the entity relating to its IPO or its admission or re-admission to the official list, or for cash but under a relevant agreement<sup>121</sup> that the entity will use the cash received to pay for such services,

will be restricted securities and subject to escrow for 24 months commencing, in the case of a new listing, on the date the entity's securities are first quoted on ASX and, in the case of a re-compliance listing, on the date of the entity's re-admission.<sup>122</sup>

In this case, ASX will generally require the escrow restrictions to be imposed via a restriction deed rather than a restriction notice.

Cash formula relief does not apply in this case.

It should be noted that securities issued to a professional adviser or consultant by an entity before or in connection with its admission or readmission to the official list for other services rendered to the entity that do not relate to its IPO or its admission or re-admission to the official list, will involve an issue of securities to a seed capitalist and may therefore be subject to escrow on that account under sections 6.5 or 6.7 below.<sup>123</sup>

### **6.4 Securities issued to a related party, promoter or associate under an employee incentive scheme**

Securities issued:

- by an entity undertaking a new or re-compliance listing that is not exempt from escrow under Listing Rule 9.2;
- before or in connection with<sup>124</sup> its admission or re-admission to the official list;
- under an employee incentive scheme;
- to a person who is a related party or promoter, or an associate of a related party or promoter, at the time of the issue,

will be restricted securities and subject to escrow for 24 months commencing, in the case of a new listing, on the date the entity's securities are first quoted on ASX and, in the case of a re-compliance listing, on the date of the entity's re-admission.<sup>125</sup>

In this case, ASX will generally require the escrow restrictions to be imposed via a restriction deed rather than a restriction notice.

Cash formula relief will apply in this case provided the securities in question are fully paid ordinary securities and the consideration paid for them was cash.

Securities issued under an employee incentive scheme to a person who is not a related party or promoter, or an associate of a related party or promoter, are not ordinarily subject to escrow unless ASX decides to apply its discretion to treat them as restricted securities.

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<sup>121</sup> For the meaning of "relevant agreement", see note 50 above.

<sup>122</sup> See item 6 in Appendix 9B.

<sup>123</sup> See items 1 (seed capitalists who are related parties or promoters or associates of a related party or promoter) and 2 (seed capitalists who are not related parties or promoters or associates of a related party or promoter) in Appendix 9B.

<sup>124</sup> Again, the reference here to an issue under an employee incentive scheme occurring "before or in connection with" an entity's admission or re-admission caters for situations where an entity has agreed to make such an issue before, but completes it after, its admission or re-admission (eg where the issue is conditional on the entity's application for admission or re-admission to the ASX official list being successful). See also note 114 above.

<sup>125</sup> See item 7 in Appendix 9B. "Employee incentive scheme" is defined in Listing Rule 19.12.

### 6.5 Other securities issued to a related party, promoter or associate as seed capitalists

Fully paid ordinary securities issued to a seed capitalist who is a related party or promoter, or an associate of a related party or promoter, for a cash payment that is not less than the price paid by investors for such securities in the entity's IPO<sup>126</sup> are not subject to escrow.<sup>127</sup>

Any other securities issued in circumstances not covered by sections 6.2, 6.3 or 6.4 above:

- by an entity undertaking a new or re-compliance listing that is not exempt from escrow under Listing Rule 9.2;
- before or in connection with<sup>128</sup> its admission or re-admission to the official list;
- to a person who is a related party or promoter, or an associate of a related party or promoter, at the time it applies for admission or re-admission to the official list,

will be restricted securities, regardless of the consideration provided for them, and subject to escrow for 24 months commencing, in the case of a new listing, on the date the entity's securities are first quoted on ASX and, in the case of a re-compliance listing, on the date of the entity's re-admission.<sup>129</sup>

In this case, ASX will generally require the escrow restrictions to be imposed via a restriction deed rather than a restriction notice.

Cash formula relief will apply in this case provided the securities in question are fully paid ordinary securities and the consideration paid for them was cash.

### 6.6 Securities issued to a vendor of classified assets who is not a related party, promoter or associate

Securities issued:

- by an entity undertaking a new or re-compliance listing that is not exempt from escrow under Listing Rule 9.2;
- before or in connection with<sup>130</sup> its admission or re-admission to the official list;
- as consideration for the acquisition by the entity of a classified asset, or for cash but under a relevant agreement<sup>131</sup> that the entity will use the cash received to pay for a classified asset,
- where the vendor of the classified asset is not a related party or promoter, or an associate of a related party or promoter, at the time of the acquisition of the classified asset;

will be restricted securities and subject to escrow for 12 months commencing on the date the securities were issued.<sup>132</sup>

In this case, if there are more than 10 vendors (as may be the case where the entity is acquiring the shares in a company with classified assets from its shareholders), ASX will generally allow the escrow restrictions to be imposed via a restriction notice rather than a restriction deed, save where the vendor at the point of listing is or will

<sup>126</sup> As to the meaning of "IPO", see note 41 above.

<sup>127</sup> See item 1 in Appendix 9B.

<sup>128</sup> Again, the reference here to an issue to a seed capitalist occurring "before or in connection with" an entity's admission or re-admission caters for situations where an entity has agreed to issue securities to the seed capitalist before, but completes the issue after, its admission or re-admission (eg because the issue is conditional on the entity's application for admission or re-admission being successful). See also note 114 above.

<sup>129</sup> See item 1 in Appendix 9B.

<sup>130</sup> Again, the reference here to an issue to a vendor of a classified asset occurring "before or in connection with" an entity's admission or re-admission caters for situations where an entity has agreed to acquire the classified asset before, but completes the acquisition after, its admission or re-admission. See also note 114 above.

<sup>131</sup> For the meaning of "relevant agreement", see note 50 above.

<sup>132</sup> See item 4 in Appendix 9B.

be a “substantial (10%+) holder” in the entity,<sup>133</sup> in which case ASX will require the restrictions for that particular vendor<sup>134</sup> to be imposed via a restriction deed.

If there are 10 or fewer vendors, ASX will generally require the escrow restrictions to be imposed via a restriction deed rather than a restriction notice.

Cash formula relief does not apply in this case.

It should be noted that where an entity has in the 12 months before its admission or re-admission to the official list acquired, or in connection with a new or re-compliance listing is proposing to acquire, a classified asset from someone who is not a related party or a promoter, or an associate of a related party or a promoter, of the entity, and part or all of the consideration for the acquisition was or will be securities in a class that is to be quoted, it is a condition of its admission or re-admission to the official list that those securities must be restricted securities unless, under Listing Rule 9.2, the entity is not required to apply the escrow restrictions in Appendix 9B.<sup>135</sup> This differs from the equivalent condition dealing with acquisitions of a classified asset from a related party or promoter, or an associate of a related party or promoter,<sup>136</sup> in that there is no specific requirement for the consideration to be restricted securities. The entity is free to acquire the classified asset from the vendor for cash or for any other consideration – it’s just that if the consideration is agreed to be securities in a class that is to be quoted, they must be restricted securities.

### 6.7 Other securities issued to a seed capitalist who is not a related party, promoter or associate

Fully paid ordinary securities issued to a seed capitalist who is not a related party or promoter, or an associate of a related party or promoter, for a cash payment that is not less than 80% of the price paid by investors for such securities in the entity’s IPO<sup>137</sup> are not subject to escrow.<sup>138</sup>

Any other securities issued in circumstances not covered by sections 6.3 or 6.6<sup>139</sup> above:

- by an entity undertaking a new or re-compliance listing that is not exempt from escrow under Listing Rule 9.2;
- before or in connection with<sup>140</sup> its admission or re-admission to the official list;
- to a person who is not a related party or promoter, or an associate of a related party or promoter, at the time it applies for admission or re-admission to the official list,

will be restricted securities, regardless of the consideration provided for them, and subject to escrow for 12 months commencing on the date the securities were issued.<sup>141</sup>

In this case, ASX will generally allow the escrow restrictions to be imposed via a restriction notice rather than a restriction deed, save where the holder at the point of listing is or will be a “substantial (10%+) holder”,<sup>142</sup> in which case ASX will require the restrictions for that holder<sup>143</sup> to be imposed via a restriction deed.

<sup>133</sup> See note 37 above.

<sup>134</sup> Again, if the substantial holding includes securities held by an associate, ASX will also expect that associate to enter into a restriction deed.

<sup>135</sup> Listing Rule 1.1 condition 11(b).

<sup>136</sup> See note 117 above and the accompanying text.

<sup>137</sup> As to the meaning of “IPO”, see note 41 above.

<sup>138</sup> See item 2 in Appendix 9B.

<sup>139</sup> Sections 6.2, 6.4 and 6.5 above are not relevant in this case as they only apply where the recipient of the securities is a related party or promoter, or an associate of a related party or promoter, of the entity.

<sup>140</sup> Again, the reference here to an issue to a seed capitalist occurring “before or in connection with” an entity’s admission or re-admission caters for situations where an entity has agreed to issue securities to the seed capitalist before, but completes the issue after, its admission or re-admission (eg because the issue is conditional on the entity’s application for admission or re-admission being successful). See also note 114 above.

<sup>141</sup> See item 2 in Appendix 9B.

<sup>142</sup> See note 37 above.

<sup>143</sup> If the substantial holding includes securities held by an associate, ASX will also expect that associate to enter into a restriction deed.

Cash formula relief will apply in this case provided the securities in question are fully paid ordinary securities and the consideration paid for them was cash.

### 6.8 Securities issued to a 10.1 party for the acquisition of a substantial classified asset

Securities issued:

- by an entity after its admission to the official list;
- to a 10.1 party as consideration for an acquisition by the entity of a substantial classified asset from that party,

will be restricted securities and subject to escrow for 12 months commencing on the date the securities are issued.<sup>144</sup>

In this case, ASX will generally require the escrow restrictions to be imposed via a restriction deed rather than a restriction notice.

Cash formula relief does not apply in this case.

### 6.9 Transferees of restricted securities

Restricted securities transferred:

- before or after an entity is admitted to the official list;
- to anyone other than as permitted by Listing Rule 9.5,<sup>145</sup>

continue to be restricted securities and subject to escrow restrictions for the balance of the escrow period applying to the original holder of the restricted securities.<sup>146</sup>

If the transferor of the restricted securities had their escrow restrictions imposed via a restriction deed rather than a restriction notice, ASX will generally require the transferee also to have their escrow restrictions imposed via a restriction deed. If the transferor of the restricted securities had their escrow restrictions imposed via a restriction notice rather than a restriction deed, ASX will generally allow the transferee to have their escrow restrictions also imposed via a restriction notice.

Transferees of restricted securities do not qualify for cash formula relief.

The escrow requirements for transferees are critical to maintaining the integrity of ASX's escrow regime. They apply:

- whether or not the transferee was aware that they were acquiring restricted securities;
- whether the transfer took place before or after the original holder became subject to escrow restrictions;
- whether the transfer was in accordance with or in breach of a restriction deed or restriction notice applying to the transferor;
- whether the transfer took place with or without ASX's approval;<sup>147</sup>
- regardless of the number of intervening transfers that have occurred since the restricted securities were originally issued; and

<sup>144</sup> See item 5 in Appendix 9B.

<sup>145</sup> See '9.1 Securities subject to a takeover bid or merger' on page 38.

<sup>146</sup> See item 8 in Appendix 9B. This applies where securities are transferred with no change in beneficial ownership under Listing Rule 9.6.

<sup>147</sup> Although ASX may, in an exceptional case, agree to a transfer of restricted securities and not require the transferee to be subject to escrow: see '9.3 Disposals with ASX approval' on page 39.

- regardless of the consideration the transferee paid or provided for the transfer.

That said, in practice, the escrow requirements for transferees mainly come into play for transfers of securities before a new or re-compliance listing when escrow restrictions are not yet in place. This is by dint of the fact that once escrow restrictions are in place, the holder is unable to transfer them to anyone else except in very limited circumstances.

ASX sometimes receives complaints from persons who bought and were transferred restricted securities before a new or re-compliance listing that they were not aware of ASX's escrow restrictions and that it is unfair that they are not able to dispose of their securities for the duration of the escrow period. ASX does not regard these complaints as well founded. Compliance with the escrow restrictions is a condition of listing. A security holder cannot obtain the benefit of a new or re-compliance listing without that condition being met.

In cases where restricted securities are transferred in breach of a restriction deed or restriction notice, ASX will not entertain any argument by the transferee that they should not be subject to escrow because they thought they were acquiring freely tradeable securities and were not aware that the securities were restricted securities nor that they were being transferred in breach of a restriction deed or restriction notice.<sup>148</sup> The transferee must submit to escrow and pursue whatever remedies it may have against the transferor.<sup>149</sup> If the transferee refuses to enter into a restriction deed when required to do so, ASX may allow<sup>150</sup> the entity to issue a restriction notice applying the required escrow restrictions.

### 6.10 Recipients of derivative securities

If a holder receives securities ("derivative securities"):

- in a scheme or similar reorganisation in substitution for, or as a distribution in relation to, restricted securities;
- as a bonus issue or in specie distribution in relation to restricted securities; or
- upon the conversion of convertible restricted securities,<sup>151</sup>

(the restricted securities in the bullet points being referred to as the "original securities"), the derivative securities will also be restricted securities and subject to escrow for the balance of the escrow period applying to the original securities.<sup>152</sup>

This applies whether the derivative securities were received before or after the entity was admitted to the official list and regardless of the consideration the recipient paid or provided for the derivative securities.

If the escrow restrictions on the original securities were imposed via a restriction deed rather than a restriction notice, ASX will generally require the escrow restrictions on the derivative securities also to be imposed in a restriction deed. If the escrow restrictions on the original securities were imposed by a restriction notice rather than a restriction deed, ASX will generally allow the escrow restrictions on the derivative securities to be imposed via a restriction notice rather than a restriction deed.

Cash formula relief does not apply in this case.

<sup>148</sup> For ASX to entertain such an argument would open the door for security holders subject to escrow to breach their restriction deed or restriction notice.

<sup>149</sup> For example, a claim for breach of an express or implied warranty that the securities are free of any restriction on transfer, for misrepresentation, or for misleading and deceptive conduct.

<sup>150</sup> If necessary, by giving a direction under Listing Rule 18.8.

<sup>151</sup> This includes the exercise of an option: see the definition of "convertible security" and "convert" in Listing Rule 19.12 and the note to item 9 in Appendix 9B.

<sup>152</sup> See item 9 in Appendix 9B.



### 6.11 Securities issued to nominees, trustees and custodians

Where the holder of restricted securities holds them in a nominee, trustee, custodial or other fiduciary capacity on behalf of a beneficiary, ASX will apply the escrow provisions on a “look through” basis, looking past the legal owner through to the underlying beneficial owner.

If the beneficial owner is or includes a related party, promoter, associate of a related party or promoter, seed capitalist, vendor or professional adviser or consultant who would have been subject to escrow if the securities in question had been issued directly to them, then ASX will classify those securities as restricted securities.

If ASX would have required the escrow restrictions to be imposed via a restriction deed had the securities been issued directly to the underlying beneficial owner, ASX will also require the holding of the nominee, trustee, custodian or fiduciary to be the subject of a restriction deed to be executed:

- by the nominee, trustee, custodian or fiduciary, as holder; and
- by the beneficial owner and any other person who, or who in ASX’s opinion, controls, or has a substantial economic interest in, the restricted securities, as “controllers”.<sup>153</sup>

If ASX would have allowed the escrow restrictions to be imposed via a restriction notice had the securities been issued directly to the underlying beneficial owner, then ASX will generally allow the escrow restrictions to be imposed via a restriction notice to the nominee, trustee, custodian or fiduciary.

Where a nominee, trustee, custodian or fiduciary holds securities that will have different escrow treatment applied (eg it holds some for a related party or promoter that will be subject to a 24 month escrow period under a restriction deed and some for an unrelated seed capitalist that will be subject to a 12 month escrow period under a restriction notice), it will need to set up the appropriate account and administration arrangements to comply with its different obligations in relation to the securities.

### 6.12 Examples of the application of escrow

Annexure A to this Guidance Note has some worked examples of how escrow is applied in different circumstances.

## 7. Cash formula relief

### 7.1 What is cash formula relief?

The “cash formula” relieves qualifying security holders who have paid cash for their fully paid ordinary securities from escrow on a proportion of those securities equal to the proportion of the IPO price they paid for them. So, for example, if a qualifying holder has paid one third of the IPO price for their fully paid ordinary securities, one third of their securities will be freed from escrow. If they have paid one half of the IPO price for their fully paid ordinary securities, one half of their securities will be freed from escrow, and so on.

ASX will usually require an entity seeking to claim cash formula relief to produce evidence satisfactory to ASX to substantiate the cash amounts actually paid to the entity.<sup>154</sup>

Where the IPO involves a free offer of options attaching to an offer of fully paid ordinary securities and qualifying security holders have options on the same terms, the cash formula also relieves them from escrow on an equivalent proportion of their free options.

Cash formula relief recognises that qualifying holders have actually contributed some amount of cash for their securities and it would therefore be unfair to subject all of their securities to escrow.

<sup>153</sup> See paragraph (b) of the definition of “controller” in the text accompanying note 87 above.

<sup>154</sup> Under Listing Rule 1.17 or 18.7. The evidence may include application forms, bank statements and other books and records evidencing the receipt of cash.

Cash formula relief is achieved by the entries in Appendix 9B for qualifying security holders<sup>155</sup> stating that where the cash formula applies, the number of securities to be escrowed is “the number of securities remaining after the application of the cash formula, unless ASX decides some other number”.

The term “cash formula” is defined as:

*“In the case of a person who has paid cash for fully paid ordinary securities that are not otherwise free from escrow:*

$$N = C / P$$

*where:*

*N = the number of those securities not subject to escrow by reason of the cash formula;*

*C = the total cash paid by the person for those securities; and*

*P = the price per fully paid ordinary security paid by investors in any initial public offering undertaken in connection with the entity’s admission to the official list, or if there is no public offering, the price agreed by ASX.*

*In the case of person who has received options which have the same terms as options offered with fully paid ordinary securities in any initial public offering undertaken in connection with the entity’s application for admission:*

$$O = N \times F$$

*where:*

*O = the number of options not subject to escrow.*

*N = the number of securities not subject to escrow under the formula above.*

*F = the number of free options offered per fully paid ordinary security in the initial public offering.<sup>156</sup>*

The reference in the opening sentence to “fully paid ordinary securities that are not otherwise free from escrow” means the cash formula does not apply to an issue of fully paid ordinary securities to a seed capitalist for a cash price that is equal to or greater than the IPO price (if they are a related party or promoter or an associate of a related party or promoter) or 80% of the IPO price (otherwise). This is because issues to seed capitalists for cash at prices above these thresholds are not subject to escrow.<sup>157</sup> This has the consequence that a seed capitalist cannot “average” or off-set amounts paid above these thresholds against amounts paid below these thresholds for the purposes of calculating cash formula relief.<sup>158</sup>

ASX interprets the phrase “options offered with fully paid ordinary securities” in the second part of the definition of “cash formula” above as meaning an offer of free options attached to an offer of fully paid ordinary securities.

In applying the definition of “cash formula” to a re-compliance listing, ASX treats the transaction as if it were a new listing and disregards the fact that the entity has previously been admitted to the official list and most likely conducted an IPO in connection with its original listing. ASX will treat the capital raising the entity is undertaking in connection with its re-compliance listing as an IPO for the purposes of that definition.<sup>159</sup>

The references in the relevant entries in Appendix 9B<sup>160</sup> giving ASX the discretion to decide “some other number” instead of the number derived by applying the cash formula, gives ASX the power to substitute a higher or lower

<sup>155</sup> See items 1, 2 and 7 in Appendix 9B.

<sup>156</sup> Listing Rule 19.12.

<sup>157</sup> Under items 1 and 2 in Appendix 9B.

<sup>158</sup> Example 4 in Annexure A to this Guidance Note illustrates the point.

<sup>159</sup> See note 19 above.

<sup>160</sup> See items 1, 2 and 7 in Appendix 9B.

number for the number of securities to be relieved from escrow. This includes designating that number as zero (that is, effectively requiring all of the shares in question to be subject to escrow notwithstanding that some cash amount may have been paid for them). This is a power ASX can use to give effect to the spirit and intent of the escrow provisions. For example, if ASX forms the view that the holder and the entity have devised a structure to claim cash formula relief when they should not be allowed to do so, ASX may designate a lesser number of securities, including the number zero, to be free from escrow instead of applying the cash formula.

### 7.2 Who qualifies for cash formula relief?

Under Appendix 9B, cash formula relief is only available to:

- seed capitalists who are issued fully paid ordinary securities for cash before or in connection with an entity's admission or re-admission to the official list – this applies to all seed capitalists, including those who are related parties or promoters, or associates of a related party or promoter;<sup>161</sup> and
- related parties or promoters, or associates of a related party or promoter, who are issued fully paid ordinary securities for cash under an employee incentive scheme before or in connection with an entity's admission or re-admission to the official list.<sup>162</sup>

It does not apply to securities issued to a vendor of a classified asset or to a professional adviser or consultant for services rendered in connection with an entity's IPO or its admission or re-admission to the official list.

### 7.3 To what types of securities does cash formula relief apply?

Given the way in which “cash formula” is defined, it can only apply to:

- fully paid ordinary securities paid for by cash; and
- options held by a qualifying security holder which have the same terms as free options offered with fully paid ordinary securities in the entity's IPO.

It is not available where a holder has provided non-cash consideration for their fully paid ordinary securities,<sup>163</sup> nor is it available in relation to any other type of security apart from fully paid ordinary securities and free attaching options.

For these purposes, if a person pays cash to subscribe for a partly paid ordinary security in an entity and then fully pays up that security before the entity's admission or re-admission, ASX will treat the resulting fully paid ordinary security as qualifying for cash formula relief. The cash paid to subscribe for the partly paid security and for the subsequent calls or instalments on the partly paid security will be included in variable “C” in the cash formula. The fully paid ordinary security will be taken to have been issued on the date the final call or instalment was paid.<sup>164</sup>

Similarly, if a person pays cash to subscribe for an option over a fully paid ordinary security in an entity and then a further cash amount to exercise the option before the entity's admission or re-admission, ASX will treat the fully paid ordinary security received on exercise as qualifying for cash formula relief. The cash paid to subscribe for and then exercise the option will be included in variable “C” in the cash formula.<sup>165</sup>

Likewise, if a person pays cash to subscribe for a debt or equity security in an entity that is convertible into a fully paid ordinary securities and then converts that security before the entity's admission or re-admission, ASX will treat

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<sup>161</sup> Items 1 and 2 in Appendix 9B.

<sup>162</sup> Item 7 in Appendix 9B.

<sup>163</sup> For example, fully paid ordinary securities issued in exchange for the supply of goods or services, the transfer of an asset or an assumption of a liability.

<sup>164</sup> If the partly paid security was held by a seed capitalist who is not a related party or promoter, or an associate of a related party or promoter, the 12 month escrow period applicable to the resulting fully paid ordinary security will run from the date the final call or instalment was paid on the partly paid security and it consequently became a fully paid ordinary security.

<sup>165</sup> If the option was held by a seed capitalist who is not a related party or promoter, or an associate of a related party or promoter, the 12 month escrow period applicable to the fully paid ordinary security received on the exercise of the option will run from the date the fully paid ordinary security was issued to the holder as a consequence of exercising the option.

the fully paid ordinary securities received on conversion as qualifying for cash formula relief. The cash paid to subscribe for the convertible security will be included in variable “C” in the cash formula.<sup>166</sup>

Finally, if a person makes a cash advance to an entity and then subsequently agrees to convert the resultant debt into fully paid ordinary securities before the entity’s admission or re-admission, ASX will treat those securities as qualifying for cash formula relief. The cash advance will be included in variable “C” in the cash formula.<sup>167</sup>

Generally speaking, ASX will not treat a debt for equity swap involving any other type of debt apart from a cash advance as qualifying for cash formula relief. This includes equity securities issued:

- to pay the principal owing on a debt (other than a debt arising from the issue of a convertible debt security for cash or a cash advance to the entity, as discussed in the guidance above);
- to pay the interest owing on a debt;
- to pay for goods or services supplied on credit;
- to pay unpaid directors’ fees or staff salaries;
- to pay unpaid rent or other unpaid invoices; or
- to satisfy a liability arising in connection with the transfer of an asset or the assumption of a liability.

Technically, ordinary securities issued to pay the interest owing on a debt arising from an issue of convertible debt securities for cash, or from a cash advance to the entity, are not issued for cash and, therefore, those securities do not qualify for cash formula relief. This can lead to a situation where, in accordance with the guidance above, ordinary securities issued to repay the principal on such a debt attract cash formula relief but ordinary securities issued to pay the interest on such a debt do not. This complicates the application of escrow and brings with it additional administrative burdens. In this situation, to simplify the application of escrow and reduce those administrative burdens, ASX will consider granting a waiver to exclude from escrow the same proportion of the ordinary securities issued to pay interest on the debt as the proportion of the ordinary securities issued to repay the principal on the debt which are excluded from escrow under the cash formula. So, for example, if one third of the securities issued to repay the principal of the debt are freed from escrow under the cash formula, one third of the ordinary securities issued to pay interest on the debt will similarly be free from escrow. ASX will only grant this waiver where:

- ASX is satisfied that the convertible securities or cash advance (as applicable) were not entered into to avoid the spirit and intent of ASX’s restricted security regime;
- the interest rate payable on the convertible securities at the time they were issued, or on the cash advance at the time it was made, was in ASX’s opinion, a reasonable commercial rate of interest, having regard to the level of development of the entity’s business and its financial condition at that time, and that situation has not changed; and

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<sup>166</sup> Technically, if the convertible security was held by a seed capitalist who is not a related party or promoter, or an associate of a related party or promoter, the 12 month escrow period applicable to the fully paid ordinary securities received on conversion of the convertible security should run from the date the fully paid ordinary securities were issued to the holder as a consequence of converting the convertible security. However, ASX recognises in a case such as this, that the seed capitalist effectively contributed their cash to the entity when they subscribed for the convertible security, not when they converted it. Accordingly, if requested, ASX will generally exercise its discretion so that escrow runs for 12 months from the date the holder subscribed for the convertible security rather than for 12 months from the date they were issued the fully paid ordinary securities upon conversion. See ‘10.7 Unrelated seed capitalists converting convertible securities or cash advances to fully paid ordinary securities’ on page 44.

<sup>167</sup> Technically, if the cash advance was provided by a seed capitalist who is not a related party or promoter, or an associate of a related party or promoter, the 12 month escrow period applicable to the fully paid ordinary securities received on the debt-for-equity swap should run from the date those securities were issued to extinguish the debt. However, in a case such as this, ASX recognises that the seed capitalist effectively contributed their cash to the entity when they made the cash advance, not when they swapped it for equity. Accordingly, if requested, ASX will generally exercise its discretion so that escrow runs for 12 months from the date the holder made the cash advance rather than for 12 months from the date they were issued the fully paid ordinary securities to extinguish the debt. See ‘10.7 Unrelated seed capitalists converting convertible securities or cash advances to fully paid ordinary securities’ on page 44.

- ASX is satisfied that it would be an unreasonable administrative burden on the entity to have to apply a different escrow treatment to the ordinary securities issued to pay the interest on the debt compared to the ordinary securities issued to pay the principal of the debt.

If ASX considers it appropriate, ASX may restrict the waiver so that it only applies to ordinary securities issued to pay interest to someone who is subject to a 12 month escrow period rather than a 24 month escrow period.

### 7.4 Examples of cash formula relief

Annexure A to this Guidance Note has some worked examples of how cash formula relief operates in different circumstances.

## 8. Notification obligations

### 8.1 Information to be supplied in an application for admission or re-admission

An entity undertaking a new or re-compliance listing that has or will have restricted securities on issue must provide to ASX with its application for admission or re-admission a completed 'ASX Restricted Securities Spreadsheet'. An editable version of the spreadsheet can be downloaded from:

<http://www.asx.com.au/regulation/compliance/compliance-downloads.htm>

### 8.2 Disclosure in prospectus or PDS

An entity undertaking a capital raising in connection with a new or re-compliance listing must disclose in the prospectus or PDS for the capital raising:

- the securities and security holders subject to escrow (or an estimate, if the final numbers have not been determined); and
- details of the restrictions, including the reasons for the restrictions and the event that is expected to trigger the release of the securities from escrow.<sup>168</sup>

This applies both to ASX imposed escrow and voluntary escrow.

### 8.3 Pre-quotation notification of securities subject to escrow

ASX will impose a standard condition on the admission or re-admission of an entity to the official list that has or will have restricted securities or securities subject to voluntary escrow on issue,<sup>169</sup> that it make pre-quotation disclosure confirming the final number of such securities and the applicable escrow period.

### 8.4 Notification by listed entities of issues of securities subject to escrow

Where a listed entity proposes to issue restricted securities (for example, under Listing Rule 10.7) or securities subject to voluntary escrow, it must notify ASX of that fact in the Appendix 3B it lodges with ASX in relation to the proposed issue.<sup>170</sup>

### 8.5 Annual report disclosure

A listed entity must disclose in its annual report the number and class of ASX restricted securities or securities subject to voluntary escrow and the date that the escrow period ends.<sup>171</sup>

<sup>168</sup> See ASIC Regulatory Guide 228 *Prospectuses: Effective disclosure for retail investors* at paragraph 228.170.

<sup>169</sup> Pursuant to Listing Rule 1.19 or 2.9.

<sup>170</sup> Listing Rule 3.10.3 and Appendix 3B.

<sup>171</sup> Listing Rule 4.10.14.

In the case of securities subject to voluntary escrow, it is incumbent on the entity to ensure that it has the necessary arrangements in place with the holders of the securities to enable it to comply with this requirement.<sup>172</sup>

### 8.6 Notification of release of securities from escrow

An entity must notify ASX that restricted securities or securities subject to voluntary escrow will be released from escrow not less than 5 business days before the end of the escrow period.<sup>173</sup> This notification will be released to the market so that it is aware of the forthcoming release of the securities from escrow.

There is no prescribed form for this type of notification. A standard market announcement will suffice.

Where an entity fails to provide the requisite 5 business days' notice that securities are about to be released from ASX or voluntary escrow, ASX is likely to designate the securities in question as restricted securities<sup>174</sup> and require them to continue to be escrowed until the requisite 5 business days' notice has been given.

### 8.7 Quotation of restricted securities after escrow expires

Restricted securities are not quoted by ASX until the end of the escrow period.<sup>175</sup> The entity must apply for quotation of them no later than 5 business days after the end of the escrow period using an Appendix 2A.<sup>176</sup>

## 9. Permitted transfers of restricted securities

### 9.1 Securities subject to a takeover bid or merger

Under Listing Rule 9.5, an entity may allow the removal of a holding lock to enable the holder of restricted securities to accept an offer under a takeover bid if and only if:

- the offers are for all of the ordinary securities and, if the restricted securities are not ordinary securities, all the securities in the same class as the restricted securities;
- holders of at least half of the securities in the bid class that are not restricted securities to which the offers relate have accepted;
- if the offer is conditional, the bidder and the holder agree in writing that the holding lock will be re-applied to each restricted security that is not bought by the bidder under the off-market bid; and
- where applicable, the holding lock is re-applied in accordance with that agreement.

Under Listing Rule 9.5, an entity may also allow the removal of a holding lock to enable restricted securities to be transferred or cancelled as part of a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act, provided the entity and the holder agree in writing that the holding lock will be re-applied if the merger does not take effect and, where applicable, the holding lock is re-applied in accordance with that agreement.

An entity does not need to approach ASX for approval to allow this to occur.

For these purposes, "takeover bid" has the same meaning as in section 9 of the Corporations Act – in other words, a takeover bid for an Australian company or registered managed investment scheme that is made in compliance with Chapter 6 of the Corporations Act. Hence, on its face, Listing Rule 9.5 only applies to a takeover bid for an Australian company or registered managed investment scheme under Chapter 6, or a merger by way of scheme of arrangement between an Australian company and its members under Part 5.1 of the Corporations Act.

In an appropriate case, ASX will consider granting a waiver to extend Listing Rule 9.5 to permit a disposal of a restricted security in an Australian trust pursuant to a "trust scheme of arrangement", where the scheme is approved

<sup>172</sup> See the note to Listing Rule 4.10.14.

<sup>173</sup> Listing Rule 3.10A.

<sup>174</sup> Using its powers in that regard under paragraph (b) of the definition of "restricted securities" in Listing Rule 19.12.

<sup>175</sup> Listing Rule 2.12.

<sup>176</sup> Listing Rules 2.7 and 2.8.5.

by a special resolution of unitholders and is subject to judicial approval under trustee legislation.<sup>177</sup> ASX will also consider granting a waiver to extend Listing Rule 9.5 to permit a disposal of a restricted security pursuant to a takeover offer of, or merger with, a foreign company or trust where ASX is satisfied that the takeover or merger is subject to an acceptable regulatory regime equivalent to the Corporations Act.

### 9.2 Transfers with no change in beneficial ownership

Under Listing Rule 9.6, an entity may allow the removal of a holding lock to enable the holder of restricted securities to transfer some or all of those securities to a related party of the holder, if and only if:

- the transfer does not involve any change in the beneficial ownership of the restricted securities;
- if the entity has entered into a restriction deed with the holder under Listing Rule 9.1(b), the entity, the transferee and each controller of the transferee enter into an equivalent restriction deed in the form set out in Appendix 9A or in such other form as ASX requires or permits immediately following the transfer restricting the disposal of the securities for the duration of the escrow period applicable to the restricted securities; and
- if the entity has given a restriction notice to the holder under Listing Rule 9.1(c), the entity gives an equivalent notice to the transferee in the form set out in Appendix 9C or in such other form as ASX requires or permits immediately following the transfer restricting the disposal of the securities for the duration of the escrow period applicable to the restricted securities.

Again, an entity does not need to approach ASX for approval to allow this to occur.

Listing Rule 9.6 only applies where there is no change in the beneficial ownership of the restricted securities in question. Accordingly, this rule only permits a transfer of restricted securities:

- by an individual or entity to a trustee or nominee who will hold the restricted securities on his, her or its behalf (and no-one else); or
- by a trustee or nominee who holds the securities on behalf of a beneficial holder:
  - to the beneficial holder; or
  - to a new trustee or nominee who will hold the securities on behalf of the same beneficial holder (and no-one else).

Listing Rule 9.6 will not apply to a transfer of restricted securities by an individual to another family member, a family company, the trustee of a discretionary family trust, or the trustee of a self-managed superannuation fund that has other beneficiaries in addition to the individual, as that will involve a change in beneficial ownership. Further, given the purpose of the escrow regime, ASX will not generally grant a waiver to extend Listing Rule 9.6 to permit such a transfer.

### 9.3 Disposals with ASX approval

The escrow restrictions in the pro forma restriction deed in Appendix 9A and pro forma restriction notice in Appendix 9C confer on ASX the discretion to permit in writing a disposal of restricted securities that would otherwise breach the restrictions in the deed/notice. This discretion is supplemented by provisions in Listing Rules 9.1(d), (e) and (g) empowering ASX to agree in writing to a listed entity not enforcing the escrow restrictions in those rules in a particular case.

Given the purpose of the escrow restrictions and the exclusions in Listing Rules 9.5 and 9.6 mentioned above, this is a discretion that ASX seldom exercises.

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<sup>177</sup> The expression “trust scheme of arrangement” is a colloquial one that refers to an amendment to the constitution of a trust to achieve a merger of the trust with another entity. It has similar features to a scheme of arrangement under Part 5.1 of the Corporations Act in that the amendment to the constitution typically requires a special resolution of unitholders and the overall arrangement is typically subject to judicial review, usually in the form of an application for judicial advice that the constitutional amendment is an appropriate one to be made by the RE of the trust.

If ASX decides to approve a disposal of restricted securities and for that purpose to agree to an entity not enforcing the escrow restrictions in Listing Rules 9.1(d), (e) and (g), it may do so on conditions.<sup>178</sup>

A party who wishes to dispose of restricted securities with ASX's permission will need to convince the listed entity of the merits of their case and then have the entity apply to ASX for written approval under Listing Rules 9.1(d), (e) and (g) (as applicable) to allow the disposal to take place. ASX will only deal with the entity in these cases and will not deal directly with, or entertain submissions from, the holder of the restricted securities.

The entity will need to convince ASX that there are exceptional circumstances justifying the disposal and that the disposal will not undermine the integrity of ASX's escrow regime.

Examples of exceptional circumstances that ASX might regard as justifying a disposal of restricted securities include:

- the holder is subject to a family settlement requiring restricted securities to be transferred to his/her spouse or de facto spouse;
- the holder dies and their legal personal representative wishes to transfer restricted securities to an individual in accordance with the holder's will or the laws related to intestacy;
- the holder dies and their legal personal representative wishes to distribute restricted securities, or the proceeds of sale of restricted securities, to a bona fide independent charity<sup>179</sup> registered with the Australian Charities and Not-for-profits Commission in accordance with the holder's will or the laws related to intestacy;
- the holder wishes to make a gift while they are still alive of restricted securities, or the proceeds of sale of restricted securities, to a bona fide independent charity<sup>180</sup> that is registered with the Australian Charities and Not-for-profits Commission.

In the first two cases above, ASX is likely to approve the transfer and impose a condition that:

- if the holder was subject to a restriction deed, the transferee enter into a restriction deed; or
- if the holder was subject to a restriction notice, the transferee be given a restriction notice,

designating the transferred securities as restricted securities and making them subject to escrow restrictions for the balance of the escrow period applying to the holder.<sup>181</sup>

In the other cases above, ASX is likely to approve the transfer or sale of the restricted securities without any escrow conditions attached, provided ASX is satisfied that the manner in which, and timeframe over which, the restricted securities are to or may be sold will not give rise to a disorderly market in the securities and, where the number of securities being released from escrow is material, the market is appropriately informed ahead of their release.

An example of circumstances that ASX would not regard as exceptional or justifying a disposal of restricted securities is where the holder has an unexpected expense or liability (including, but not limited to, a tax liability) and would like to sell restricted securities to raise funds to help defray the expense or liability.

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<sup>178</sup> Listing Rule 18.5A.

<sup>179</sup> ASX is highly unlikely to approve a disposal of restricted securities to or for the benefit of a charity that is controlled by, or otherwise has a close affiliation with, the holder of the restricted securities.

<sup>180</sup> See note 179 above.

<sup>181</sup> See item 8 in Appendix 9B.



## 10. Waivers and discretions

### 10.1 ASX's power to waive or modify the escrow requirements in the Listing Rules

The escrow requirements in the Listing Rules can be modified either by a formal waiver of the applicable Listing Rule<sup>182</sup> or an exercise of the discretion given to ASX under the Listing Rules.<sup>183</sup>

- to allow escrow restrictions to be imposed via a restriction notice rather than a restriction deed;<sup>184</sup>
- to allow different escrow restrictions than those set out in Appendix 9B;<sup>185</sup>
- to permit an entity to use a form of restriction deed different to the deed set out in Appendix 9A;<sup>186</sup>
- to permit an entity to use a form of restriction notice different to the notice set out in Appendix 9C;<sup>187</sup> or
- to agree in writing not to require compliance with the restrictions in Listing Rule 9.1(d), (e) or (g).<sup>188</sup>

ASX may impose conditions on the grant of such a waiver or the exercise of such a discretion and, if it does, the entity must comply with those conditions.<sup>189</sup>

### 10.2 ASX's general approach to waiving or modifying the escrow requirements in the Listing Rules

ASX regards its escrow regime as one of the fundamental protections afforded to investors under the Listing Rules. While ASX may consider procedural and other minor waivers or modifications to the escrow rules, ASX will only waive or modify the central requirement for holders of restricted securities to be subject to escrow for the periods nominated in Annexure 9B in exceptional circumstances, where it is clear to ASX that the waiver or modification will not undermine the integrity of its escrow regime. The onus is firmly on the entity seeking the waiver or modification to establish this to ASX's satisfaction.

As mentioned in section 9.1 above, ASX will consider a waiver extending Listing Rule 9.5 (securities subject to a takeover bid or merger) to permit a disposal of a restricted security in an Australian trust pursuant to a "trust scheme of arrangement", where the scheme is approved by a special resolution of unitholders and is subject to judicial approval under trustee legislation, or to permit a disposal of a restricted security pursuant to a takeover offer of, or a merger with, a foreign company or trust where ASX is satisfied that the takeover or merger is subject to an acceptable regulatory regime equivalent to the Corporations Act.

Sections 10.3 – 10.11 below set out some other common cases where ASX will consider waiving or modifying its escrow requirements. The relevant section indicates whether it is necessary to apply for a formal waiver or whether the matter will be dealt with by the exercise of ASX discretion. In the latter case, the entity simply need ask ASX to confirm the exercise of its discretion by email rather than go the trouble and expense of applying for a formal waiver.

If a formal waiver is necessary, Guidance Note 17 *Waivers and In-Principle Advice* has further guidance on how to apply for a waiver under the Listing Rules.

As mentioned in section 5.8 above, ASX expects entities to resolve all issues concerning escrow by the deadlines mentioned in that section. Once securities have been designated as restricted securities and that information has been made known to the market (as it will be under the notification requirements mentioned in section 8 above),

<sup>182</sup> Listing Rule 18.1.

<sup>183</sup> Listing Rule 18.5A.

<sup>184</sup> As permitted by Listing Rules 9.1(b) and (c).

<sup>185</sup> As permitted by Listing Rules 9.1(b) and (c) and also by ASX's capacity in items 1, 2 and 7 of Appendix 9B to substitute a different number for the number of securities relieved from escrow than the number derived by the application of the cash formula.

<sup>186</sup> As permitted by Listing Rule 9.1(b). Although, as mentioned previously, these are standard form deeds and ASX will not generally agree to any changes.

<sup>187</sup> As permitted by Listing Rule 9.1(c). Although, as mentioned previously, these are standard form notices and ASX will not generally agree to any changes.

<sup>188</sup> As permitted by Listing Rules 9.1(d), (e) and (g) respectively.

<sup>189</sup> Listing Rules 18.1 and 18.5A.

the fact that the market has traded on that basis will be a significant impediment to the consideration of any waiver or other exercise of discretion affecting the escrow treatment of the securities.

### 10.3 Re-compliance listings

Where a listed entity undertakes a re-compliance listing and it is not excluded from escrow by Listing Rule 9.2, a strict application of the Listing Rules would require escrow restrictions to be applied afresh as if it were a new listing. In such a case, however, ASX recognises that the entity has already existed and operated as a listed entity and so a fresh application of escrow restrictions may not be appropriate.

To the extent that the entity already has any restricted securities on issue from its original listing or any previous re-compliance listing, the escrow restrictions applicable to those securities will continue unaffected by the latest re-compliance listing.

As to issues of securities that have occurred since its original or any previous re-compliance listing, ASX will not generally apply escrow to:

- securities issued prior to the date that is 12 months before the lodgement of the entity's latest application for re-admission to the ASX official list;
- securities issued since that date with security holder approval under Listing Rule 7.1 or that do not require such approval under Listing Rule 7.2; or
- securities issued since that date under a prospectus or PDS,

and, if requested, will exercise its discretion not to apply escrow in relation to such issues.

ASX will carefully examine any other issue of securities the entity has undertaken in the 12 months before lodging its application for re-admission to the ASX official list to determine whether the securities should be subject to escrow.

In particular, 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 to see if securities may have been issued to related parties, promoters, professional advisers involved in the transaction, or their family, friends and associates,<sup>190</sup> at a significant discount to the anticipated offer price for the capital raising. If they have and ASX forms the view that the purpose of the issue was not to raise genuinely needed seed capital but rather to confer a benefit on the recipients through the prospective re-pricing of their securities if the transaction is successful then, as mentioned in section 2.2 above, at a minimum, ASX is likely to classify the securities as restricted securities, making them subject to the escrow requirements in Chapter 9 and Appendices 9A, 9B and 9C of the Listing Rules. It is also likely to designate the recipients as promoters, requiring them and their controllers to execute a restriction deed subjecting their securities to escrow for 24 months from the date the entity is re-admitted to the official list. In an egregious case, ASX may exercise its discretion<sup>191</sup> not to re-admit the entity to the official list or not to quote the securities in question.

### 10.4 Top hat listings

Where a listed entity undergoes a reorganisation to install a new holding entity that will be listed on ASX (commonly referred to as a "top hat listing") and the new holding entity is not excluded from escrow by Listing Rule 9.2, a strict application of the Listing Rules would require escrow restrictions to be applied afresh to the holding entity as a new listing. In such a case, however, ASX recognises that the holding entity is effectively the successor of the listed entity and so a fresh application of escrow restrictions may not be appropriate.

If there are existing holders of restricted securities in the listed entity, the derivative securities they receive in the holding entity will also be restricted securities subject to escrow for the balance of the escrow period applying to

<sup>190</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>191</sup> Under Listing Rules 1.19 and 2.9 respectively.

their original securities in the listed entity.<sup>192</sup> The holding entity will therefore be required to comply with the escrow requirements applicable to those securities, including (at ASX's election) entering into a restriction deed with, or giving a restriction notice to, the holders of the derivative securities. Subject to this requirement being met, ASX will exercise its discretion not to apply escrow to any other recipients of securities in the holding entity. If needed,<sup>193</sup> it will also grant a waiver to allow the holders of restricted securities in the listed entity to dispose of those securities in exchange for restricted securities in the holding entity.

### 10.5 Standard spin-outs

Where a listed entity spins out a major asset and the spin-out vehicle will be listed on ASX and is not one that is excluded from escrow by Listing Rule 9.2, a strict application of the Listing Rules again would require escrow restrictions to be applied afresh to the spin-out vehicle as a new listing.

In the case of a standard spin-out, as described in Guidance Note 13 *Spin-outs of Major Assets* (that is, a pro rata distribution of securities in the spin-out vehicle to the holders of securities in the listed entity by way of an *in specie* dividend or capital return or pursuant to a scheme of arrangement or similar transaction),<sup>194</sup> ASX recognises that the spin-out vehicle is effectively the successor of the listed entity in relation to the assets being spun out and so a fresh application of escrow restrictions may not be appropriate.

If a holder of restricted securities in the listed entity receives securities in the spin-out vehicle by way of a pro rata distribution on their restricted securities, ASX will expect the spin-out vehicle to apply escrow to those securities for the balance of the escrow period applying to the holder's restricted securities in the listed entity.<sup>195</sup> Subject to this requirement being met, ASX will exercise its discretion not to apply escrow to any other recipients of securities in the spin-out vehicle.

### 10.6 'Look through' relief for seed capitalists

Where an entity undertaking a new or re-compliance listing is subject to escrow, seed capitalists who pay cash for securities in the entity qualify for cash formula relief. However, vendors who receive securities in the entity in return for selling a classified asset to the entity do not qualify for cash formula relief.

Suppose an entity (A) subject to escrow is contemplating a new listing on ASX and it has a substantial proportion of its assets as classified assets. If A chooses to list itself, any seed capitalists who paid cash for fully paid ordinary securities in A ahead of its listing will be entitled to cash formula relief.

However, if A decides instead that it wants to list a new holding entity (B) and have B acquire ahead of its listing all of the issued securities in A from their holders in return for an issue to them of securities in B, then in the absence of a waiver or exercise of discretion from ASX:

- the vendors of the securities in A will be vendors of a classified asset;<sup>196</sup>
- the securities they receive in B will be restricted securities; and
- as vendors of a classified asset, they will not qualify for cash formula relief regardless of the consideration they paid or provided for their securities in A.

In other words, the simple act of inserting a new holding entity B into the structure has changed the escrow treatment for security holders.

The same issue arises where an entity (B) subject to escrow is acquiring in connection with a new or re-compliance listing another entity (A) that has a substantial proportion of its assets as classified assets. If B acquires all of the

<sup>192</sup> See '6.10 Recipients of derivative securities' on page 32 above.

<sup>193</sup> This additional waiver may not be needed, depending on how the top hat listing is being effected.

<sup>194</sup> This may be with or without an associated IPO by the spin-out vehicle.

<sup>195</sup> Under item 9 in Appendix 9B: see '6.10 Recipients of derivative securities' on page 32.

<sup>196</sup> This means that A itself is a classified asset: see '2.5 "Classified asset"' on page 13.

issued securities in A in return for an issue of securities in B, then again in the absence of a waiver or exercise of discretion from ASX:

- the vendors of the securities in A will be vendors of a classified asset;
- the securities they receive in B will be restricted securities; and
- as vendors of a classified asset, they will not qualify for cash formula relief regardless of the consideration they paid or provided for their securities in A,

even though, if A had chosen to list itself, any seed capitalists who paid cash for fully paid ordinary securities in A before or in connection with A's listing would have been entitled to cash formula relief.

In cases such as this, ASX may be prepared to grant a waiver from Listing Rule 9.1 (referred to as "look-through" relief) to permit any seed capitalists who paid cash for fully paid ordinary securities in A to be treated for escrow purposes as if they were seed capitalists in B rather than as vendors of a classified asset.

Where look-through relief is granted, the applicable escrow period for a seed capitalist who is not a related party or promoter, or an associate of a related party or promoter, of B will start at the date the seed capitalist paid cash for their fully paid ordinary securities in A rather than the date they acquired their securities in B. This upholds the principle of the escrow regime that seed capitalists who are not related parties or promoters, or associates of a related party or promoter, should be subject to escrow only for a period of 12 months from when they contributed their capital. By contrast, the applicable escrow period for a seed capitalist who is a related party or promoter, or an associate of a related party or promoter, of B will start at the time B is admitted or re-admitted to the official list. This upholds the principle of the escrow regime that related parties, promoters and their associates should be subject to escrow in all cases for a period of 24 months from listing.

Look through relief requires a formal waiver from ASX. An application for that waiver must be made in writing to ASX no later than 5 weeks prior to the proposed date for the entity's admission or re-admission to the official list.

ASX will only grant look-through relief to an entity (B) undertaking a new or re-compliance listing that is acquiring another entity (A) where:

- B is acquiring 100% of the issued securities in A;
- the consideration paid or provided by B to the holders of the securities in A consists solely of securities in B; and
- A does not return any capital, distribute any assets, pay any unusual dividends or make any other unusual distributions to its security holders before the acquisition by B of A becomes effective.

It should be noted that look through relief only applies to seed capitalists who paid cash for securities in the underlying entity. It does not apply to security holders who acquired their securities in the underlying entity for a different consideration (eg for disposing of assets or for services rendered).

ASX will usually require proof<sup>197</sup> that the seed capitalists paid cash for their securities in the underlying entity as a condition of granting look-through relief.

ASX will only grant one level of look-through relief.

### **10.7 Unrelated seed capitalists converting convertible securities or cash advances to fully paid ordinary securities**

Ordinarily, where an entity undertaking a new or re-compliance listing is subject to escrow, a seed capitalist who is not a related party or promoter, or an associate of a related party or promoter, and who receives securities in the entity is subject to escrow for 12 months from when the securities were issued.

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<sup>197</sup> Such as copies of application forms and bank statements.

ASX recognises that where a seed capitalist subscribes cash for a convertible security and subsequently converts that security into fully paid ordinary securities prior to the entity's admission or re-admission to the official list, they effectively contributed their capital when they subscribed for the convertible security, not when they converted it. Accordingly, if requested, ASX will generally exercise its discretion in such a case so that the escrow period runs for 12 months from the date the seed capitalist subscribed for the convertible security rather than for 12 months from the date they were issued the ordinary securities upon conversion.<sup>198</sup>

Likewise, ASX recognises that where a seed capitalist makes a cash advance to the entity and subsequently agrees to convert the debt arising from that advance into fully paid ordinary securities prior to the entity's admission or re-admission to the official list, they effectively contributed their capital when they made the cash advance, not when they converted it to equity. Accordingly, if requested, ASX will generally exercise its discretion in such a case so that the escrow period runs for 12 months from the date the seed capitalist made the cash advance rather than for 12 months from the date they were issued the ordinary securities in satisfaction of the debt.<sup>199</sup>

This treatment upholds the principle of the escrow regime that seed capitalists who are not related parties or promoters, or associates of a related party or promoter, should be subject to escrow only for a period of 12 months from when they contributed their capital.

### **10.8 Bona fide purchases from related parties, promoters and their associates**

Where an entity undertaking a new listing is subject to escrow, a seed capitalist who was not a related party or promoter, or an associate of a related party or promoter, of the entity and who subscribed cash for securities in the entity will only be subject to escrow for 12 months from when the securities were issued.

By contrast, a party who purchased and took a transfer of restricted securities will be subject to escrow for the balance of the escrow period applicable to the seller. Accordingly, if they purchased the securities from an unrelated seed capitalist they will only be subject to escrow for 12 months from when the securities were issued, whereas if they purchased the securities from a related party or promoter, or an associate of a related party or promoter, they will be subject to escrow for 24 months from the date of listing, a substantially longer period.

In certain situations, this might be seen to penalise a bona fide purchaser for value from a related party or promoter, or an associate of a related party or promoter, by making them subject to a much longer escrow period than would have applied if they had acquired their securities as or from a seed capitalist who is not a related party or promoter, or an associate of a related party or promoter.

To address this issue, ASX may exercise its discretion not to apply escrow in the following circumstances:

- a purchaser has paid cash to acquire shares in an entity subject to escrow from a related party or promoter, or an associate of a related party or promoter, of the entity;
- the purchase was on arm's length terms and took place at least 24 months prior to the entity's application for admission or re-admission;
- the purchaser was not at the time of the purchase, and has not since become, a related party or promoter, or an associate of a related party or promoter, of the entity;
- the purchaser was not at the time of the purchase a related party or associate of the seller; and
- having regard to all the circumstances, ASX is satisfied that the seller has not received a substantial benefit from the sale and was not seeking to avoid the application of escrow at listing by selling the securities to the purchaser.

The onus is firmly on the entity to establish this last point to ASX's satisfaction. If it is not able to do so, ASX may instead allow one or more security holders who otherwise have freely transferable securities (perhaps through the application of cash formula relief) to substitute their securities as restricted securities for those acquired by the

<sup>198</sup> See also note 166 above and the accompanying text.

<sup>199</sup> See also note 167 above and the accompanying text.

purchaser and enter into a restriction deed for in aggregate the same number of securities and for the same escrow period as should have applied to purchaser. In this case, ASX will designate the substituted securities as restricted securities<sup>200</sup> and exercise its discretion not to apply escrow to the securities purchased by the purchaser.

### 10.9 Execution of restriction deeds by controllers

Where required, a restriction deed must be entered into by the entity, the holder of the restricted securities and each “controller”.<sup>201</sup> This is to prevent those who have an economic interest in restricted securities from avoiding ASX’s escrow regime by the simple expedient of using a chain of entities to hold that interest and then transferring the controller interests in an entity “up the chain”, rather than the restricted securities themselves, to dispose of that economic interest.

ASX approaches this requirement in a common sense manner, consistent with its intent and purpose. Hence, if restricted securities are held or controlled by an entity (“material controlling entity”) that is:

- listed on ASX or any other recognised stock exchange;
- a registered managed investment scheme that invests in a portfolio of securities;
- a pooled development fund that is required to comply with the Pooled Development Fund Act 1992 (Cth); or
- any other type of investment vehicle that holds a portfolio of investments where the restricted securities comprise less than 10% of the value of that portfolio,

ASX will look favourably upon a request to exercise its discretion to only require the restriction deed to be signed by the material controlling entity and any of its child entities who have an economic interest in the restricted securities, and not to require any upstream controller of the material controlling entity to be a party to the restriction deed.

### 10.10 Greenmailers

Occasionally an entity undertaking a new or re-compliance listing is confronted with a situation where a security holder who holds restricted securities refuses to enter into a restriction deed relating to those securities and threatens to disrupt the listing unless their securities are bought out.

An entity confronted with this situation has essentially 3 choices if it wishes to proceed with its listing:

- arrange for one or more parties to purchase and take a transfer of those securities and have the purchasers enter into restriction deeds as transferees of restricted securities;<sup>202</sup>
- arrange for one or more security holders who otherwise have freely transferable securities (perhaps through the application of cash formula relief) to voluntarily substitute their securities as restricted securities and enter into a restriction deed for in aggregate the same number of securities and for the same escrow period as would have applied to the security holder in question;<sup>203</sup> or
- if it is unable to arrange either of the above, apply to ASX for approval to have the escrow restrictions for those securities imposed via a restriction notice rather than a restriction deed.

<sup>200</sup> Using its powers in that regard under paragraph (b) of the definition of “restricted securities” in Listing Rule 19.12.

<sup>201</sup> See paragraph (b) of the definition of “controller” in the text accompanying note 87 above.

<sup>202</sup> See ‘6.9 Transferees of restricted securities’ on page 31.

<sup>203</sup> In this case, ASX will designate the substituted securities as restricted securities (using its powers in that regard under paragraph (b) of the definition of “restricted securities” in Listing Rule 19.12) and exercise its discretion not to apply escrow to the securities that have been substituted.

### 10.11 Entities listed on another exchange

If an entity undertaking a new or re-compliance listing on ASX is already listed on another securities exchange, whether in Australia or elsewhere, and its securities are freely tradeable on that other exchange, the application of escrow by ASX becomes problematical.

It is relatively uncommon for an entity that can justify a dual listing not to be excluded from escrow by Listing Rule 9.2. In those rare cases where escrow might apply, ASX will consider the situation on a case-by-case basis to determine an appropriate outcome. In some cases it may be appropriate to grant a waiver from ASX escrow altogether, or to align ASX's escrow regime with any escrow regime applying to the entity on the other exchange. In other cases, it may be appropriate to insist on the full application of ASX escrow and, if the entity is not able to comply with that requirement, to reject its application for admission or re-admission to the ASX official list.

Factors ASX will take into account in this regard include:

- whether ASX will be its primary listing or a secondary listing;<sup>204</sup>
- how long the entity has been listed on the other exchange;<sup>205</sup>
- the reputation and standing of the other exchange;<sup>206</sup>
- whether the entity has been, or continues to be, subject to an escrow regime on the other exchange;<sup>207</sup> and
- the level of trading in the entity's securities on the other exchange.<sup>208</sup>

## 11. ASX's enforcement powers

ASX has a range of enforcement powers it can exercise if an entity proposes to breach, or has breached, its obligations under the Listing Rules in relation to restricted securities, including by failing to enforce the escrow restrictions in its constitution or in any restriction deed against a person who has not complied with, or is threatening not to comply with, those restrictions.

ASX may seek to prevent or remediate the entity's breach by directing the entity to enforce the applicable escrow provisions in its constitution<sup>209</sup> or in a restriction deed<sup>210</sup> against that person.

Whether or not it gives such a direction, ASX may also:

- suspend quotation of the entity's securities generally;<sup>211</sup>
- if the restricted securities in question are not presently the subject of a holding lock, require the entity to impose a holding lock on the restricted securities to prevent them from being disposed of or further disposed of;<sup>212</sup> and
- if any of the restricted securities concerned are not yet quoted on ASX, exercise its discretion not to quote those securities.<sup>213</sup>

<sup>204</sup> If ASX will be the entity's primary listing, that may tilt the scales in favour of ASX escrow applying, whereas if ASX will be a secondary listing, that may tilt the scales in favour of ASX escrow not applying.

<sup>205</sup> The longer an entity has been listed on the other exchange, the less likely ASX is to apply escrow.

<sup>206</sup> The higher the reputation and standing of the other exchange, the less likely ASX is to apply escrow.

<sup>207</sup> Where an entity has been, or continues to be, subject to an escrow regime on the other exchange, the less likely ASX is to apply escrow.

<sup>208</sup> If the entity's securities are thinly traded on the other exchange, that may tilt the scales in favour of ASX escrow applying, whereas if they are widely traded on the other exchange, that may tilt the scales in favour of ASX escrow not applying.

<sup>209</sup> Listing Rule 18.8(i).

<sup>210</sup> Listing Rule 18.8(j).

<sup>211</sup> Listing Rule 17.3.1.

<sup>212</sup> Listing Rule 18.8(h).

<sup>213</sup> Listing Rule 2.9.

until the matter has been dealt with to ASX's satisfaction.

Further, where an entity breaches its escrow obligations under the Listing Rules and ASX considers the breach to be an egregious one, ASX may:

- censure the entity;<sup>214</sup> and/or
- terminate the entity's admission to the official list.<sup>215</sup>

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

Whenever ASX takes enforcement action against an entity for breaching the escrow provisions in the Listing Rules, 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>214</sup> Listing Rule 18.8A.

<sup>215</sup> Listing Rule 17.12.



### Annexure A: Examples of the application of escrow

#### *Example 1 – simplified example of the application of the cash formula to seed capitalists*

An entity has lodged an application for admission to the official list on 1 June 2018 and is offering 50,000,000 ordinary fully paid shares at 20 cents each to raise \$10,000,000 in its IPO. Its anticipated date of admission is 14 August 2018. It has conducted three rounds of pre-IPO fundraising as follows:

- |                 |   |
|-----------------|---|
| 1 February 2016 | <p>10,000,000 ordinary shares issued to related parties/promoters for a cash payment of 2 cents each to raise \$200,000, plus</p> <p>10,000,000 ordinary shares issued to multiple unrelated parties for a cash payment of 2 cents each to raise \$200,000.</p> <p>Total capital at this point: 20,000,000 ordinary shares.</p>         |
| 3 November 2017 | <p>20,000,000 ordinary shares issued to related parties/promoters for a cash payment of 7.5 cents each to raise \$1,500,000, plus</p> <p>20,000,000 ordinary shares issued to multiple unrelated parties for a cash payment of 7.5 cents each to raise \$1,500,000.</p> <p>Total capital at this point: 60,000,000 ordinary shares.</p> |
| 4 March 2018    | <p>5,000,000 ordinary shares issued to related parties/promoters for a cash payment of 16 cents each to raise \$800,000, plus</p> <p>5,000,000 ordinary shares issued to multiple unrelated parties for a cash payment of 16 cents each to raise \$800,000.</p> <p>Total capital at this point: 70,000,000 ordinary shares.</p>         |

To calculate the number of securities subject to escrow and the applicable escrow period, in practice, requires the cash formula to be applied to each individual holder and to each individual issue of securities in which they have participated. However, to give a simplified illustration of the effect of the cash formula, applying it to the two categories of seed capitalist (related party/promoter<sup>216</sup> vs unrelated seed capitalist<sup>217</sup>) for each round of pre-IPO fundraising will result, in aggregate, in the following escrow outcomes:

#### *1 February 2016 issue to related parties/promoters*

$$\begin{aligned}
 C &= \$200,000 \\
 P &= \$0.20 \\
 N &= C/P = 1,000,000
 \end{aligned}$$

1,000,000 of the shares issued to the related parties/promoters on 1 February 2016 are free from escrow under the cash formula. 9,000,000 of the shares issued to them on that date (10,000,000 – 1,000,000) are subject to escrow for 24 months from the date the entity's shares commence quotation on ASX.

#### *1 February 2016 issue to unrelated parties*

These shares were issued more than 12 months before the anticipated date of admission. The applicable escrow period will have already expired by the time the entity is admitted. All 10,000,000 shares issued to the unrelated parties on 1 February 2016 are therefore free from escrow.

<sup>216</sup> Item 1 in Appendix 9B.

<sup>217</sup> Item 2 in Appendix 9B.

### *3 November 2017 issue to related parties/promoters*

$$\begin{aligned} C &= \$1,500,000 \\ P &= \$0.20 \\ N &= C/P = 7,500,000 \end{aligned}$$

7,500,000 of the shares issued to the related parties/promoters on 3 November 2017 are free from escrow under the cash formula. 12,500,000 of the shares issued to them on that date (20,000,000 – 7,500,000) are subject to escrow for 24 months from the date the entity's shares commence quotation on ASX.

### *3 November 2017 issue to unrelated parties*

$$\begin{aligned} C &= \$1,500,000 \\ P &= \$0.20 \\ N &= C/P = 7,500,000 \end{aligned}$$

7,500,000 of the shares issued to the unrelated parties on 3 November 2017 are free from escrow under the cash formula. 12,500,000 of the shares issued to them on that date (20,000,000 – 7,500,000) are subject to escrow for 12 months expiring on 3 November 2018.

### *4 March 2018 issue to related parties/promoters*

$$\begin{aligned} C &= \$800,000 \\ P &= \$0.20 \\ N &= C/P = 4,000,000 \end{aligned}$$

4,000,000 of the shares issued to the related parties/promoters on 4 March 2018 are free from escrow under the cash formula. 1,000,000 of the shares issued to them on that date (5,000,000 – 4,000,000) are subject to escrow for 24 months from the date the entity's shares commence quotation on ASX.

### *4 March 2018 issue to unrelated parties*

The issue price of these securities is not less than 80% of the IPO price. All 5,000,000 shares are therefore free from escrow. The cash formula is not applicable.

### *In total:*

The related parties/promoters will have 12,500,000 shares free from escrow under the cash formula and 22,500,000 shares subject to escrow for 24 months from the date the entity's shares commence quotation on ASX.

The unrelated parties will have 27,500,000 shares free from escrow and 7,500,000 shares subject to escrow for 12 months expiring on 3 November 2018.

### **Example 2 – deemed promoter**

Suppose in example 1 above that a single unrelated party ("A") participated in the capital raisings on 3 November 2017 and 4 March 2018 as follows.

3 November 2017	7,000,000 out of the 20,000,000 ordinary shares issued to unrelated parties at \$0.075, paying a cash consideration of \$525,000.
4 March 2018	2,000,000 out of the 5,000,000 ordinary shares issued to unrelated parties at \$0.16, paying a cash consideration of \$320,000.

Following the 4 March 2018 funding round, A therefore has 9,000,000 (or approximately 12.8%) of the 70,000,000 ordinary shares then on issue. This makes A substantial (10%+) holder in the entity under the Listing Rules<sup>218</sup> and results in A being deemed to be a promoter unless ASX decides otherwise.

<sup>218</sup> Noting that the threshold to be a substantial (10%+) holder under the Listing Rules is 10%, compared to the 5% threshold applicable under the Corporations Act (see the definition of "substantial (10%+) holder" in Listing Rule 19.12).

Assuming ASX does not decide otherwise and treats A as a promoter, applying the cash formula to A's shares will result in the following outcome:

$$\begin{aligned} C &= \$845,000 \\ P &= \$0.20 \\ N &= C/P = 4,225,000 \end{aligned}$$

4,225,000 of A's shares are free from escrow under the cash formula. 4,775,000 of A's shares (9,000,000 – 4,225,000) are subject to escrow for 24 months from the date the entity's shares commence quotation on ASX.

Note that in the case of a related party or promoter, or an associate of a related party or promoter, it makes no difference to the escrow outcome whether the capital raisings on 3 November 2017 and 4 March 2018 have the cash formula applied to them individually or as a group. The overall result will still be the same. This is because the escrow period for related parties and promoters is not dependent on the date of issue of the securities. It runs from the date the entity's shares commence quotation on ASX.

In the case of seed capitalists who are not related parties or promoters, or associates of a related party or promoter, the cash formula needs to be applied to each individual issue as the escrow period for them runs from the date of issue of the relevant securities.

### **Example 3 – former related party**

Suppose in example 1 above that an investor ("B") who was a director, and therefore a related party, of the entity at the time of the 1 February 2016 pre-IPO round of funding subscribed for 2,000,000 shares at 2 cents each in that round for an issue price of \$40,000. After that issue, B held 2,000,000 (or 10%) of the 20,000,000 ordinary shares then on issue and therefore was a substantial (10%+) holder under the Listing Rules,<sup>219</sup> as well as being a related party of the entity.

Suppose B retired from the board on 31 December 2016. As from 1 July 2017, B will have ceased to be a related party of the entity, as defined in the Listing Rules.<sup>220</sup>

Suppose further that B did not participate in the 3 November 2017 or 4 March 2018 pre-IPO funding rounds.

Following the 3 November 2017 funding round, B ceases to be a substantial (10%+) holder under the Listing Rules, as B's holding drops to 2,000,000 (or approximately 6.7%) of the 60,000,000 ordinary shares then on issue. However, as B was a substantial (10%+) holder up to the funding round on 3 November 2017 and that date is within 12 months of the date the entity applied for admission (1 June 2018), B will be deemed to be a promoter unless ASX decides otherwise.

If ASX does not decide otherwise and treats B as a promoter, applying the cash formula to B's shares will result in the following escrow outcome:

$$\begin{aligned} C &= \$40,000 \\ P &= \$0.20 \\ N &= C/P = 200,000 \end{aligned}$$

200,000 of B's shares are free from escrow under the cash formula. 1,800,000 of B's shares (2,000,000 – 200,000) are subject to escrow for 24 months from the date the entity's shares commence quotation on ASX.

If instead ASX decides that B should not be considered a promoter in all of the circumstances, as an unrelated party whose shares were issued more than 12 months before the anticipated date of admission, any applicable escrow period will have already expired by the time the entity is admitted. All 2,000,000 shares issued to B on 1 February 2016 are therefore free from escrow.

<sup>219</sup> See note 218 above.

<sup>220</sup> In common with the Corporations Act, the definition of "related party" in Listing Rule 19.12 has a 6 month look back. Therefore a person who resigns from the board of a listed entity on a particular date will continue to be a related party of the entity for 6 months thereafter.

### ***Example 4 – no averaging of “unders and overs”***

Suppose in example 1 above that the entity made a further issue on 12 May 2018 of 100,000 fully paid ordinary shares to a person (“C”) who is a related party and 50,000 fully paid ordinary shares to another party (“D”) who is not a related party or promoter, or an associate of a related party or promoter, for 25 cents each in cash. Suppose that C and D had each participated in one or more of the prior rounds of pre-IPO fundraising and each of them had some securities subject to escrow and some securities free from escrow under the cash formula as a result.

As the cash price paid for the 100,000 shares issued to C is equal to or greater than the IPO price, none of them is subject to escrow.

Similarly, as the cash price paid for the 50,000 shares issued to D is equal to or greater than 80% of the IPO price, none of them is subject to escrow.

Cash formula relief is not applicable to these shares as they are specifically excluded from escrow.<sup>221</sup>

The fact that C and D paid 5 cents above the IPO price (20 cents) for these shares, reflecting an aggregate premium of \$5,000 above the IPO price for C and \$2,500 above the IPO price for D, does not entitle them to any credit that can be applied against the securities they hold that are subject to escrow.

### ***Example 5 – vendor of a classified asset who is a related party, promoter or associate***

On 1 February 2018, an entity purchased an exploration mining tenement from a vendor (“E”) who is a related party or promoter, or an associate of a related party or promoter, of the entity. The vendor had not expended any money developing the mining tenement. The consideration paid by the entity for the acquisition of the tenement was 5,000,000 fully paid ordinary shares. The entity has lodged an application for admission to the official list on 1 June 2018 and is offering 50,000,000 ordinary fully paid shares at 20 cents each to raise \$10,000,000 in its IPO.

The tenement will be a classified asset. All 5,000,000 shares received by E as the consideration for the asset are subject to escrow for 24 months from the date the entity’s shares commence quotation on ASX.<sup>222</sup>

Note that in this case, the consideration for the classified assets must be restricted securities. Cash can only be paid for an acquisition of a classified asset from a related party or promoter, or an associate of a related party or promoter, if the transaction occurs more than 24 months prior to the entity lodging its application for admission to the official list, or if and to the extent that the consideration is reimbursement of expenditure incurred by the vendor in developing the classified asset.<sup>223</sup>

Suppose instead that the consideration paid by the entity for the acquisition of the tenement was 4,500,000 fully paid ordinary shares plus a cash payment of \$100,000 in purported reimbursement of expenditure incurred by the vendor in developing the classified asset. Suppose further that ASX is not satisfied that any of expenditure by the vendor was actually incurred in developing the classified asset. ASX will likely require remedial action in this case before allowing the listing to proceed. This could be, for example, having E use the cash received to subscribe for 500,000 fully paid ordinary shares in the IPO at 20 cents each and then executing a restriction deed for 5,000,000 shares (the 4,500,000 received as consideration for the sale of the asset and the additional 500,000 purchased in the IPO).

### ***Example 6 – vendor of a classified asset who is not a related party, promoter or associate***

On 1 February 2018, an entity purchased an exploration mining tenement from a vendor (“F”) who is not a related party or promoter, or an associate of a related party or promoter, of the entity. The vendor had not expended any money developing the mining tenement. The entity has lodged an application for admission to the official list on 1 June 2018 and is offering 50,000,000 ordinary fully paid shares at 20 cents each to raise \$10,000,000 in its IPO.

<sup>221</sup> Under items 1 and 2 in Appendix 9B.

<sup>222</sup> Under item 3 in Appendix 9B.

<sup>223</sup> Listing Rule 1.1 condition 11(a).

Unlike example 4 above, because the vendor is not a related party or promoter, or an associate of a related party or promoter, the consideration paid by the entity for the asset can include a cash component.<sup>224</sup> If the consideration includes any securities that are or are going to be quoted, those securities will be restricted securities and subject to escrow for 12 months from their issue.<sup>225</sup> So if the consideration for the acquisition of the tenement is:

- an issue of 5,000,000 fully paid ordinary securities – all 5,000,000 shares are “restricted securities” and will be subject to escrow until 1 February 2019;
- a cash payment of \$500,000 and an issue of 2,500,000 fully paid ordinary securities – all 2,500,000 shares are “restricted securities” and will be subject to escrow until 1 February 2019; or
- a cash payment of \$1,000,000 – escrow is not applicable as there are no “restricted securities” involved.

### **Example 7 – issue under an employee incentive scheme**

An entity has lodged an application for admission to the official list on 1 June 2018 and is offering 50,000,000 ordinary fully paid shares at 20 cents each to raise \$10,000,000 in its IPO. It had issued two tranches of free options to subscribe for fully paid ordinary shares to its managing director (a related party) under an employee incentive scheme, the first being 100,000 options exercisable at 5 cents per share subject to certain performance hurdles being met over the short term and the second being 200,000 options exercisable at 25 cents per share subject to longer term performance hurdles being met.

The relevant performance hurdles having been met prior to listing, the director exercised the first tranche of options receiving 100,000 fully paid ordinary shares on 1 March 2018 for a cash payment of \$5,000. The second tranche of options remains outstanding as at the date of the entity’s admission to the official list.

The 100,000 shares issued to the director on the exercise of the first tranche of options would otherwise be restricted securities but for the fact they qualify for cash formula relief. 25,000 shares<sup>226</sup> will be free from escrow under the cash formula and 75,000 shares subject to escrow for 24 months from the date the entity’s shares commence quotation on ASX.<sup>227</sup>

The second tranche of options will be restricted securities subject to escrow for 24 months from the date the entity’s shares commence quotation on ASX.

Suppose the performance hurdles are met on the second tranche of options and the director exercises them at some point after the entity is admitted to the official list and during the escrow period. The resulting 200,000 shares issued on the exercise of the option will also be restricted securities and subject to escrow for the balance of the 24 month period from the date the entity’s shares commenced quotation on ASX.<sup>228</sup> Even though the director may pay cash to exercise the second tranche of options, they will not qualify for cash formula relief.<sup>229</sup>

### **Example 8 – transferee from a related party, promoter or associate**

An entity issued 3,000,000 fully paid ordinary shares on 1 February 2016 at 2 cents each to a related party seed capitalist (“G”), raising \$60,000. The entity has lodged an application for admission to the official list on 1 June 2018 and is offering 50,000,000 fully paid ordinary shares at 20 cents each to raise \$10,000,000 in its IPO.

<sup>224</sup> Compare Listing Rule 1.1 condition 11(a) with condition 11(b).

<sup>225</sup> Under item 4 in Appendix 9B.

<sup>226</sup> \$5,000/\$0.20 = 25,000.

<sup>227</sup> Under item 1 in Appendix 9B.

<sup>228</sup> Under item 9 of Appendix 9B (securities received on the conversion of convertible restricted securities).

<sup>229</sup> Cash formula relief does not apply to issues under item 9 of Appendix 9B. It only applies to issues of fully paid ordinary securities to a seed capitalist for cash before or in connection with the entity’s admission to the official list (items 1 and 2 in Appendix 9B) and to issues of fully paid ordinary securities to a related party or promoter, or an associate of a related party or promoter, for cash under an employee incentive scheme before or in connection with its admission (item 7 in Appendix 9B).

All other things being equal, G would have had 300,000 shares free from escrow under the cash formula<sup>230</sup> and 2,700,000 shares subject to escrow for 24 months from the date the entity's shares commence quotation on ASX.

Suppose G transferred 100,000 shares in the entity to another person ("H") on 30 April 2018. The parties essentially have 3 choices:

- treat the 100,000 shares as coming from the 300,000 shares G holds that are free from escrow, with the entity entering into a restriction deed with G and any controllers of G for 2,700,000 shares imposing escrow for 24 months from the date the entity's shares commence quotation on ASX;
- treat the 100,000 shares as coming from G's escrowed shares, with the entity entering into a restriction deed with E and any controllers of E for 2,600,000 shares and one with H and any controllers of H for 100,000 shares,<sup>231</sup> each imposing escrow for 24 months from the date the entity's shares commence quotation on ASX; or
- some combination in between these two ends of the spectrum.

Suppose G instead transferred 1,000,000 shares in the entity to H on 30 April 2018. The parties essentially have 3 choices:

- treat 300,000 of those shares as coming from the 300,000 shares G holds that are free from escrow and the balance as coming from G's escrowed shares, with the entity entering into a restriction deed with G and any controllers of G for 2,000,000 shares and one with H and any controllers of H for 700,000 shares,<sup>232</sup> each imposing escrow for 24 months from the date the entity's shares commence quotation on ASX;
- treat all 1,000,000 shares as coming from G's escrowed shares, with the entity entering into a restriction deed with G and any controllers of G for 1,700,000 shares and one with H and any controllers of H for 1,000,000 shares,<sup>233</sup> each imposing escrow for 24 months from the date the entity's shares commence quotation on ASX; or
- some combination in between these two ends of the spectrum.

### **Example 9 – transferee from an unrelated party**

An entity issued to a seed capitalist ("I") who is not a related party or promoter, or an associate of a related party or promoter, of an entity 1,000,000 fully paid ordinary shares on 1 February 2016 at 2 cents each, raising \$20,000, and 2,000,000 fully paid ordinary shares on 3 November 2017 at 7.5 cents each, raising \$150,000. The entity has lodged an application for admission to the official list on 1 June 2018 and is offering 50,000,000 fully paid ordinary shares at 20 cents each to raise \$10,000,000 in its IPO.

All other things being equal, the 1,000,000 shares issued to I on 1 February 2016 would be free from escrow as the escrow period for those shares would have expired on 1 February 2017. Of the shares issued to I on 3 November 2017, 750,000 shares would be free from escrow under the cash formula<sup>234</sup> and 1,250,000 shares would be subject to escrow for 12 months expiring on 3 November 2018.

Suppose I transferred 100,000 shares in the entity to another person ("J") on 30 April 2018. The parties essentially have 3 choices:

- treat the 100,000 shares as coming from the 1,750,000 shares I holds that are free from escrow, with the entity issuing a restriction notice to I for 1,250,000 shares imposing escrow for 12 months expiring on 3 November 2018;

<sup>230</sup>  $\$60,000/\$0.20 = 300,000$ .

<sup>231</sup> Under item 8 of Appendix 9B.

<sup>232</sup> Under item 8 of Appendix 9B.

<sup>233</sup> Under item 8 of Appendix 9B.

<sup>234</sup>  $\$150,000/\$0.20 = 750,000$ .

- treat the 100,000 shares as coming from I's escrowed shares, with the entity issuing a restriction notice to I for 1,150,000 shares and one to J for 100,000 shares,<sup>235</sup> each imposing escrow for 12 months expiring on 3 November 2018; or
- some combination in between these two ends of the spectrum.

Suppose I instead transferred 2,000,000 shares in the entity to J on 30 April 2018. The parties essentially have 3 choices:

- treat 1,750,000 of those shares as coming from the 1,750,000 shares I holds that are free from escrow and the balance of 250,000 shares as coming from I's escrowed shares, with the entity issuing a restriction notice to I for 1,000,000 shares and one to J for 250,000 shares, each imposing escrow for 12 months expiring on 3 November 2018;
- treat 1,250,000 of those shares as coming from I's escrowed shares and the balance of 750,000 shares as coming from the shares I holds that are free from escrow, with the entity issuing a restriction notice to J for 1,250,000 shares imposing escrow for 12 months expiring on 3 November 2018; or
- some combination in between these two ends of the spectrum.

### **Example 10 – derivative securities**

A person ("K") holds 100,000 fully paid ordinary securities in a listed entity ("L") that are restricted securities and subject to escrow until 31 July 2019.

*Example 10A:* L undertakes a top-hat scheme to insert a new holding company ("M"), where shareholders transfer the shares they hold in L to M in exchange for the issue of an equivalent number of shares in M and M is then listed on ASX. The 100,000 shares K receives in M in respect of their 100,000 restricted securities in L will also be restricted securities subject to escrow until 31 July 2019.<sup>236</sup> M must enter into a restriction deed with, or give a restriction notice to, K (as appropriate) in relation to those 100,000 shares.

*Example 10B:* L undertakes a de-merger of a subsidiary ("N") via a scheme of arrangement where the holders of fully paid ordinary securities in L receive fully paid ordinary securities in N on a one for two basis and N is then listed on ASX. The 50,000 shares in N that K receives in respect of their 100,000 restricted securities in L will also be restricted securities subject to escrow until 31 July 2019.<sup>237</sup> N must enter into a restriction deed with, or give a restriction notice to, K (as appropriate) in relation to those 50,000 shares.

*Example 10C:* L undertakes a spin-out of an asset where L transfers the asset to a new entity ("O") for an issue of shares in O and then distributes those shares to the holders of its fully paid ordinary shares as an *in specie* dividend on a 1 for 10 basis. O is then listed on ASX. The 10,000 shares K receives in O in respect of their 100,000 restricted securities in L will also be restricted securities subject to escrow until 31 July 2019.<sup>238</sup> O must enter into a restriction deed with, or give a restriction notice to, K (as appropriate) in relation to those 10,000 shares.

*Example 10D:* L undertakes a 1 for 4 bonus issue on its fully paid ordinary securities. The 25,000 bonus shares K receives in respect of their 100,000 restricted securities will also be restricted securities subject to escrow until 31 July 2019.<sup>239</sup> There is no need for L to enter into a new restriction deed with, or give a new restriction notice to, K for the 25,000 bonus shares as they will be covered by the original restriction deed or restriction notice for their 100,000 restricted securities.<sup>240</sup> However, in the interests of good shareholder communications and to avoid any shareholder confusion, L should write individually to the holders of its restricted securities (and, if there are multiple

<sup>235</sup> Under item 8 of Appendix 9B.

<sup>236</sup> Under item 9 of Appendix 9B (securities received in a scheme or similar reorganisation in substitution for restricted securities).

<sup>237</sup> Under item 9 of Appendix 9B (securities received in a scheme or similar reorganisation as a distribution in relation to restricted securities).

<sup>238</sup> Under item 9 of Appendix 9B (securities received as an *in specie* distribution in relation to restricted securities).

<sup>239</sup> Under item 9 of Appendix 9B (securities received as a bonus issue in relation to restricted securities).

<sup>240</sup> The prescribed form of restriction deed in Appendix 9A and restriction notice in Appendix 9C both extend to other securities "attaching to or arising out of" the restricted securities specified in the deed or notice that are also restricted securities under the Listing Rules.

holders, make an announcement to the market) reminding them that the bonus shares they receive on their restricted securities are subject to escrow in the same manner and for the same period as their restricted securities.

### **Example 11 – convertible securities**

An entity ("P") is admitted to the official list and its fully paid ordinary shares commence quotation on 14 August 2018. It is subject to escrow under chapter 9.

*Example 11A:* prior to P being admitted to the official list, a person ("Q") paid a cash amount to P for 100,000 options each to subscribe for one fully paid ordinary share in P for 25 cents exercisable at any time up to 30 June 2021. Q was a related party of P at the time P applied for admission and therefore the options are restricted securities and subject to escrow until 14 August 2020.<sup>241</sup> Q exercises the options during the escrow period. The 100,000 shares Q receives for exercising the options will also be restricted securities and subject to escrow until 14 August 2020.<sup>242</sup> Cash formula relief does not apply even though Q has paid cash to P to subscribe for, and to exercise, the option.<sup>243</sup>

*Example 11B:* on 31 March 2018, a person ("R") paid a cash amount to P for 50,000 options each to subscribe for one fully paid ordinary share in P for 25 cents exercisable at any time up to 30 June 2021. R was not a related party or promoter, or an associate of a related party or promoter, of P at the time P applied for admission and therefore the options are restricted securities and subject to escrow until 31 March 2019.<sup>244</sup> R exercises the options during the escrow period. The 50,000 shares R receives for exercising the options will also be restricted securities and subject to escrow until 31 March 2019.<sup>245</sup> Cash formula relief does not apply even though R has paid cash to P to subscribe for, and to exercise, the option.<sup>246</sup>

*Example 11C:* prior to P being admitted to the official list, a person ("S") paid \$100,000 in cash to P to subscribe for a convertible note entitling the holder to convert the note into fully paid ordinary shares in P at an issue price of 25 cents each at any time up to 31 December 2023. S was a related party of P at the time P applied for admission and therefore the note is a restricted security and subject to escrow until 14 August 2020.<sup>247</sup> S converts the note during the escrow period. The 40,000 shares S receives on conversion will also be restricted securities and subject to escrow until 14 August 2020.<sup>248</sup> Cash formula relief does not apply even though S paid cash to P to subscribe for the note.<sup>249</sup>

*Example 11D:* on 31 March 2018, a person ("T") paid \$50,000 in cash to P to subscribe for a convertible note entitling the holder to convert the note into fully paid ordinary shares in P at an issue price of 25 cents each at any time up to 31 December 2023. T was not a related party or promoter, or an associate of a related party or promoter, of P at the time P applied for admission and therefore the note is a restricted security and subject to escrow until 31 March 2019.<sup>250</sup> T converts the note during the escrow period. The 20,000 shares T receives on conversion will also be restricted securities and subject to escrow until 31 March 2019.<sup>251</sup> Cash formula relief does not apply even though T paid cash to P to subscribe for the note.<sup>252</sup>

<sup>241</sup> Under item 1 of Appendix 9B.

<sup>242</sup> Under item 9 of Appendix 9B (securities received on the conversion of convertible restricted securities). The exercise of an option is a conversion of a convertible security: see the definition of "convertible security" and "convert" in Listing Rule 19.12 and the note to item 9 in Appendix 9B.

<sup>243</sup> See note 229 above.

<sup>244</sup> Under item 2 of Appendix 9B.

<sup>245</sup> Under item 9 of Appendix 9B (securities received on the conversion of convertible restricted securities).

<sup>246</sup> See note 229 above.

<sup>247</sup> Under item 1 of Appendix 9B.

<sup>248</sup> Under item 9 of Appendix 9B (securities received on the conversion of convertible restricted securities).

<sup>249</sup> See note 229 above.

<sup>250</sup> Under item 2 of Appendix 9B.

<sup>251</sup> Under item 9 of Appendix 9B (securities received on the conversion of convertible restricted securities).

<sup>252</sup> See note 229 above.



### **Example 12 – free options**

An entity has lodged an application for admission to the official list on 1 June 2018 and is offering in its IPO 50,000,000 fully paid ordinary shares at 20 cents each, plus one free option for each 2 shares subscribed entitling the option holder to subscribe for one fully paid ordinary share for a cash payment of 25 cents at any time up to 30 June 2022.

The entity undertook a seed capital raising on 31 March 2018 to raise the funds needed to proceed with its application for listing, offering 5,000,000 fully paid ordinary shares at 15 cents each plus one free option for each 2 ordinary shares subscribed on the same terms as those referred to in the previous paragraph. The seed capital raising was fully subscribed.

A related party (“U”) took up 1,000,000 shares for a cash payment of \$150,000 and received 500,000 free options in the seed capital raising. Applying the cash formula to U’s shares and options will result in the following escrow outcome:

$$\begin{aligned} C &= \$150,000 \\ P &= \$0.20 \\ N &= C/P = 750,000 \\ F &= 0.5 \text{ (ie one half of an option for each share subscribed)} \\ O &= N \times F = 375,000 \end{aligned}$$

750,000 of U’s shares and 375,000 of U’s free options are free from escrow under the cash formula. 250,000 of U’s shares and 125,000 of U’s free options subject to escrow for 24 months from the date the entity’s shares commence quotation on ASX.<sup>253</sup>

Another investor (“V”), who is not a related party or promoter, or an associate of a related party or promoter, took up 500,000 shares for a cash payment of \$150,000 and received 250,000 free options in the seed capital raising. Applying the cash formula to V’s shares and options will result in the following escrow outcome:

$$\begin{aligned} C &= \$75,000 \\ P &= \$0.20 \\ N &= C/P = 375,000 \\ F &= 0.5 \\ O &= N \times F = 187,500 \end{aligned}$$

375,000 of V’s shares and 187,500 of V’s free options are free from escrow under the cash formula. 125,000 of V’s shares and 62,500 of V’s free options are subject to escrow until 31 March 2019.<sup>254</sup>

<sup>253</sup> Under item 1 of Appendix 9B.

<sup>254</sup> Under item 2 of Appendix 9B.