

## THE RESTRICTIONS ON ISSUING EQUITY SECURITIES IN CHAPTER 7 OF THE LISTING RULES

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To assist entities to understand and comply with the restrictions on issuing equity securities in Chapter 7 of the Listing Rules</li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>The 15% limit on placements of equity securities without security holder approval in Listing Rule 7.1</li> <li>The additional 10% placement capacity available to an eligible entity under Listing Rule 7.1A and the conditions the entity must satisfy to access it</li> <li>The exceptions to Listing Rules 7.1 and 7.1A in Listing Rule 7.2</li> <li>The application of Listing Rules 7.1 and 7.1A to convertible securities</li> <li>Ratification of issues of, or agreements to issue, equity securities under Listing Rule 7.4</li> <li>The requirements for notices of meeting proposing a resolution under Listing Rules 7.1, 7.1A or 7.4</li> <li>The obligation to notify ASX immediately of a proposed issue of securities</li> <li>The constraints on issues of equity securities in Listing Rules 7.6 and 7.9</li> <li>The powers ASX may exercise if an entity issues equity securities in breach of Chapter 7 of the Listing Rules</li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>Guidance Note 5 <i>CHESS Depository Interests (CDIs)</i></li> <li>Guidance Note 11 <i>Restricted Securities and Voluntary Escrow</i></li> <li>Guidance Note 17 <i>Waivers and In-Principle Advice</i></li> <li>Guidance Note 19 <i>Performance Shares</i></li> <li>Guidance Note 22 <i>Notification of Directors' Interests</i></li> <li>Guidance Note 25 <i>Issues of Equity Securities to Persons in a Position of Influence</i></li> <li>Guidance Note 30 <i>Applying for Quotation of Additional Securities</i></li> <li>Guidance Note 34 <i>Naming Conventions for Debt and Hybrid 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 by ASX Limited (“ASX”) to assist listed entities admitted to the ASX official list as an ASX Listing<sup>1</sup> to understand the framework regulating new issues of equity securities<sup>2</sup> in Chapter 7 of the Listing Rules, including in particular the constraints on placements in Listing Rules 7.1, 7.1A and 7.2. Those rules are part of a suite of Listing Rules intended to give effect to the principle set out in the introduction to the Listing Rules that securities should be issued in circumstances, and have rights and obligations attaching to them, that are fair to new and existing security holders.<sup>3</sup>

<sup>1</sup> Listing Rules 7.1, 7.1A and 7.2 do not apply to entities admitted to the official list as an ASX Debt Listing or as an ASX Foreign Exempt Listing (see Listing Rules 1.10 and 1.15.1). 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> The term “equity security” is defined in Listing Rule 19.12 as: (a) a share; (b) a unit; (c) an option over an issued or unissued share or unit; (d) a right to an issued or unissued share or unit; (e) an option over, or right to, a security referred to in (c) or (d); (f) a convertible security; and (g) any security that ASX decides to classify as an equity security; but not (h) a security ASX decides to classify as a debt security.

<sup>3</sup> Other Listing Rules directed to the same principle include the requirement in Listing Rule 6.1 that the terms that apply to each class of equity securities must, in ASX’s opinion, be appropriate and equitable; the requirement in Listing Rule 6.2 that an entity only have one class of ordinary securities unless ASX agrees otherwise; the provisions governing preference securities in Listing Rules 6.3 – 6.7; the provisions governing options in Listing Rules 6.14 – 6.23A; and the provisions in Chapter 9 dealing with restricted securities.

The constitutions of most listed entities<sup>4</sup> will usually reserve to the board of directors of the entity an unfettered power to issue securities at such times, in such amounts and on such terms as the board decides. However, for so long as the entity remains listed on ASX, that power must be exercised in a manner that is consistent with the Listing Rules,<sup>5</sup> including the requirement that the terms that apply to each class of equity securities must, in ASX's opinion, be appropriate and equitable.<sup>6</sup> In common with all other powers exercisable by directors, the power to issue securities must also be exercised in accordance with the statutory and common law duties of directors to act with due care and skill, in good faith, for a proper purpose and in the best interests of the entity.<sup>7</sup>

Listing Rule 7.1 seeks to balance the interests of an entity in being able to raise capital flexibly and the interests of its security holders in not being unfairly diluted. It does so by setting an aggregate limit on the number of equity securities an entity can issue over any 12 month period without security holder approval broadly equivalent to 15% of its fully paid ordinary issued capital. Up to that limit and subject to the constraints mentioned in the previous paragraph, the entity is free to issue equity securities at whatever price and on whatever terms its board considers appropriate. Once that limit is reached, the holders of the entity's ordinary securities must approve the issue.

This 15% limit is often referred to as an entity's "placement capacity", reflecting the fact that the types of issues to which it applies would often (although not always) be characterised as "placements".

The 15% placement capacity under Listing Rule 7.1 is available to all listed entities. It is automatically replenished every 12 months on a rolling basis and there are no conditions on the type of equity securities that can be issued or the price at which they can be issued.

Listing Rule 7.1 is expressed to operate subject to Listing Rule 7.1A, which was introduced in 2012 to make it easier for small to mid-cap entities to raise additional equity capital.<sup>8</sup> It allows an "eligible entity" to obtain at its annual general meeting ("AGM") an approval from the holders of its ordinary securities (a "7.1A mandate") to have an additional placement capacity broadly equivalent to 10% of its fully paid ordinary issued capital. The mandate expires at the date of the entity's next AGM or after 12 months, whichever is the earlier. It also expires if the entity receives security holder approval for a transaction under Listing Rule 11.1.2 (significant change in the nature or scale of activities) or 11.2 (disposal of main undertaking).

By comparison to Listing Rule 7.1, the additional 10% placement capacity under Listing Rule 7.1A is only available to eligible entities with a 7.1A mandate, which has to be renewed each year at the entity's AGM. There are also constraints on the type of equity securities that can be issued and the price at which they can be issued.

Listing Rule 7.2 sets out various types of equity security issues that are excluded from the operation of Listing Rules 7.1 and 7.1A.

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<sup>4</sup> This statement does not necessarily apply to listed trusts. In the case of a listed trust, the power to issue securities is usually reserved to the responsible entity of the trust and is exercisable by the directors of the responsible entity. Generally most listed trusts will be registered managed investment schemes under the *Corporations Act 2001* (Cth). They are subject to a requirement that the constitution of the scheme must make "adequate provision" for the consideration that is to be paid to acquire an interest in the scheme (section 601GA(1)(a)). ASIC's view on what this means can be found in ASIC Regulatory Guide 134 *Managed Investments: Constitutions*.

The *Corporations Act 2001* (Cth) is 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.

<sup>5</sup> Listing Rule 1.1 condition 2 provides that an entity must have a constitution which is consistent with the Listing Rules or which includes the provisions in Appendix 15A or Appendix 15B (as applicable) for it to be eligible to be admitted to the official list as an ASX Listing. Listing Rule 15.11.1 requires any subsequent amendment to the constitution to be consistent with the Listing Rules unless the constitution includes the provisions in Appendix 15A or Appendix 15B (as applicable). Appendix 15A and Appendix 15B include overarching provisions that give the Listing Rules priority in the event of any conflict between those rules and the provisions of the constitution.

<sup>6</sup> Listing Rule 6.1.

<sup>7</sup> See, for example, sections 180 and 181 (officers of listed companies) and 601FD (officers of responsible entities of listed trusts) of the Corporations Act.

<sup>8</sup> Listing Rule 7.1A recognises that small to mid-cap entities often have limited access to venture capital and debt funding, particularly in the early stages of their life cycle when they are frequently earning limited revenue and/or are loss making. They also usually have a narrower base of shareholders than larger entities, which constrains their ability to use pro rata issues as a fundraising tool. They are therefore often critically reliant on being able to conduct placements of equity securities whenever a suitable opportunity presents itself to obtain additional funding.

It should be noted that Listing Rules 7.1 and 7.1A only restrict an entity's ability to issue equity securities. As far as the Listing Rules are concerned, debt securities<sup>9</sup> can be issued at such times, in such amounts and on such terms as the directors of the entity may determine.

## 2. Calculating an entity's placement capacity

### 2.1 The formula for calculating an entity's 15% placement capacity

Listing Rule 7.1 provides that an entity must not, without the approval of the holders of its ordinary securities, issue or agree to issue more equity securities than the number calculated in accordance with the following formula:

$$(A \times B) - C^{10}$$

where:

A = the number of fully paid ordinary securities on issue at the commencement of the relevant period,

- plus the number of fully paid ordinary securities issued in the relevant period under an exception in Listing Rule 7.2 other than exception 9, 16 or 17,<sup>11</sup>
- plus the number of fully paid ordinary securities issued in the relevant period on the conversion of convertible securities within Listing Rule 7.2 exception 9 where the issue of the convertible securities was approved, or taken to be approved,<sup>12</sup> under Listing Rule 7.1 or 7.4,
- plus the number of fully paid ordinary securities issued in the relevant period under an agreement to issue securities within Listing Rule 7.2 exception 16 where the agreement was approved, or taken to be approved,<sup>13</sup> under Listing Rule 7.1 or 7.4,
- plus the number of any other fully paid ordinary securities issued in the relevant period with approval under Listing Rule 7.1 or 7.4,<sup>14</sup>
- plus the number of partly paid ordinary securities that became fully paid in the relevant period,

<sup>9</sup> The term "debt security" is defined in Listing Rule 19.12 as: (a) a bond, certificate of deposit, debenture, note or other instrument evidencing a debt owing by an entity to the holder that is negotiable or transferrable and that is not a convertible security; (b) any security that ASX decides to classify as a debt security; but not (c) a security ASX decides to classify as an equity security.

<sup>10</sup> For the avoidance of doubt, the formula in Listing Rule 7.1 follows the normal convention that operations in brackets or parentheses are performed first. Therefore, variable A is first multiplied by variable B, and variable C is then subtracted. If the result of that mathematical operation is zero or a negative number, the entity does not have the placement capacity available under Listing Rule 7.1 to make the issue without security holder approval.

<sup>11</sup> Issues under exceptions 9, 16 or 17 of Listing Rule 7.2 are excluded from the first bullet point in the definition of variable A and dealt with separately in the second, third and fourth bullet points to prevent them being prematurely included in variable A. To illustrate, without the exclusion of issues under exception 9, a listed entity could use its 15% issuance capacity under Listing Rule 7.1 to issue convertible securities that convert into fully paid ordinary securities, convert those securities shortly thereafter and have the resulting fully paid shares immediately counted in variable A (because those securities are then issued under an exception in rule 7.2).

<sup>12</sup> The reference to an issue of convertible securities being "taken to be approved" under Listing Rule 7.1 is a reference to an issue of convertible securities under paragraph (a) of Listing Rule 7.2 exception 9 (ie an issue of convertible securities made before the entity was listed where it disclosed the existence and material terms of the convertible securities in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3). Under Listing Rule 7.2 exception 9, such an issue is taken to be approved under Listing Rule 7.1.

<sup>13</sup> The reference to an agreement being "taken to be approved" under Listing Rule 7.1 is a reference to an agreement to issue of securities under paragraph (a) of Listing Rule 7.2 exception 16 (ie an agreement entered into before the entity was listed where it disclosed the existence and material terms of the agreement in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3). Under Listing Rule 7.2 exception 16, such an issue is taken to be approved under Listing Rule 7.1.

<sup>14</sup> This includes fully paid ordinary securities issued in the relevant period under an agreement to issue securities within Listing Rule 7.2 exception 17 where the issue is subsequently approved under Listing Rule 7.1 in accordance with that exception.

- less the number of fully paid ordinary securities cancelled in the relevant period;<sup>15</sup>

B = 15%;

C = the number of equity securities issued or agreed to be issued in the relevant period that are not issued:

- with the approval of the holders of ordinary securities under Listing Rule 7.1 or 7.4;
- under Listing Rule 7.1A.2; or
- under an exception in Listing Rule 7.2; and

“relevant period” means:

- if the entity has been admitted to the official list for 12 months or more, the 12 month period immediately preceding the date of the issue or agreement; or
- if the entity has been admitted to the official list for less than 12 months, the period from the date the entity was admitted to the official list to the date immediately preceding the date of the issue or agreement.

Variable A in the formula above is the base amount of capital on which the 15% placement capacity in Listing Rule 7.1 is calculated.

The product of A and B is the aggregate placement capacity available to an entity under Listing Rule 7.1 over the relevant period.

Variable C is the amount of the aggregate 15% placement capacity that has already been used during the relevant period.

The difference between the aggregate 15% placement capacity and C, therefore, is the remainder of that capacity available for the balance of the relevant period.

## 2.2 The formula for calculating an entity’s additional 10% placement capacity

Listing Rule 7.1A.2 provides that in addition to issues under Listing Rule 7.1, an eligible entity which has obtained a 7.1A mandate may, during the period of the mandate, issue or agree to issue a number of equity securities calculated in accordance with the following formula:

$$(A \times D) - E^{16}$$

where:

A = has the same meaning as in Listing Rule 7.1;

D = 10%;

E = the number of equity securities issued or agreed to be issued under Listing Rule 7.1A.2 in the relevant period where the issue or agreement has not been subsequently approved by holders of ordinary securities under Listing Rule 7.4; and

“relevant period” has the same meaning as in Listing Rule 7.1.

<sup>15</sup> This includes fully paid ordinary securities that are the subject of a buy-back by the entity during the relevant period and that are cancelled pursuant to section 257H(3) of the Corporations Act.

<sup>16</sup> Again, for the avoidance of doubt, the formula in Listing Rule 7.1A.2 follows the normal convention that operations in brackets or parentheses are performed first. Therefore variable A is first multiplied by variable D, and variable E is then subtracted. If the result of that mathematical operation is zero or a negative number, the entity does not have the placement capacity available under Listing Rule 7.1A.2 to make the issue and must either resort to its available placement capacity under Listing Rule 7.1 or seek security holder approval to the issue.

Variable A in the formula above is the base amount of capital on which the 10% additional placement capacity in Listing Rule 7.1A.2 is calculated. It is the same as variable A in Listing Rule 7.1.

The product of A and D is the aggregate additional placement capacity available to an eligible entity under Listing Rule 7.1A.2 over the relevant period.

Variable E is the amount of the aggregate 10% additional placement capacity that has already been used during the relevant period.

The difference between the aggregate 10% additional placement capacity and E, therefore, is the remainder of that capacity available for the balance of the relevant period.

### 2.3 The relevant date for applying these formulae

Listing Rules 7.1 and 7.1A.2 both operate at a point in time, being the date (the “relevant date”) on which an entity is proposing to issue securities or to enter into an agreement to issue securities.

Where there is no distinct agreement to issue securities, as will typically be the case where there is an offer of securities to multiple investors under a prospectus, PDS or information memorandum, the relevant date will be the date the entity is proposing to issue those securities. The entity’s placement capacity under Listing Rules 7.1 and 7.1A.2 should be tested on that date.

Where there is a distinct agreement to issue securities, as will typically be the case under an agreement to issue securities to a single placee or small number of placees, the relevant date is the date of the agreement. The entity’s placement capacity under Listing Rules 7.1 and 7.1A.2 should be tested on the date of the agreement. Provided the entity has the placement capacity to agree to issue the securities on that date, the subsequent issue of securities under the agreement will fall within exception 16 in Listing Rule 7.2.

### 2.4 Applying these formulae on the relevant date

Where the entity is relying on its Listing Rule 7.1 placement capacity, the number of securities issued or agreed to be issued on the relevant date must be less than or equal to the number calculated in accordance with the formula in that rule or else the issue or agreement must be approved by the holders of the entity’s ordinary securities under Listing Rule 7.1.

Where the entity is relying on its Listing Rule 7.1A.2 placement capacity, the number of securities issued or agreed to be issued under Listing Rule 7.1A.2 on the relevant date must be less than or equal to the formula in that rule or else the issue or agreement falls outside of the entity’s additional placement capacity under Listing Rule 7.1A.2 and can only be made without the approval of the holders of the entity’s ordinary securities if it falls within the entity’s 15% placement capacity under Listing Rule 7.1.

If on the relevant date an entity is undertaking one or more issues of equity securities and/or entering into one or more agreements to issue equity securities, these must be aggregated to determine if the total number of equity securities being issued or agreed to be issued on the relevant date exceeds the formula in Listing Rule 7.1 or 7.1A.2 (as applicable).

### 2.5 The relevant period considered in these formulae

Listing Rules 7.1 and 7.1A.2 both require a determination of the “relevant period”. If the entity has been admitted to the official list for at least 12 months, this is the 12 month period immediately preceding the “relevant date”. If the entity has been admitted to the official list for less than 12 months, this is the period from the date the entity was admitted to the official list to the date immediately preceding the “relevant date”.

For these purposes, “month” is taken to mean a calendar month and the relevant date itself is not counted in the period.<sup>17</sup>

<sup>17</sup> Cf ASIC Regulatory Guide 7 *Calculating time periods*.

So, if the entity has been admitted to the official list for at least 12 months and the relevant date is 1 March 2017, the relevant period runs from the start of the day on 1 March 2016<sup>18</sup> and finishes at the end of the day on 28 February 2017.

If the entity was admitted to the official list on 15 July 2016 and the relevant date is 1 March 2017, the relevant period runs from the start of the day on 15 July 2016 and finishes at the end of the day on 28 February 2017.

### 2.6 Calculating variable A

Variable A in the formulae in Listing Rules 7.1 and 7.1A.2 only includes fully-paid ordinary securities on issue at the commencement of the relevant period and certain fully-paid ordinary securities that are issued, paid up or cancelled over the course of the relevant period.<sup>19</sup>

An agreement to issue fully paid ordinary securities, even one that has been approved by security holders under Listing Rule 7.1 or 7.4, only gets factored into variable A if and when the securities agreed to be issued are actually issued.

Issues of, or agreements to issue, any other class of security are ignored for the purposes of calculating variable A.

Unless ASX determines otherwise, each fully paid ordinary security referred to in the definition of variable A counts as one security in working out the value of that variable.<sup>20</sup>

An example of where ASX may determine that some or all of the fully paid ordinary securities referred to in variable A should count as some value other than one is where an entity has consolidated, subdivided or otherwise reconstructed its capital over the relevant period. In that case, ASX will make appropriate adjustments to ensure that the numbers are all calculated on a post consolidation, subdivision or reconstruction basis and the formulae in Listing Rules 7.1 and 7.1A.2 operate as intended.

### 2.7 Calculating variables C and E

Unlike variable A, variables C and E in the formulae in Listing Rules 7.1 and 7.1A.2 factor in all equity securities issued or agreed to be issued<sup>21</sup> over the relevant period, including partly paid ordinary securities and securities that are not ordinary securities.

Where any of the equity securities referenced in variable C or E are not fully paid ordinary securities, to “compare apples with apples”, it is necessary to convert them to their equivalent in fully paid ordinary securities. For these purposes, unless ASX determines otherwise:

- partly paid ordinary securities are counted as the maximum number of fully paid ordinary securities into which they can be paid up;<sup>22</sup>
- convertible securities are counted as the maximum number of fully paid ordinary securities into which they can be converted;<sup>23</sup> and

<sup>18</sup> Or, if you prefer, as at the end of the day on 29 February 2016, since the two points in time are the same.

<sup>19</sup> The fact that securities may have been classified as “restricted securities” under the Listing Rules does not make them a separate class (see the note to the definition of “class” in Listing Rule 19.12). Accordingly, restricted fully-paid ordinary securities on issue 12 months prior to the relevant date, or that fall within the different bullet points in the definition of variable A, are counted in variable A. The same applies to fully-paid ordinary securities that are subject to voluntary escrow.

<sup>20</sup> Listing Rule 7.1B.1(c).

<sup>21</sup> If an agreement to issue equity securities is entered into but then cancelled during the relevant period, it is included in variables C and E from the point it is entered into but ceases to be included in variables C and E from the point it is cancelled.

<sup>22</sup> Listing Rule 7.1B.1(d).

<sup>23</sup> Listing Rule 7.1B.1(e). Further guidance on how convertible securities are treated under Listing Rules 7.1 and 7.1A can be found in ‘5 The application of Listing Rules 7.1 and 7.1A to convertible securities’ on page 27.



- any other types of equity securities are counted as ASX decides.<sup>24</sup>

Again, an example of where ASX may determine that some or all of the equity securities referred to in variable C or E should count as a different value to that set out above is where an entity has consolidated, subdivided or otherwise reconstructed its capital over the relevant period. In that case, ASX will make an appropriate adjustment to ensure that all numbers are calculated on a post consolidation, subdivision or reconstruction basis and the formulae in Listing Rules 7.1 and 7.1A.2 operate as intended.

To calculate variable E in Listing Rule 7.1A.2, it is also necessary to determine the number of equity securities issued or agreed to be issued under Listing Rule 7.1A.2 in the relevant period. For these purposes, unless ASX determines otherwise, an issue is taken to be made under Listing Rule 7.1A.2 if the issue complies with all of the requirements in Listing Rule 7.1A and either:

- the entity has stated in its announcement of the proposed issue under Listing Rule 3.10.3 or in its application for quotation of the securities under Listing Rule 2.7 that the issue is being, or has been, made under Listing Rule 7.1A.2; or
- ASX determines that the issue should be taken to have been made under Listing Rule 7.1A.2.<sup>25</sup>

### 2.8 Calculating the number of securities being issued or agreed to be issued

Listing Rules 7.1 and 7.1A.2 allow an entity to issue equity securities without the approval of the holders of the entity's ordinary securities only if the number of securities issued or agreed to be issued on the relevant date is less than or equal to the formula in the applicable rule.

Again, where any of the equity securities issued or agreed to be issued on the relevant date are not fully paid ordinary securities, to "compare apples with apples", it is necessary to convert them to their equivalent in fully paid ordinary securities. The same rules apply here as apply when calculating variables C and E, set out in the preceding section.

### 2.9 The interaction between Listing Rules 7.1 and 7.1A

The placement capacities in Listing Rule 7.1 and 7.1A.2 operate independently of each other.

When an entity issues or agrees to issue equity securities under Listing Rule 7.1 without security holder approval, that issue or agreement uses up part of its 15% placement capacity under that rule.

Similarly, where an eligible entity with a 7.1A mandate issues or agrees equity securities under Listing Rule 7.1A.2, that issue or agreement uses up part of its 10% placement capacity under that rule.

An eligible entity with a 7.1A mandate which has capacity available under both Listing Rules 7.1 and 7.1A and which is making an issue that complies with all of the other requirements in Listing Rule 7.1A, can elect which of those capacities it wishes to use. Generally, it will make sense for the entity to elect to use its Listing Rule 7.1A.2 capacity in preference to its Listing Rule 7.1 capacity, so as to retain the greater freedom to issue equity securities that Listing Rule 7.1 affords.

<sup>24</sup> Listing Rule 7.1B.1(f). It would be most unusual for an entity to have a class of equity securities on issue that are not fully paid or partly paid ordinary securities or convertible securities and that required ASX to make a decision on how they should be counted under this rule (noting that an entity can generally only have one class of ordinary securities under Listing Rule 6.2 and that preference shares which do not have any rights of conversion into another class of equity security are excluded from the restrictions in Listing Rules 7.1 and 7.1A by Listing Rule 7.2 exception 11).

<sup>25</sup> Listing Rule 7.1B.5. Otherwise an issue is taken to be made under Listing Rule 7.1 rather than under Listing Rule 7.1A.2 (Listing Rule 7.1B.4). ASX will generally only make a determination that an issue should be taken to have been made under Listing Rule 7.1A.2 rather than Listing Rule 7.1 where it is clear to ASX that an entity was intending to use its additional 10% placement capacity under the former rule but accidentally forgot to mention that in its announcement of the proposed issue under Listing Rule 3.10.3 and in its application for quotation of the securities under Listing Rule 2.7 and where the market has not traded for any material period believing that the issue was made under Listing Rule 7.1 rather than Listing Rule 7.1A.2.

For these reasons, an eligible entity with a 7.1A mandate must be clear which rule it is proceeding under whenever it issues or agrees to issue equity securities.<sup>26</sup> If it is being done under Listing Rule 7.1A.2, that fact should be stated in its announcement of the proposed issue under Listing Rule 3.10.3 or in its application for quotation of the securities under Listing Rule 2.7.<sup>27</sup>

### 2.10 Worked examples and work sheets for calculating placement capacities

Annexure A contains some worked examples of how to calculate an entity's placement capacity under Listing Rules 7.1 and 7.1A.2.

Annexures B and C contain work sheets to calculate an entity's placement capacity under Listing Rules 7.1 and 7.1A.2 respectively. They are available on ASX Online and can also be downloaded in an editable form from:

[www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

Where an entity lodges an Appendix 3B announcing a proposed issue of equity securities without security holder approval using its Listing Rule 7.1 or 7.1A.2 placement capacity, the entity will be prompted by the Appendix 3B to complete the relevant work sheet and send it to its ASX Listings Compliance adviser to confirm that it has the available placement capacity under those rules.<sup>28</sup>

Where an entity lodges an Appendix 2A applying for the quotation of equity securities issued without security holder approval using its Listing Rule 7.1 or 7.1A.2 placement capacity, and it hasn't lodged an Appendix 3B for the issue, the entity will be prompted by the Appendix 2A to complete the relevant work sheet and send it to its ASX Listings Compliance adviser to confirm that it has the available placement capacity under those rules.<sup>29</sup>

If at any time ASX has concerns that an entity may have exceeded its placement capacity under Listing Rule 7.1 or 7.1A.2, ASX may also require the entity to provide it with the applicable work sheet, with all details completed, to demonstrate that the entity is in compliance with those rules.<sup>30</sup>

The work sheets in Annexures B and C can also be used by an entity contemplating an issue of equity securities to calculate whether it has the available placement capacity under Listing Rule 7.1 or 7.1A.2 to make the issue without security holder approval.

## 3. The requirements for accessing the additional 10% placement capacity

### 3.1 The entity must be an "eligible entity"

To be eligible to access the additional 10% placement capacity in Listing Rule 7.1A, at the date of the AGM at which the entity is seeking its 7.1A mandate,<sup>31</sup> it must:

- have a market capitalisation<sup>32</sup> of less than the prescribed amount<sup>33</sup> (currently \$300 million); and

<sup>26</sup> Among other reasons, where an issue is made under Listing Rule 7.1A.2, the entity will need to be able to demonstrate that it has complied with the minimum price requirement in Listing Rule 7.1A.3 (see '3.6 The consideration must be a cash amount not less than the prescribed minimum issue price' on page 13).

<sup>27</sup> Listing Rule 7.1B.5. See also note 25 above and the accompanying text.

<sup>28</sup> See '8.2 Appendix 3B disclosure requirements' on page 49.

<sup>29</sup> See '8.3 Appendix 2A application for quotation' on page 49.

<sup>30</sup> Listing Rule 18.7.

<sup>31</sup> See '3.2 The entity must have a 7.1A mandate' and '3.3 The 7.1A mandate must be obtained at the entity's AGM' below.

<sup>32</sup> "Market capitalisation" is defined in Listing Rule 19.12 to mean the number of securities in the entity's main class on issue multiplied by the price determined by ASX to be a fair measure of the market value of those securities.

<sup>33</sup> "Prescribed amount" is defined in Listing Rule 19.12 to mean the amount determined by ASX to be the maximum market capitalisation that an entity may have and still be eligible to seek approval of the holders of its ordinary securities by special resolution passed at an AGM to have the additional capacity to issue equity securities under Listing Rule 7.1A.

- not be included in the S&P/ASX 300 Index.<sup>34</sup>

If the entity meets both of these eligibility criteria at the date of the AGM and it obtains a 7.1A mandate, that mandate continues to be valid notwithstanding that the entity's market capitalisation may increase above \$300 million, or it may be included in the S&P/ASX 300 Index, at some time after that date and during the 12 month life of the mandate.<sup>35</sup>

As to the first of these criteria, an entity's market capitalisation is calculated by multiplying the number of securities in the entity's main class<sup>36</sup> by the price determined by ASX to be a fair measure of the market value of those securities. For these purposes, ASX will generally treat the closing price of those securities on ASX on the last trading day before the date of the AGM as a fair measure of the market value of those securities.<sup>37</sup>

As to the second of these criteria, the S&P/ASX 300 Index is re-balanced twice a year in March and September, with changes taking effect after market close on the third Friday of March and September. ASX publishes on the market announcements section of its website under the stock code "ZSP" an announcement with the names of the entities that are to be added to or removed from the S&P/ASX 300 Index. These announcements are made on the second Friday of March and the first Friday of September.

### 3.2 The entity must have a 7.1A mandate

To access the additional 10% placement capacity in Listing Rule 7.1A, an entity must have secured a 7.1A mandate – that is, an approval from the holders of its ordinary securities by way of special resolution that it should have the additional capacity to issue securities provided for in Listing Rule 7.1A.<sup>38</sup>

The Listing Rules do not define the expression "special resolution" and so it takes its meaning under the Corporations Act.<sup>39</sup> Under that Act, for a resolution to be a special resolution:

- the notice of meeting proposing the resolution must state both the intention to propose the resolution as a special resolution and the terms of the resolution; and
- it must be passed by at least 75% of the votes cast by members entitled to vote on the resolution.<sup>40</sup>

A 7.1A mandate is permissive and not obligatory. An entity with such a mandate is free to use it or not, as it determines.

<sup>34</sup> See the opening paragraph of Listing Rule 7.1A and the definition of "eligible entity" in Listing Rule 19.12.

<sup>35</sup> In the rare event that an entity adjourns its AGM without having passed a special resolution approving a 7.1A mandate and then passes that resolution at the adjourned meeting, eligibility is still determined as at the date of the original AGM rather than the date of the adjourned meeting. The 12 month life of the mandate also runs from the date of the original AGM and not from the date of the adjourned meeting. In each case, this is because, at law, the adjourned meeting is taken to be a continuation of the original meeting (*Scadding v Lorant* [1851] 3 HL Cas 418).

<sup>36</sup> "Main class" is defined in Listing Rule 19.12 to mean the ordinary securities of the entity or, if ordinary securities are not to be quoted, the class of securities designated by ASX. Generally speaking, if an entity has fully paid ordinary securities quoted on ASX, they will be its main class. If an entity only has partly paid ordinary securities quoted on ASX, they will be its main class. If the entity has both fully paid and partly paid ordinary securities quoted on ASX, its fully paid ordinary securities will be its main class and its partly paid ordinary securities will be excluded from the calculation of its market capitalisation for the purposes of the Listing Rules.

<sup>37</sup> ASX may use a different measure of fair market value if it considers that there is evidence that the closing price on ASX of the entity's main class of securities on the last trading day before the date of the AGM has been manipulated to reduce that price to a level where the entity's market capitalisation is less than \$300million.

<sup>38</sup> See the opening paragraph of Listing Rule 7.1A.

<sup>39</sup> Listing Rule 19.3.

<sup>40</sup> See section 249L (Australian companies) and 252J(c) (registered managed investment schemes). Even though the expression "special resolution" is only defined in the Corporations Act in relation to an Australian company and a registered management investment scheme, ASX extends the definition to apply to listed foreign companies and to listed Australian and foreign trusts that are not registered managed investment schemes.

### 3.3 The 7.1A mandate must be obtained at the entity's AGM

A 7.1A mandate can only be sought at an entity's AGM and not at any other meeting of security holders during the year.<sup>41</sup>

For the 7.1A mandate to be valid,<sup>42</sup> the notice of meeting for the AGM must include all of the disclosures required by Listing Rule 7.1A.3. These are explained in further detail in section 7.3 below.

The Listing Rules do not define what is an AGM for these purposes. Most listed entities will designate a particular meeting of security holders each year to be its AGM and will deal with issues at that meeting such as the tabling of annual financial statements and elections of directors.<sup>43</sup> ASX will generally regard that meeting as the entity's AGM for the purposes of Listing Rule 7.1A.<sup>44</sup>

If an entity seeks to bootstrap itself into Listing Rule 7.1A by designating as an AGM a meeting that is really an extraordinary general meeting of security holders, any 7.1A mandate purportedly passed at the meeting is not effective for the purposes of the Listing Rules. In such a case, ASX may direct the entity<sup>45</sup> that it can only rely on its Listing Rule 7.1 placement capacity and that any issue of securities outside that capacity must be approved by the holders of its ordinary security holders.

ASX notes that listed trusts which are registered as managed investment schemes under the Corporations Act are not required under that Act to hold an AGM. Where such a trust is required by its constitution to hold an AGM, or otherwise has a demonstrated track record of voluntarily holding regular AGMs, ASX will treat each such meeting as an AGM for the purposes of Listing Rule 7.1A, even though it may not be considered to be an AGM under the Corporations Act.

If a listed trust does not hold an AGM, it cannot avail itself of the additional placement capacity in Listing Rule 7.1A.<sup>46</sup>

### 3.4 The 7.1A mandate must still be current

To fit within Listing Rule 7.1A.2, an issue of equity securities must be made, or an agreement to issue equity securities must be entered into, during the period of the 7.1A mandate.<sup>47</sup>

A 7.1A mandate commences on the date of the AGM at which the resolution approving the mandate is passed and expires on the earliest of:

- the date that is 12 months after the date of the AGM at which the mandate was approved;
- the time and date of the entity's next AGM; and
- the time and date on which the entity receives security holder approval for a transaction under either Listing Rule 11.1.2 (significant change to nature or scale of activities) or 11.2 (disposal of main undertaking).<sup>48</sup>

<sup>41</sup> See the opening paragraph of Listing Rule 7.1A.

<sup>42</sup> An approval of security holders is not effective under the Listing Rules unless the notice of meeting includes everything that the Listing Rules require it to include: Listing Rule 14.6.

<sup>43</sup> Under the Corporations Act, an Australian company is required to hold its initial AGM within the first 18 months of its registration (section 250N(1)) and subsequent AGMs at least once in each calendar year and within 5 months after the end of its financial year (section 250N(2)).

<sup>44</sup> It is possible, although it would be rare, for an entity to have two AGMs within the one calendar year – for example, if it were to change its financial year end and to have an interim substituted accounting period of less than one year.

<sup>45</sup> Pursuant to Listing Rule 18.8.

<sup>46</sup> Where a listed trust is not required by its constitution and has not expressed an intent in its listing prospectus, PDS or information memorandum to hold a regular AGM, ASX will disregard any attempt by the trust to bootstrap itself into Listing Rule 7.1A by designating a meeting as an AGM.

<sup>47</sup> By virtue of the words "during the period of the approval" in the opening paragraph of Listing Rule 7.1A.2.

<sup>48</sup> Listing Rule 7.1A.1.

Again, in calculating the 12 month life of a 7.1A mandate, “month” is taken to mean a calendar month and the date of the AGM approving the mandate is not counted in the period.<sup>49</sup> So, if the date of the AGM approving a 7.1A mandate is 30 September 2017, the mandate commences upon the passage of the special resolution at the AGM and expires at the earliest of:

- the end of the day on 30 September 2018;
- if the entity holds its next AGM on or before 30 September 2018, the commencement of its next AGM; or
- if the entity receives approval for a transaction under Listing Rule 11.1.2 or 11.2 before then, the time the resolution is passed conferring that approval.

An entity may seek a 7.1A mandate at the same meeting as it seeks approval for a transaction under Listing Rule 11.1.2 or 11.2, provided that meeting is its AGM and the special resolution conferring the mandate is passed after the resolution approving the transaction under Listing Rule 11.1.2 or 11.2.

### 3.5 The entity must be issuing securities in an existing class of quoted securities

Only securities in an existing class<sup>50</sup> of quoted equity securities can be issued under Listing Rule 7.1A.<sup>51</sup> If an entity wishes to issue securities in a class that is not presently quoted on ASX without security holder approval, it must rely on its Listing Rule 7.1 placement capacity or the issue must fall within an exception in Listing Rule 7.2.

### 3.6 The consideration must be a cash amount not less the prescribed minimum issue price

Securities can only be issued under Listing Rule 7.1A for a cash amount which is not less than the prescribed minimum issue price mentioned below. If an entity wishes to issue securities for a non-cash consideration or for a cash consideration that is lower than the prescribed minimum issue price without security holder approval, it must rely on its Listing Rule 7.1 placement capacity or the issue must fall within an exception in Listing Rule 7.2.

For the avoidance of doubt, an issue of securities in satisfaction of a debt owing by, or as payment for services rendered to, the entity is an issue for non-cash consideration and therefore not permitted under Listing Rule 7.1A.<sup>52</sup>

The prescribed minimum issue price is 75% of the volume weighted average price (“VWAP”)<sup>53</sup> for securities in the relevant quoted class, calculated over the 15 trading days on which trades in that class were recorded<sup>54</sup> immediately before:

<sup>49</sup> See note 17 above and accompanying text.

<sup>50</sup> The notion of a ‘class’ of securities in the Listing Rules differs in some respects from the equivalent notion under the Corporations Act. For example, the note to the definition of “class” in Listing Rule 19.12 confirms that partly paid securities are a different class to fully paid securities for the purposes of the Listing Rules, whereas section 605(2) of the Corporations Act provides that securities are not taken to be different classes merely because some of the securities are fully-paid and others are partly-paid, or because different amounts are paid up or remain unpaid on the securities.

<sup>51</sup> Listing Rule 7.1A.3.

<sup>52</sup> If an entity wishes to issue securities under its Listing Rule 7.1A.2 capacity to satisfy a debt (including a debt for services rendered), the proper course is for the entity to issue the securities for a cash amount and then to apply the cash received in payment of the debt. ASX may ask an entity under Listing Rule 18.7 to provide a copy of its bank statements to verify that it has issued securities for a cash amount, as required under Listing Rule 7.1A.

<sup>53</sup> “Volume weighted average price”, or VWAP, in relation to particular securities for a particular period, means the volume weighted average price of trading in those securities on the ASX market and the Chi-X market over that period, excluding block trades, large portfolio trades, permitted trades during the pre-trading hours period, permitted trades during the post-trading hours period, out of hours trades and exchange traded option exercises (Listing Rule 19.12). Trading on the ASX market and Chi-X market includes trades executed on those markets and trades reported to those markets (other than block trades, large portfolio trades, permitted trades during the pre-trading hours period, permitted trades during the post-trading hours period, out of hours trade and exchange traded option exercises). The terms “block trades”, “large portfolio trades”, “permitted trades during the pre-trading hours period”, “permitted trades during the post-trading hours period” and “out of hours trades” have the same meaning as in the ASIC Market Integrity Rules (Competition in Exchange Markets) 2011. These types of trades are excluded as they are not necessarily representative of market trading.

<sup>54</sup> Note that this period may therefore be longer than the previous 15 trading days, if on any of those days there were no trades recorded in the relevant class.

- the date on which the price at which the securities are to be issued was agreed by the entity and the recipient of the securities; or
- if the securities are not issued within 10 trading days of that date, the date on which the securities were issued.<sup>55</sup>

For convenience, whichever of these two dates is applicable is referred to as the “pricing date” and the 15 trading days on which trades in the relevant class of equity securities were recorded immediately prior to the pricing date are referred to as the “pricing period”.

Setting the pricing period as the 15 trading days on which trades actually occur immediately prior to the pricing date, rather than a shorter period, is intended to minimise the risk that securities might be issued at an artificially low price when there has been a temporary drop in the market price of the entity’s securities.

Setting the initial pricing date as the date on which the entity and the potential investor agree the price for the issue and calculating the minimum price by reference to VWAP over the 15 trading days on which trades actually occur immediately prior to that date allows the parties to calculate the minimum price required under Listing Rule 7.1A with certainty at that date and ensure that this requirement has been satisfied. This is subject to the proviso that the securities must be issued within 10 trading days of that date to ensure that the pricing is still reasonably current. If the securities are not able to be issued within that 10 trading day period, then the pricing date defaults to the date on which the securities are issued.

VWAP calculations can be obtained from ASX Customer Service or other third party service providers. A listed entity may use any recognised information service provider (such as Reuters, Bloomberg or IRESS) as the source of its VWAP calculation.

The Appendix 3B an entity is required to lodge when it announces a proposed issue of equity securities under Listing Rule 7.1A will prompt the entity to send to its ASX Listings Compliance adviser a completed work sheet in the form of Annexure C to confirm that the entity has the available capacity to issue the securities. The work sheet will require the entity to state the pricing date, the pricing period and the VWAP for securities in the relevant class over that period. It will also ask the entity to identify the source of its VWAP calculation.

ASX is alive to entities purporting to issue securities under a combination of their Listing Rules 7.1 and 7.1A.2 placement capacities and allocating a lower price to the former and a higher price to the latter in an effort to appear compliant with the minimum pricing requirement for issues under Listing Rule 7.1A. If the average price at which the securities are being issued across both capacities is less than the minimum price required under Listing Rule 7.1A, ASX will regard that as contrary to the spirit and intent of the Listing Rules.<sup>56</sup> In such a case, ASX is likely to direct the entity<sup>57</sup> that it cannot rely on its Listing Rule 7.1A placement capacity to make the issue and, if the issue exceeds its Listing Rule 7.1 placement capacity, it must be approved by security holders under Listing Rule 7.1.

## 4. Permitted issues under Listing Rule 7.2

### 4.1 The effect of the exceptions in Listing Rule 7.2

Listing Rule 7.2 lists different types of security issues to which Listing Rules 7.1 and 7.1A do not apply.

Issues under an exception in Listing Rule 7.2 are specifically excluded from variables C and E and hence do not expend any of the entity’s placement capacity under Listing Rules 7.1 and 7.1A.2.<sup>58</sup> They can therefore be made

<sup>55</sup> Listing Rule 7.1A.3.

<sup>56</sup> And therefore a breach by the entity of Listing Rule 19.2.

<sup>57</sup> Pursuant to Listing Rule 18.8.

<sup>58</sup> In the case of Listing Rule 7.1, this is because any issue under Listing Rule 7.2 is specifically excluded from variable C in the first bullet point of the definition of that variable. In the case of Listing Rule 7.1A, this is because variable E in Listing Rule 7.1A.2 only counts securities specifically issued under that rule and not those issued under Listing Rule 7.2.

without obtaining shareholder approval under Listing Rule 7.1,<sup>59</sup> regardless of their size and the amount of placement capacity an entity has left under Listing Rules 7.1 and 7.1A.2.

If the securities being issued under Listing Rule 7.2 are fully paid ordinary securities, they may<sup>60</sup> also be included in variable A and therefore increase the base level of fully paid ordinary securities on which the 15% and 10% placement capacities in Listing Rules 7.1 and 7.1A.2 are calculated.

### 4.2 Exception 1 – pro rata issues

Listing Rule 7.2 exception 1<sup>61</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities to holders of ordinary securities made under a pro rata issue,<sup>62</sup> as well as an issue of securities to the holders of other equity securities to the extent that the terms of issue of those other equity securities permit participation in the pro rata issue.

These issues are excluded from the restrictions in Listing Rules 7.1 and 7.1A as all security holders have an opportunity to participate in the issue and to maintain their proportionate equity interest in the entity.

### 4.3 Exception 2 – underwritings of pro rata issues

Listing Rule 7.2 exception 2<sup>63</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities under an agreement to underwrite the shortfall<sup>64</sup> on:

- a pro rata issue to holders of ordinary securities; or
- a pro rata issue to holders of ordinary securities and to holders of other equity securities to the extent that the terms of issue of the equity securities permit participation in the pro rata issue.

These issues are excluded from the restrictions in Listing Rules 7.1 and 7.1A since the pro rata nature of the underlying issue ensures that all security holders have had an opportunity to participate in the issue and to maintain their proportionate equity interest in the entity.

To qualify for this exception, the entity must have disclosed in the Appendix 3B lodged under Listing Rule 3.10.3 in relation to the pro rata issue:

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<sup>59</sup> Although in some cases it may require approval under a different Listing Rule or other legal requirement – for example, exception 8, which applies to issues approved by security holders under item 7 of section 611 of the Corporations Act, and exception 14, which applies to issues of securities that have been approved by security holders under Listing Rule 10.11 or 10.14.

<sup>60</sup> They will count in variable A if they were issued:

- under an exception in Listing Rule 7.2 other than exception 9, 16 or 17;
- on the conversion of convertible securities within Listing Rule 7.2 exception 9 where the issue of the convertible securities was approved or taken to be approved under Listing Rule 7.1 or 7.4;
- under an agreement to issue securities within Listing Rule 7.2 exception 16 where the agreement was approved or taken to be approved under Listing Rule 7.1 or 7.4; or
- otherwise with approval under Listing Rule 7.1 or 7.4 (for example, under an agreement to issue securities within Listing Rule 7.2 exception 17 where the issue was subsequently approved under Listing Rule 7.1 in accordance with that exception).

See the first, second and third bullet points of Listing Rule 7.1 and notes 11, 12 and 13 above.

<sup>61</sup> There is an equivalent exception in Listing Rule 10.12 exception 1, meaning that a related party or other person caught by Listing Rule 10.11 can participate in a pro rata issue without obtaining security holder approval under Listing Rule 10.11.

<sup>62</sup> A pro rata issue must comply with Listing Rule 7.11. The issue can be renounceable or non-renounceable, although if the theoretical rights price for the issue is less than 0.1 cents, the lowest price point at which securities can be traded on ASX, as a practical matter, it will have to be non-renounceable. An issue is not precluded from being a pro rata issue for the purposes of the Listing Rules because security holders with addresses outside Australia and New Zealand are excluded from the issue under Listing Rule 7.7.1 or because security holders are allowed to subscribe for a greater number of securities than their entitlement under Listing Rule 7.11.4 (see the note to Listing Rule 7.2 exception 1 and the definition of “pro rata issue” in Listing Rule 19.12).

<sup>63</sup> There is an equivalent exception in Listing Rule 10.12 exception 2, meaning that a related party or other person caught by Listing Rule 10.11 can underwrite a pro rata issue without obtaining security holder approval under Listing Rule 10.11.

<sup>64</sup> Where security holders with addresses outside Australia and New Zealand are excluded from an issue under Listing Rule 7.7.1, ASX regards the securities that would otherwise have been issued to them as forming part of the shortfall.

- the name of the underwriter(s);
- the extent of the underwriting;
- the fee or commission payable to the underwriter(s); and
- a summary of the material circumstances where the underwriter(s) have the right to avoid or change their obligations.

It must also make the issue not later than 15 business days after the close of the offer.

To fit within this exception, the arrangement with the underwriter must constitute a genuine underwriting. ASX agrees with the views expressed by the Australian Securities and Investments Commission (“ASIC”) in this regard:

*“A central element of underwriting is the assumption of risk by the underwriter—in particular the obligation to subscribe for, or nominate other persons to subscribe for, shares in the event of a shortfall ...*

*Where an arrangement does not, in substance, involve the assumption of this risk, we take the view that the arrangement is not underwriting. This includes arrangements:*

- (a) incorporating terms or conditions that, in the circumstances, effectively give the ‘underwriter’ a general discretion to terminate the underwriting arrangement from the outset (e.g. terms or conditions giving the underwriter a termination right if one or more events over which the underwriter has effective control occur); or*
- (b) that may otherwise be terminated in circumstances that mean that the ‘underwriter’ does not, in effect, bear the risk of the shortfall.*

*For example, arrangements that permit the underwriter to be relieved of its obligations following a default by a sub-underwriter—either entirely through termination of the agreement, or by reducing the amount of the underwriting commitment by the amount in default—seek to relieve the underwriter of their obligation to subscribe for securities in the event of a shortfall. Accordingly, we do not consider such arrangements to constitute ‘underwriting’.*

*Further, arrangements that permit the underwriter to terminate on the basis of an event that is certain, or near certain, to occur (such as a token fall in a relevant market index) are also likely to mean that the underwriter has an option to underwrite and does not, in substance, assume shortfall risk.”<sup>65</sup>*

It should be noted that exception 2 only applies to issues of securities to make up the underwritten shortfall from a pro rata issue. It does not apply to any other issues of securities under an underwriting agreement (for example, in payment of the underwriting fee or any other amount due to the underwriter under the agreement). These other types of issues will therefore only be able to be made without security holder under Listing Rule 7.1 if the entity has sufficient placement capacity available at the time under Listing Rules 7.1 and (if applicable) 7.1A.

#### 4.4 Exception 3 – allocation of shortfalls from pro rata issues

Listing Rule 7.2 exception 3<sup>66</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities to make up the shortfall<sup>67</sup> on:

- a pro rata issue to holders of ordinary securities; or

<sup>65</sup> See ASIC Regulatory Guide 6 *Takeovers: Exceptions to the general prohibition* at paragraphs 6.148 – 6.151. *A fortiori*, someone who has given an undertaking to place securities on a “best endeavours” basis is not an underwriter for the purposes of exception 2.

<sup>66</sup> There is no equivalent exception in Listing Rule 10.12 to Listing Rule 7.2 exception 3. Accordingly, a related party or other person caught by Listing Rule 10.11 can only participate in an issue of equity securities to make up the shortfall on a pro rata issue if they receive specific approval to do so under Listing Rule 10.11.

<sup>67</sup> See note 64 above.



- a pro rata issue to holders of ordinary securities and to holders of other equity securities to the extent that the terms of issue of the equity securities permit participation in the pro rata issue.

These issues again are excluded from the restrictions in Listing Rules 7.1 and 7.1A since the pro rata nature of the underlying issue ensures that all security holders have had an opportunity to participate in the issue and to maintain their proportionate equity interest in the entity.

To fall within exception 3, the following additional conditions must be satisfied:

- the directors of the entity (or if the entity is a trust, the responsible entity of the trust) must have stated as part of the offer that they reserve the right to issue the shortfall and what their allocation policy will be in relation to the shortfall;
- the entity must make the issue no later than 3 months after the close of the offer; and
- the issue price must also not be less than the price at which the securities were offered under the pro rata issue.

In meeting the requirement to state their allocation policy, the directors (or in the case of a listed trust, the responsible entity) should be reasonably specific. It is not sufficient, for example, for them simply to state that they reserve the right to allocate the shortfall in their discretion. They should also state the factors they will take into account in exercising that discretion.

#### 4.5 Exception 4 – DRPs

Listing Rule 7.2 exception 4 excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities under:

- under a dividend or distribution plan (DRP);<sup>68</sup> or
- an agreement to underwrite the shortfall on a DRP<sup>69</sup> where:
  - details of the underwriting agreement were disclosed prior to the date for payment of the dividend or distribution in accordance with Listing Rule 3.10.9; and
  - the entity makes the issue within 15 business days after the date for payment of the dividend or distribution.<sup>70</sup>

In each case above, the DRP must not impose a limit on participation and security holders must be able to elect to receive all of their dividend or distribution as securities.

These types of issues again are excluded from the restrictions in Listing Rules 7.1 and 7.1A because all security holders have an opportunity to participate in the DRP and to maintain their proportionate equity interest in the entity.

If a DRP does impose a limit on participation – for example, a maximum dollar limit on the amount of reinvestment or a maximum limit on the number of securities that a security holder can acquire under the DRP – any issue under the DRP will not qualify under exception 4 and will only be able to be made without security holder approval under Listing Rule 7.1 if the entity has sufficient placement capacity available at the time under Listing Rules 7.1 and (if applicable) 7.1A.

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<sup>68</sup> There is an equivalent exception to this limb of Listing Rule 7.2 exception 4 in Listing Rule 10.12 exception 3, meaning that a related party or other person caught by Listing Rule 10.11 can participate in a DRP that meets the requirements above without obtaining security holder approval under Listing Rule 10.11.

<sup>69</sup> Under Listing Rule 3.10.9, if an entity enters into an underwriting agreement in relation to a DRP, it must immediately tell ASX the name of the underwriter, the extent of the underwriting, the fee or commission payable, and a summary of the material circumstances where the underwriter has the right to avoid or change its obligations.

<sup>70</sup> There is no equivalent exception to this limb of Listing Rule 7.2 exception 4 in Listing Rule 10.12, meaning that a related party or other person caught by Listing Rule 10.11 can only take up equity securities as an underwriter of a DRP if they receive specific approval to do so under Listing Rule 10.11.

### 4.6 Exception 5 – SPPs

Listing Rule 7.2 exception 5<sup>71</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities under a security purchase plan (“SPP”) provided:

- the number of securities to be issued is not greater than 30% of the number of fully paid ordinary securities already on issue; and
- the issue price of the securities is at least 80% of the VWAP for securities in that class, calculated over the last 5 days on which sales in the securities were recorded, either before the day on which the issue is announced or before the day on which the issue is made.

Exception 5 is only available once in any 12 month period. This applies even where the size of the issue is less than the 30% limit in the first of the two bullet points above.<sup>72</sup>

Issues under an SPP are excluded from the restrictions in Listing Rules 7.1 and 7.1A because all security holders have an opportunity to participate in the issue, up to the \$15,000 cap imposed in ASIC Class Order CO 09/425 (as discussed below).

An SPP is defined to have the same meaning as a “purchase plan” in ASIC Class Order CO 09/425 *Share and interest purchase plans*.<sup>73</sup> This Class Order allows ASX listed companies and managed investment schemes to offer securities to existing members without a prospectus or PDS provided they meet certain conditions summarised below. The offer must be made to each registered holder of securities in the class in question whose address (as recorded in the register of members) is in a place in which, in the reasonable opinion of the entity, it is lawful and practical for the entity to offer and issue securities to that person.<sup>74</sup>

For an entity to qualify for the relief in Class Order CO 09/425, the following conditions must be satisfied:<sup>75</sup>

- the entity must be in compliance with its continuous disclosure and financial reporting obligations;
- offers of securities under the SPP must only be made to registered holders of securities in the same class;
- each offer must be made on similar terms and conditions and on a non-renounceable basis;
- a registered holder who is not a custodian must not be issued more than \$15,000 worth of securities under the class order relief in any consecutive 12 month period;
- where a registered holder is a custodian:
  - the custodian must certify in writing to the entity that certain conditions have been met; and
  - the entity must be reasonably satisfied that in any consecutive 12 month period, the total application price of the securities to be issued to, or in relation to, any beneficiary of that custodian under the class order relief (excluding securities applied for by the custodian on behalf of a beneficiary but not issued) is not more than \$15,000;

<sup>71</sup> There is an equivalent exception in Listing Rule 10.12 exception 4, meaning that a related party or other person caught by Listing Rule 10.11 can participate in an SPP that meets the requirements above without obtaining security holder approval under Listing Rule 10.11.

<sup>72</sup> ASX has sometimes been approached by entities seeking a waiver of the requirement that exception 5 can only be used once in any 12 month period. ASX will only contemplate such a waiver where the total number of shares issued or to be issued under the entity’s SPP over a 12 month period complies with the 30% limit mentioned in the text and the entity satisfies ASX that it will be in compliance with, or has an exemption from, the \$15,000 issuance limit in any 12 month period imposed under ASIC Class Order CO 09/425 *Share and interest purchase plans*.

<sup>73</sup> Listing Rule 19.12. See also ASIC Regulatory Guide 125 *Share purchase plans*. [ASX notes that this Class Order is due to be replaced shortly.]

<sup>74</sup> See paragraph (a) of the definition of “purchase plan” in ASIC Class Order CO 09/425.

<sup>75</sup> This is a summary only of the conditions that must be satisfied to qualify for the relief provided in ASIC Class Order CO 09/425. Entities wishing to rely on that relief should read that Class Order in full.

- the entity must have lodged a cleansing notice with ASX;
- the issue price must be less than the market price during a specified period (determined by the entity) in the 30 days before either the date of the offer or the date of the issue;
- the written offer document must disclose the method used to calculate the issue price, the relationship between the issue and market price, and the risk that the market price may change between the date of the offer and the date when the securities are issued; and
- the entity's securities must not have been suspended from trading on ASX for more than a total of 5 days during the 12 months before the day on which the offer is made under the SPP or, if the securities have been quoted on ASX for less than 12 months, during the period of quotation.

For an issue of securities to fall within exception 5, the entity must meet all of the conditions in ASIC Class Order CO 09/425 apart from the last requirement above. If the entity does not meet the last requirement, it can still avail itself of exception 5 but it will not qualify for the relief in ASIC Class Order CO 09/425 and will therefore have to prepare a prospectus or PDS for the offer under the SPP.

Unlike exceptions 2 and 4, exception 5 does not extend to an issue of securities under an agreement to underwrite the shortfall on an SPP. Accordingly, such an issue will only be able to be made without security holder approval under Listing Rule 7.1 if the entity has sufficient placement capacity available at the time under Listing Rules 7.1 and (if applicable) 7.1A.

It should be noted that a standard waiver is available under Guidance Note 17 *Waivers and In-Principle Advice*, where an entity is seeking approval under Listing Rule 7.1 to an issue of securities under an SPP to which exception 5 of Listing Rule 7.2 would otherwise have applied but for the fact that the number of securities to be issued under the SPP is greater than 30% of the number of fully paid ordinary securities already on issue or because the issue price of the securities is less than 80% of the average market price for securities in that class. In such a case, ASX will grant a standard waiver of Listing Rule 7.3.9<sup>76</sup> to permit a resolution in a notice of meeting approving the issue of securities under the SPP not to include a voting exclusion statement that excludes the votes of any person who may participate in the SPP or any associate of such a person, provided:

- the SPP is not underwritten; or
- if the SPP is underwritten, the entity excludes any votes cast on the resolution by any proposed underwriter or sub-underwriter of the SPP and their associates.

#### 4.7 Exceptions 6 and 7 – takeovers and mergers

Listing Rule 7.2 exception 6<sup>77</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities under a takeover bid or under a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act.

Listing Rule 7.2 exception 7 excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue to fund the cash consideration payable under a takeover bid or under a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act, where the terms of the issue are disclosed in the takeover or scheme documents.

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 managed investment scheme that is made in compliance with Chapter 6 of the Corporations Act.

<sup>76</sup> The requirement for a notice of meeting proposing a resolution to approve an issue of securities under Listing Rule 7.1 to include a voting exclusion statement. See also Listing Rules 14.11 and 14.11.1.

<sup>77</sup> There is an equivalent exception in Listing Rule 10.12 exception 5, meaning that a related party or other person caught by Listing Rule 10.11 can participate in an issue made under a takeover bid or a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act without obtaining security holder approval under Listing Rule 10.11.

Exceptions 6 and 7 therefore only apply to a takeover bid or merger by way of scheme of arrangement involving Australian entities that are regulated by the Corporations Act.

Exceptions 6 and 7 have been included as a concession to listed entities, in recognition of the fact that a takeover or acquisition by way of a scheme of arrangement could be difficult to complete in circumstances where the entity is required to seek approval from its security holders before it can issue securities under or to fund the takeover or scheme. A requirement for security holder approval could also put the entity at a competitive disadvantage to an unlisted bidder/acquirer in a contested takeover/acquisition.

Exceptions 6 and 7 also recognise the robust regulatory framework and the high level of regulatory and curial oversight applied to takeovers and schemes in Australia, including the regulation of unacceptable conduct and the provision of collateral benefits in Chapter 6 of the Corporations Act.

In an appropriate case, ASX will consider granting a waiver to extend exceptions 6 and 7 to a merger with an Australian trust by way of 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.<sup>78</sup> ASX will also consider granting a waiver to extend exceptions 6 and 7 to an entity making a takeover offer for, or merging with, a foreign company or trust that can satisfy ASX that the takeover or merger is subject to an acceptable regulatory regime equivalent to the Corporations Act.<sup>79</sup>

To avoid this concession being abused, exceptions 6 and 7 are not available, and ASX will not grant the waivers referred to above, if the issue in question is being made under or to fund a “reverse takeover” (or, in the case of a takeover offer for, or merger with, a foreign company or trust, the foreign equivalent of a “reverse takeover”).

A “reverse takeover” is defined as a takeover bid or a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act where an entity is proposing to acquire control of another body and the aggregate number of equity securities issued or to be issued by the entity:

- under the takeover bid or scheme; and/or
- to fund the cash consideration payable under the takeover bid or scheme,

is equal to or greater than the number of fully paid ordinary securities on issue in the entity at the date of announcement of the takeover bid or scheme. Separate issues may be aggregated if, in ASX’s opinion, they form part of the same commercial transaction.<sup>80</sup>

It should be noted that the exceptions in Listing Rule 7.2 operate independently of each other. Hence the fact that exceptions 6 and 7 do not apply to an issue under or to fund a reverse takeover does not mean that other exceptions are not available for that purpose. For example, an entity could use an underwritten pro rata issue with a placement of the shortfall under exceptions 1, 2 and 3, or an issue under a DRP under exception 4 or an SPP under exception 5, to fund some or all of the cash consideration payable under a takeover bid or scheme without requiring any security holder approval under Listing Rule 7.1. An entity may also have some placement capacity available to it under Listing Rules 7.1 and 7.1A.2 that it can use for these purposes.

However, given the way in which “reverse takeover” is defined and the size of the issue involved (100%+), an issue of securities under or to fund a reverse takeover will in many cases exceed the 15% and 10% placement limits in

<sup>78</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 responsible entity of the trust. Note that this waiver will not be granted if the entity is, in substance, engaging in a reverse takeover of the trust.

<sup>79</sup> ASX has previously granted such waivers in relation to takeovers or mergers under the laws of the US, UK, New Zealand, Canada, Papua New Guinea, Singapore and Canada. Note again that this waiver will not be granted if the entity is, in substance, engaging in a reverse takeover of the foreign company or trust.

<sup>80</sup> Listing Rule 19.12.

Listing Rules 7.1 and 7.1A.2 respectively and consequently require security holder approval under Listing Rule 7.1 before it can be made.

#### 4.8 Exception 8 – issues approved under item 7 of section 611

Listing Rule 7.2 exception 8<sup>81</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities approved under item 7 of section 611 of the Corporations Act. These issues are excluded on the basis that the security holder approval requirements under item 7 of section 611 are more extensive than those under Listing Rules 7.1 and 7.1A<sup>82</sup> and it would be an unnecessary duplication to require an additional security holder approval under Listing Rule 7.1 or 7.1A.

Item 7 of section 611, and therefore exception 8, only applies to an Australian company or registered managed investment scheme that is subject to the takeover provisions in Chapter 6 of the Corporations Act.

In an appropriate case, ASX will consider granting a waiver to extend exception 8 to an acquisition of securities in a foreign company or trust that is approved under equivalent legislation in its place of establishment.

It should be noted that, unlike issues made with security holder approval under Listing Rule 7.1, issues made with approval under item 7 of section 611 are not constrained by any time limit.<sup>83</sup> An entity must include a summary in its annual report of any issues of securities approved for the purposes of item 7 of section 611 of the Corporations Act which have not been completed as at the date of the annual report.<sup>84</sup>

#### 4.9 Exception 9 – conversion of convertible securities

Listing Rule 7.2 exception 9<sup>85</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities as a result of the conversion of convertible securities.<sup>86</sup> The entity must have issued the convertible securities:

- (a) before it was listed and disclosed the existence and material terms of the convertible securities in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3; or
- (b) after it was listed and complied with the Listing Rules when it did so.

This is a technical exception intended to ensure that the Listing Rules deal appropriately with convertible securities. The time at which an issue of convertible securities is tested to determine whether it falls within an entity's placement capacity under Listing Rules 7.1 and 7.1A is when they are issued, not when they are converted. If at the time they are issued they comply with the Listing Rules, any subsequent conversion in accordance with their terms falls outside of Listing Rules 7.1 and 7.1A.

In the case of (a) above, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and material terms of the convertible securities in its listing prospectus, PDS or information memorandum as an implicit approval by security holders to the issue of the convertible securities. However, this does not mean that the entity has carte blanche to issue whatever convertible securities it wants pre-listing. ASX may refuse to admit the entity to the official list and to quote its securities if ASX considers

<sup>81</sup> There is an equivalent exception in Listing Rule 10.12 exception 6.

<sup>82</sup> Among other things, to comply with ASIC's regulatory guidance on item 7, an entity must obtain an independent expert's report opining on whether the issue is fair and reasonable to non-participating security holders.

<sup>83</sup> Although, an item 7 approval may need to be renewed if there is a material change in circumstances after the approval has been given and before the transaction is completed and may not be available for an acquisition that will complete in the distant future: see paragraphs 87 and 89 of ASIC Regulatory Guide 74 *Acquisitions approved by members*.

<sup>84</sup> Listing Rule 4.10.21.

<sup>85</sup> There is an equivalent exception in Listing Rule 10.12 exception 7.

<sup>86</sup> An option is a convertible security for the purposes of this exception (see the notes to Listing Rule 7.2 exception 9 and the definition of "convertible security" in Listing Rule 19.12). Recognising this, the term 'convertible' is defined to include 'exercisable' (see the definition of "convertible" in Listing Rule 19.12).

that the convertible securities breach Chapter 6 of the Listing Rules<sup>87</sup> or result in the entity not having an appropriate structure for a listed entity,<sup>88</sup> or it is otherwise appropriate for ASX to exercise its discretion to refuse the application.<sup>89</sup>

To meet the requirement in (a) above that the entity disclose the existence and material terms of the convertible securities in its listing prospectus, PDS or information memorandum, the entity should include in that document:<sup>90</sup>

- the names of the persons to whom the entity issued the convertible securities or the basis upon which those persons were identified or selected;<sup>91</sup>
- the number of convertible securities that were issued to them;
- a summary of the material terms of the convertible securities;
- the date or dates on which the convertible securities were issued;
- the price or other consideration the entity received for the issue; and
- the purpose of the issue, including the use or intended use of any funds raised by the issue.

To meet the requirement in (b) above that the entity must have complied with the Listing Rules when it issued the convertible securities, the issue must not only be made in compliance with the placement restrictions in Listing Rules 7.1 and 7.1A,<sup>92</sup> it also must not breach the prohibitions in Listing Rule 7.6, 7.9, 10.11 or 10.14.<sup>93</sup>

Where (a) applies, the issue of the convertible securities is taken to have been approved under Listing Rule 7.1.<sup>94</sup> This means that the convertible securities fit within the second bullet point in the definition of variable A in Listing Rule 7.1. Accordingly, if they are eventually converted into fully paid ordinary securities, those fully paid ordinary securities will count in variable A in Listing Rules 7.1 and 7.1A.2 from the moment they are issued.

Where (b) applies, the issue of the convertible securities is not taken to have been approved under Listing Rule 7.1. This means that to fit within the second bullet point in the definition of variable A, a post-listing issue of the convertible securities must have been expressly approved by security holders under Listing Rule 7.1 or 7.4.<sup>95</sup>

#### 4.10 Exception 10 – underwritten exercise of options

Listing Rule 7.2 exception 10<sup>96</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities under an agreement to underwrite the shortfall on an exercise of options. The exception is only available if:

- (a) the entity issued the options:

<sup>87</sup> Listing Rule 2.1 condition 1. This includes the requirement in Listing Rule 6.1 that the terms applying to the convertible securities are, in ASX's opinion, appropriate and equitable.

<sup>88</sup> Listing Rule 1.1 condition 1. See also section 3.1 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>89</sup> Listing Rule 1.19. See also section 2.8 of Guidance Note 1 *Applying for Admission – ASX Listings*.

<sup>90</sup> By analogy with the information required to be disclosed under Listing Rule 7.3 in a notice of meeting seeking security holder approval under Listing Rule 7.1.

<sup>91</sup> In the case of a placement to 10 or fewer persons, ASX would generally expect the entity to name those persons in its listing prospectus, PDS or information memorandum rather than describe the basis on which they were identified or selected.

<sup>92</sup> Note that Listing Rule 7.1A only permits an issue of convertible securities if they are in a class of securities that is already quoted on ASX: see section '3.5 The entity must be issuing securities in an existing class of quoted securities' on page 13.

<sup>93</sup> See '9.1 Listing Rule 7.6' on page 50, '9.2 Listing Rule 7.9' on page 51 and Guidance Note 25 *Issues of Securities to Related Parties*.

<sup>94</sup> As noted above, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and material terms of the convertible securities in its listing prospectus, PDS or information memorandum as de facto approval by security holders of those terms.

<sup>95</sup> This is the effect of the first and second bullet points in the definition of variable A in listing Rule 7.1.

<sup>96</sup> There is no equivalent exception in Listing Rule 10.12 to Listing Rule 7.2 exception 10, meaning that a related party or other person caught by Listing Rule 10.11 can only underwrite an exercise of options if they receive specific approval to do so under Listing Rule 10.11.

- (i) before it was listed and disclosed the existence and material terms of the options in the prospectus, PDS or information memorandum lodged with ASX under rule 1.1 condition 3; or
  - (ii) after it was listed and complied with the Listing Rules when it did so;
- (b) details of the underwriting agreement are disclosed prior to the expiry of the options in accordance with Listing Rule 3.11.3;<sup>97</sup> and
- (c) the underlying securities are issued within 15 business days after expiry of the options.

In the case of (a)(i) above, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and material terms of the options in its listing prospectus, PDS or information memorandum as an implicit approval by security holders to the issue of the options. Again, however, this does not mean that the entity has carte blanche to issue whatever options it wants pre-listing. ASX may refuse to admit the entity to the official list and to quote its securities if ASX considers that the options breach Chapter 6 of the Listing Rules or result in the entity not having an appropriate structure for a listed entity, or it is otherwise appropriate for ASX to exercise its discretion to refuse the application.<sup>98</sup>

To meet the requirement in (a)(i) above that the entity disclose the existence and material terms of the options in its listing prospectus, PDS or information memorandum, the entity should include in that document:<sup>99</sup>

- the names of the persons to whom the entity issued the options or the basis upon which those persons were identified or selected;<sup>100</sup>
- the number of options that were has issued to them;
- a summary of the material terms of the options;
- the date or dates on which the options were issued;
- the price or other consideration the entity received for the issue; and
- the purpose of the issue, including the use or intended use of any funds raised by the issue.

To meet the requirement in (a)(ii) above that the entity must have complied with the Listing Rules when it issued the options, the issue must not only be made in compliance with the placement restrictions in Listing Rules 7.1 and 7.1A,<sup>101</sup> it also must not breach the prohibitions in Listing Rule 7.6, 7.9, 10.11 or 10.14.<sup>102</sup>

#### 4.11 Exception 11 – preference shares

Listing Rule 7.2 exception 11<sup>103</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of preference shares which do not have any rights of conversion into another class of equity security.

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<sup>97</sup> Under Listing Rule 3.11.3, if an entity enters into an underwriting agreement for the exercise of options, it must immediately tell ASX the name of the underwriter, the extent of the underwriting, the fee or commission payable, and a summary of the material circumstances where the underwriter has the right to avoid or change its obligations.

<sup>98</sup> See the Listing Rules cited in notes 87, 88 and 89 above.

<sup>99</sup> By analogy with the information required to be disclosed under Listing Rule 7.3 in a notice of meeting seeking security holder approval under Listing Rule 7.1.

<sup>100</sup> In the case of a placement to 10 or fewer persons, ASX would generally expect the entity to name those persons in its listing prospectus, PDS or information memorandum rather than describe the basis on which they were identified or selected.

<sup>101</sup> Note that Listing Rule 7.1A only permits an issue of options if they are in a class of securities that is already quoted on ASX: see section '3.5 The entity must be issuing securities in an existing class of quoted securities' on page 13.

<sup>102</sup> See the materials cited in note 93 above.

<sup>103</sup> There is no equivalent exception in Listing Rule 10.12 to Listing Rule 7.2 exception 11, meaning that a related party or other person caught by Listing Rule 10.11 can only take up preference shares if they receive specific approval to do so under Listing Rule 10.11.

The preference shares in question must comply with Chapter 6 of the Listing Rules. Among other things, this means that they must have limited voting rights and they must be entitled to a dividend or distribution at a commercial rate and to a return of capital upon a winding up, in preference to the holders of ordinary securities.<sup>104</sup>

Issues of these types of securities are excluded from Listing Rules 7.1 and 7.1A as they are more akin to debt securities than equity securities and do not raise the same dilution issues that an issue of other types of equity securities may raise.

#### 4.12 Exception 12 – forfeited shares

Listing Rule 7.2 exception 12 excludes from the restrictions in Listing Rules 7.1 and 7.1A a sale or reissue of forfeited shares<sup>105</sup> within 6 weeks after the day on which the call on the shares was due and payable.

This exception is included as a concession to listed companies to facilitate the sale or reissue of forfeited shares in a timely manner. Otherwise, the need to obtain shareholder approval under Listing Rule 7.1 before the sale or reissue could add undue risk and delay to completion of the transaction.

There is also no dilution to existing shareholders from a sale or reissue of forfeited shares.

#### 4.13 Exception 13 – approved issues under employee incentive schemes

Listing Rule 7.2 exception 13 excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities under an employee incentive scheme if within 3 years before the issue date:

- (a) in the case of a scheme established before the entity was listed – a summary of the terms of the scheme<sup>106</sup> and the maximum number of securities proposed to be issued under the scheme were set out in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3;<sup>107</sup> or
- (b) holders of ordinary securities have approved the issue of securities under the scheme as an exception to Listing Rule 7.2.

In the latter case, the notice of meeting must have included a summary of the terms of the scheme,<sup>108</sup> the number of securities issued under the scheme since the entity was listed or the date of the last approval under paragraph (b) above, the maximum number of securities proposed to be issued under the scheme following the approval and a voting exclusion statement<sup>109</sup> that precludes any person who is eligible and likely to be extended an offer to participate in the employee incentive scheme and their associates from voting in favour of the Listing Rule 10.14 resolution.<sup>110</sup>

These issues are excluded from Listing Rules 7.1 and 7.1A on the basis that they have effectively already been approved by security holders and to require a separate approval under Listing Rule 7.1 would therefore be an unnecessary duplication. In the case of (b) above, the approval is explicit. In the case of (a) above, the approval is

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<sup>104</sup> See Listing Rules 6.3 – 6.6.

<sup>105</sup> Under Listing Rule 7.1B.3, the sale or reissue of forfeited equity securities is treated as an issue of equity securities under Listing Rules 7.1 and 7.1A.

<sup>106</sup> The phrase “terms of the scheme” includes terms, conditions, rules, regulations or guidelines formulated to introduce or administer an employee incentive scheme (Listing Rule 19.12).

<sup>107</sup> For these purposes, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed a summary of the terms of the scheme and the maximum number of securities proposed to be issued under the scheme in its listing prospectus, PDS or information memorandum as de facto approval by security holders of the issue under the scheme. Despite this approval, the entity must still meet the requirements in Listing Rule 1.1 condition 1 that its structure and operations are appropriate for a listed entity and in Listing Rule 2.1 condition 1 that its securities comply with Chapter 6 of the Listing Rules, including the requirement in Listing Rule 6.1 that the terms of each class of its equity securities are, in ASX’s opinion, appropriate and equitable. If ASX considers the employee incentive scheme infringes these requirements, it may exercise its discretion under Listing Rule 1.19 to reject the entity’s listing application.

<sup>108</sup> See note 106 above.

<sup>109</sup> See ‘7.7 Voting exclusions’ on page 43.

<sup>110</sup> Listing Rule 14.11.1.



implicit and evidenced by security holders agreeing to invest in the entity with the material terms of the scheme having been disclosed in the entity's listing prospectus, PDS or information memorandum.

Exception 13 is only available if and to the extent that the number of securities issued under the scheme does not exceed the maximum number set out in the entity's prospectus, PDS or information memorandum (in the case of (a) above) or in the notice of meeting (in the case of (b) point above).<sup>111</sup> An issue of securities above that maximum will only be able to be made without security holder under Listing Rule 7.1 if the entity has sufficient placement capacity available at the time under Listing Rules 7.1 and (if applicable) 7.1A.

Exception 13 also ceases to be available if there is a material change to the terms of the scheme from those set out in the entity's prospectus, PDS or information memorandum (in the case of (a) above) or in the notice of meeting (in the case of (b) above).<sup>112</sup> If there has been a material change to the terms of the scheme, the scheme must be freshly approved by security holders as an exception under Listing Rule 7.2. If the approval is not refreshed, an issue under the scheme will only be able to be made without security holder under Listing Rule 7.1 if the entity has sufficient placement capacity available at the time under Listing Rules 7.1 and (if applicable) 7.1A.

#### **4.14 Exception 14 – issues approved under Listing Rule 10.11 or 10.14<sup>113</sup>**

Listing Rule 7.2 exception 14<sup>114</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue of securities made with the approval of holders of ordinary securities under Listing Rule 10.11 or 10.14.

These issues are excluded from Listing Rules 7.1 and 7.1A on the basis that they have already been approved by security holders and therefore requiring a separate approval under Listing Rule 7.1 would be an unnecessary duplication.

It should be noted that the exception for an issue of securities under Listing Rule 10.11 only applies if the issue is completed within 1 month after the date of the meeting approving the issue.<sup>115</sup> This contrasts with the 3 or 6 month period permitted for issues to unrelated parties made with the approval of security holders under Listing Rule 7.1.<sup>116</sup> The shorter period is intended to reduce the likelihood of there being a material change in circumstances between the time the issue is approved and the time it is made.

#### **4.15 Exception 15 – issues of certain options and rights under employee incentive schemes**

Listing Rule 7.2 exception 15<sup>117</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A a grant of options or other rights to acquire securities under an employee incentive scheme, where the securities to be acquired on the exercise of the options or in satisfaction of the rights are required by the terms of the scheme<sup>118</sup> to be purchased on-market.

These issues are excluded from Listing Rules 7.1 and 7.1A on the basis that they are effectively remuneration arrangements that properly fall to the directors for approval. Since the securities to be acquired on the exercise of the options or in satisfaction of the rights must be purchased on-market, there is no dilution to existing security holders.

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<sup>111</sup> See the note to exception 13.

<sup>112</sup> Again, see the note to exception 13.

<sup>113</sup> See also Guidance Note 25 *Issues of Securities to Related Parties*.

<sup>114</sup> There is an equivalent exception in Listing Rule 10.12 exception 8 for issues made with the approval of holders of ordinary securities under Listing Rule 10.14.

<sup>115</sup> Listing Rule 10.13.5.

<sup>116</sup> Listing Rule 7.3.4.

<sup>117</sup> There is an equivalent exception in Listing Rule 10.12 exception 9. See also Listing Rule 10.15B.

<sup>118</sup> See note 106 above.

### 4.16 Exception 16 – agreements to issue securities

Listing Rule 7.2 exception 16<sup>119</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an issue under an agreement to issue securities. The entity must have entered into the agreement:

- (a) before it was listed and disclosed the existence and material terms of the agreement in the prospectus, PDS or information memorandum lodged with ASX under Listing Rule 1.1 condition 3; or
- (b) after it was listed and complied with the Listing Rules when it did so.

This is a technical exception intended to ensure that the Listing Rules deal appropriately with agreements to issue securities. The time at which an agreement to issue securities is tested to determine whether it falls within an entity's placement capacity under Listing Rules 7.1 and 7.1A is the time the agreement is entered into. If at that time the agreement complies with the Listing Rules, any subsequent issue of securities in accordance with the agreement falls outside of Listing Rules 7.1 and 7.1A.

In the case of (a) above, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and material terms of the agreement to issue securities in its listing prospectus, PDS or information memorandum as an implicit approval by security holders of the agreement. Again, however, this does not mean that the entity has carte blanche to enter into whatever agreements to issue securities it wants pre-listing. ASX may refuse to admit the entity to the official list and to quote its securities if ASX considers that the securities the subject of the agreement breach Chapter 6 of the Listing Rules or result in the entity not having an appropriate structure for a listed entity, or it is otherwise appropriate for ASX to exercise its discretion to refuse the application.<sup>120</sup>

To meet the requirement in (a) above that the entity disclose the existence and material terms of the agreement in its listing prospectus, PDS or information memorandum, the entity should include in that document:<sup>121</sup>

- the names of the persons to whom the entity has agreed to issue the securities;<sup>122</sup>
- the number and class of securities the entity has agreed to issue;
- if the securities are not fully paid ordinary securities, a summary of the material terms of the securities;
- the date or dates on which the securities will be issued;
- the price or other consideration the entity has received or will receive for the issue;
- the purpose of the issue, including the intended use of any funds raised by the issue; and
- a summary of any other material terms of the agreement.

To meet the requirement in (b) above that the entity must have complied with the Listing Rules when it entered into the agreement, the agreement must not only be made in compliance with the placement restrictions in Listing Rules 7.1 and 7.1A<sup>123</sup> it also must not breach the prohibitions in Listing Rule 7.6, 7.9, 10.11 or 10.14.<sup>124</sup>

<sup>119</sup> There is an equivalent exception in Listing Rule 10.12 exception 10.

<sup>120</sup> See the Listing Rules cited in notes 87, 88 and 89 above.

<sup>121</sup> By analogy with the information required to be disclosed under Listing Rule 7.3 in a notice of meeting seeking security holder approval under Listing Rule 7.1.

<sup>122</sup> Again, in the case of a placement to 10 or fewer persons, ASX would generally expect the entity to name those persons in its listing prospectus, PDS or information memorandum rather than describe the basis on which they will be identified or selected.

<sup>123</sup> Note that Listing Rule 7.1A only permits an agreement to issue securities if they are in a class of securities that is already quoted on ASX: see section '3.5 The entity must be issuing securities in an existing class of quoted securities' on page 13.

<sup>124</sup> See the materials cited in note 93 above.

Where (a) applies, the agreement to issue securities is taken to have been approved under Listing Rule 7.1.<sup>125</sup> This means that the agreement to issue the securities fits within the third bullet point in the definition of variable A in Listing Rule 7.1. Accordingly, if the agreement provides for an issue of fully paid ordinary securities, those fully paid ordinary securities will count in variable A in Listing Rules 7.1 and 7.1A.2 from the moment they are issued.<sup>126</sup>

Where (b) applies, the agreement to issue securities is not taken to have been approved under Listing Rule 7.1. This means that to fit within the third bullet point in the definition of variable A, a post-listing agreement to issue securities must have been expressly approved by security holders under Listing Rule 7.1 or 7.4.<sup>127</sup>

#### 4.17 Exception 17 – issues conditional on prior approval by security holders

Listing Rule 7.2 exception 17<sup>128</sup> excludes from the restrictions in Listing Rules 7.1 and 7.1A an agreement to issue equity securities that is conditional on holders of ordinary securities approving the issue under Listing Rule 7.1 before the issue is made. If an entity relies on this exception it must not issue the equity securities without such approval.

This too is a technical exception to address the point that Listing Rule 7.1 applies to an agreement to issue securities and requires security holder to approve the agreement before it is entered into. This exception allows an entity to enter into an agreement to issue equity securities that would otherwise fall outside its placement capacity under Listing Rule 7.1 and 7.1A.2 on condition that the issue of the securities is approved by the holders of ordinary securities before it is made.

### 5. The application of Listing Rules 7.1 and 7.1A to convertible securities

The application of Listing Rules 7.1 and 7.1A to convertible securities raises particular issues that are explored in greater detail in this section.

#### 5.1 What is a convertible security?

A “convertible security” is any security that is convertible<sup>129</sup> by the holder, by the issuer,<sup>130</sup> or otherwise by its terms of issue, into equity securities.<sup>131</sup> For the avoidance of doubt, this includes instruments that automatically convert into equity securities upon the occurrence of specified events.<sup>132</sup>

Instruments styled as convertible notes, convertible bonds, convertible preference shares, performance shares<sup>133</sup> and options<sup>134</sup> will typically fall within the definition of “convertible security” in the Listing Rules.

<sup>125</sup> As noted above, the Listing Rules effectively treat the fact that security holders have agreed to invest in the entity after it has disclosed the existence and material terms of an agreement to issue securities in its listing prospectus, PDS or information memorandum as de facto approval by security holders of those terms.

<sup>126</sup> Note that paragraph (a) of exception 16 can also apply to an issue of securities under the entity's listing prospectus, PDS or information memorandum itself. Hence, if an entity issues securities under its listing prospectus, PDS or information memorandum before it is admitted to the official list (as most do), they count in variable A because they are “on issue at the commencement of the relevant period”, within the opening paragraph of the definition of variable A. If the entity issues securities under its listing prospectus, PDS or information memorandum after it is admitted to the official list (as it may do if its securities are initially traded in a conditional market following listing and quotation), the issue is taken under Listing Rule 7.2 exception 16 to have been approved under Listing Rule 7.1 and the securities count in variable A from the moment they are issued under the third bullet point in the definition of variable A.

<sup>127</sup> This is the effect of the first and third bullet points in the definition of variable A in listing Rule 7.1.

<sup>128</sup> There is an equivalent exception in Listing Rule 10.12 exception 11.

<sup>129</sup> The term ‘convertible’ includes exercisable (see the definition of that term in Listing Rule 19.12).

<sup>130</sup> ASX prefers to describe a security that is convertible into equity securities at the option of the issuer as ‘transformable’ rather than ‘convertible’ (see Guidance Note 34 *Naming Conventions for Debt and Hybrid Securities*).

<sup>131</sup> See the definition of “convertible security” in Listing Rule 19.12.

<sup>132</sup> See the note to the definition of “convertible security” in Listing Rule 19.12. ASX prefers to describe a security that automatically converts into equity securities upon the occurrence of certain events as ‘converting’ rather than ‘convertible’ (see Guidance Note 34 *Naming Conventions for Debt and Hybrid Securities*).

<sup>133</sup> See Guidance Note 19 *Performance Shares*.

<sup>134</sup> See note 86 above.

With one exception, convertible securities are generally classified as equity securities for the purposes of the Listing Rules.<sup>135</sup> This applies whether they take the form of a convertible debt instrument (such as a convertible note or convertible bond)<sup>136</sup> or a convertible equity instrument (such as a convertible preference share, performance share or option). It also applies whether they convert into fully paid ordinary securities in the entity (as occurs in the vast majority of cases) or some other form of equity security.<sup>137</sup>

The one exception to this general rule is that ASX has decided that a security<sup>138</sup> issued by an APRA-regulated entity that falls within the definition of “convertible security” in rule 19.12 solely because it can be converted on the occurrence of a “non-viability trigger event” and/or a “capital trigger event” and that would otherwise be a debt security but for the inclusion of those provisions, should be classified as a debt security rather than an equity security for the purposes of the Listing Rules.<sup>139</sup> For these purposes, a “non-viability trigger event” means a provision in the terms of issue of a debt security that allows APRA, solely at its discretion, to require the debt security to be written off or converted into equity securities because, without that occurring, the entity would be non-viable. A “capital trigger event” means that APRA has determined, or the entity has determined and notified APRA, that the ratio of the entity’s common equity capital to its risk-adjusted assets has fallen below a minimum threshold fixed by APRA and specified in the terms of issue of the security.

Subject to this one exception, since convertible securities are equity securities for the purposes of the Listing Rules, an issue of, or agreement to issue, convertible securities potentially triggers the restrictions on issuances of equity securities in Listing Rules 7.1 and 7.1A.

## 5.2 Calculating whether an issue of convertible securities falls within an entity’s placement capacity

To work out whether an entity has the placement capacity to issue, or agree to issue, particular convertible securities under Listing Rule 7.1 or 7.1A.2, to “compare apples with apples”, it is first necessary to translate those convertible securities to the number of fully paid ordinary securities they represent.

For these purposes, unless ASX determines otherwise, convertible securities are counted as the maximum number of fully paid ordinary securities into which they can be converted.<sup>140</sup> This applies no matter how likely or unlikely it is that the convertible security may or will convert into the underlying ordinary securities and no matter how far out into the future conversion may or will occur. In other words, there is no discount for uncertainty or for the time value of money.

Section 5.4 below has guidance on how to determine this maximum number.

## 5.3 How convertible securities are counted in variables C and E

Similarly, if an entity has issued or agreed to issue convertible securities during the “relevant period”, to work out the impact that has on variables C and E, and therefore its remaining placement capacity under Listing Rules 7.1 and 7.1A.2, to “compare apples with apples”, it is first necessary to translate those convertible securities to the number of fully paid ordinary securities they represent.

For these purposes, unless ASX determines otherwise, convertible securities issued during the relevant period are counted as the maximum number of fully paid ordinary securities into which they can be converted.<sup>141</sup> Again, this

<sup>135</sup> See paragraph (f) of the definition of “equity security” in Listing Rule 19.12.

<sup>136</sup> Note also the definition of “convertible debt security” in Listing Rule 19.12 – an instrument that would be a debt security but for the fact that it is a convertible security.

<sup>137</sup> See section 5.8 below for a discussion of the issues that can arise where convertible securities convert into something other than fully paid ordinary securities.

<sup>138</sup> These types of securities are often referred to as “capital notes” or “Tier 1 capital notes”.

<sup>139</sup> As it is empowered to do under paragraph (h) of the definition of “equity security” in Listing Rule 19.12. This decision is confirmed in the note to the definition of “equity security” in that rule.

<sup>140</sup> Listing Rule 7.1B.1(e). See also ‘2.8 Calculating the number of securities being issued or agreed to be issued’ on page 9.

<sup>141</sup> Listing Rule 7.1B.1(e). See also ‘2.7 Calculating variables C and E’ on page 8.

applies no matter how likely or unlikely it is that the convertible security may or will convert into the underlying ordinary securities and no matter how far out into the future conversion may or will occur.

This maximum number is determined as at the relevant date that variables C and E are being calculated, not as at the date the convertible securities were originally issued or agreed to be issued. So, if the conversion formula has a variable in it (eg it is linked to the market value of the underlying security) and the maximum number of securities into which the convertible securities can convert has increased since their issue due to a change in the variable in the period up to the relevant date, it is the higher number applicable on the relevant date that must be used when calculating the available placement capacity under Listing Rules 7.1 and 7.1A.2, not the lower number that applied when they were issued. Conversely, if the maximum number of securities into which the convertible securities can convert has decreased since their issue due to a change in the variable in the period up to the relevant date, it is the lower number applicable on the relevant date that must be used when calculating the available placement capacity under Listing Rules 7.1 and 7.1A.2, not the higher number that applied when they were issued.<sup>142</sup>

Section 5.4 below has guidance on how to determine this maximum number.

### 5.4 Determining the maximum number of securities that can be issued under a convertible security

Subject to the three exceptions mentioned below, in determining the maximum number of fully paid ordinary securities that can be issued upon the conversion of a convertible security, ASX will generally assume that any conditions attached to the right of conversion have been, or will be, satisfied in full. This applies no matter how likely or unlikely it is that those conditions will in fact be satisfied.<sup>143</sup>

The three exceptions to this general rule are:

- where a convertible security has normal anti-dilution provisions attached that simply protect the value of the holders' rights of conversion in the case of future share splits, capital restructures and the like – in working out the maximum number of underlying securities that can be issued under the terms of the convertible security, ASX will generally assume that these anti-dilution provisions will not be triggered over the term of the convertible security;
- where a convertible security gives the issuer the ability to capitalise unpaid interest, dividends or other distributions, either at its option or in certain specified circumstances – in working out the maximum number of underlying securities that can be issued under the terms of the convertible security, ASX will generally assume that interest, dividends or other distributions are paid as and when due and therefore no unpaid amounts will be capitalised;<sup>144</sup> and
- where the conversion rights attaching to a convertible security are only exercisable with security holder approval – that situation is addressed in section 5.6 below.

In many cases, the maximum number of ordinary securities into which a convertible security may or will convert is fixed in, or easily calculable by reference to, the terms of the convertible security.<sup>145</sup>

It is not uncommon, however, for the number of equity securities into which a convertible security may or will convert to be linked to some measure of the market price of the underlying security (such as its VWAP over a specified period) or the value of a foreign currency at or near the date of conversion. In such cases, the inclusion of the market price or foreign currency variable in the conversion formula makes it impossible to determine, at the relevant date, the actual number of underlying securities that will be issued under the terms of the convertible security.

<sup>142</sup> Example 6 in Annexure A illustrates the point.

<sup>143</sup> Example 4 in Annexure A illustrates the point.

<sup>144</sup> If the issue of the convertible security has not been approved by security holders under Listing Rule 7.1 or 7.4 and equity securities are subsequently issued in lieu of interest, dividends or other distributions on the convertible security, the entity will need to have the available placement capacity under Listing Rules 7.1 and (if applicable) 7.1A.2 at the time the securities are issued or else the issue will need to be approved by security holders under Listing Rule 7.1.

<sup>145</sup> Example 5 in Annexure A illustrates the point.

In these cases, ASX will generally<sup>146</sup> calculate the maximum number of underlying securities that can be issued under the terms of a convertible security assuming the security was being converted on the relevant date and applying the conversion formula accordingly.<sup>147</sup>

Occasionally, an entity may issue a convertible security that has alternative formulae for calculating the number of underlying securities into which it converts, depending on the circumstances. In that case, the maximum number of underlying securities that can be issued under the terms of a convertible security is to be calculated at the relevant date using whichever of the formulae will result in the highest number of underlying securities being issued.

Very occasionally, the conversion formula for a convertible security may include a variable unrelated to the market price of the underlying security or the value of a foreign currency. An example is where the conversion formula varies by reference to the amount of dividends or other distributions that the entity has paid over the term of the convertible security.

If an entity is considering issuing a convertible security that converts by reference to a variable other than the market price of the underlying security or the value of a foreign currency, it should approach ASX at the earliest opportunity to determine how that security will be treated under Listing Rules 7.1 and, if relevant, 7.1A.2 and also whether it meets the requirements of Listing Rule 6.1 (the terms that apply to an equity security must, in ASX's opinion, be appropriate and equitable).

### **5.5 How Listing Rules 7.1 and 7.1A.2 apply to the conversion of convertible securities**

If an issue of convertible securities complies with Listing Rules 7.1 or 7.1A – either because it falls within the entity's placement capacity at the date of issue or because the issue has been approved by the holders of ordinary securities under Listing Rule 7.1 – then any subsequent issue of the underlying equity securities in accordance with the terms of issue of the convertible security will fall within Listing Rule 7.2 exception 9<sup>148</sup> and hence outside of Listing Rules 7.1 and 7.1A. It therefore will not require any further approval of security holders under those rules.<sup>149</sup>

### **5.6 Conversion rights that are only exercisable with security holder approval**

Listing Rule 7.2 exception 17 excludes from the restrictions in Listing Rules 7.1 and 7.1A an agreement to issue equity securities that is conditional on holders of ordinary securities approving the issue before the issue is made.

Where a convertible security expressly provides that the right of conversion is not exercisable unless and until the holders of the entity's ordinary securities have approved the issue of the underlying securities, Listing Rule 7.2 exception 17 is attracted and the convertible security falls outside of the restrictions in Listing Rule 7.1. As a consequence, it can be issued without security holder approval under that rule and, when issued, will not count towards variable C in Listing Rule 7.1 or variable E in Listing Rule 7.1A.2.

If an entity relies on Listing Rule 7.2 exception 17 in this fashion, it must not issue the underlying equity securities without first obtaining the approval of the holders of its ordinary securities.<sup>150</sup> The entity must comply with the notice requirements in Listing Rule 7.3<sup>151</sup> in relation to the underlying securities. Among other things, absent a waiver from

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<sup>146</sup> ASX may choose a different market price (such as its VWAP over an extended period) to calculate the maximum number of securities that can be issued under the terms of the convertible security if it suspects that the market price has been manipulated to achieve a more favourable calculation for the entity.

<sup>147</sup> Examples 6, 7 and 8 in Annexure A illustrate ASX's approach.

<sup>148</sup> See '4.9 Exception 9 – conversion of convertible securities' on page 21.

<sup>149</sup> Note that the issue may require approval under Listing Rule 10.11 or 10.14 if it is made to a person and in circumstances covered by those rules.

<sup>150</sup> If the entity issues the underlying securities without obtaining security holder approval, it will breach the second sentence in Listing Rule 7.2 exception 17. If security holder approval is not given, the convertible security ceases to be convertible and effectively becomes a debt security that will need to be repaid in cash upon maturity.

<sup>151</sup> See '7.2 Specific disclosure requirements for resolutions under Listing Rule 7.1' on page 35.

ASX,<sup>152</sup> this will require the conversion to ordinary securities to occur no later than 3 months after the date of the meeting approving the issue of the underlying securities.<sup>153</sup>

For this reason, rather than including a Listing Rule 7.2 exception 17 condition in the convertible securities and seeking security holder approval subsequently for the issue of the underlying securities, it will generally be preferable for an entity either:

- to seek an upfront approval from its ordinary security holders under Listing Rule 7.1 to the issue of convertible securities; or
- to have its ordinary security holders subsequently approve the issue of convertible securities under Listing Rule 7.4 (although, if it relies on this alternative, the entity will need to have the available capacity under Listing Rule 7.1 and 7.1A.2 to issue the convertible securities ahead of the approval).

Where the issue of convertible securities is approved upfront under Listing Rule 7.1 or subsequently under Listing Rule 7.4, the conversion of those securities will fall within Listing Rule 7.2 exception 9 and therefore require no further approvals under Listing Rules 7.1 or 7.1A, no matter when conversion occurs.<sup>154</sup> Additionally, when the underlying securities are issued upon conversion, they are expressly excluded from variable C in Listing Rule 7.1 and variable E in Listing Rule 7.1A.2<sup>155</sup> and therefore have no ongoing effect on the entity's placement capacity under those rules.

### 5.7 Conversion rights that only apply where security holder approval is not required

ASX has in the past been approached by entities seeking to issue convertible securities on terms that the right of conversion cannot be exercised if it would require security holder approval and arguing that this effectively caps the right of conversion to an amount that will necessarily fall within its placement capacity under Listing Rule 7.1 and (if applicable<sup>156</sup>) Listing Rule 7.1A. ASX does not agree with this argument.

This type of term is qualitatively different to a condition that the right of conversion is not exercisable unless and until the holders of the ordinary securities have approved the issue. It therefore does not attract Listing Rule 7.2 exception 17 mentioned in section 5.6 above. Consequently, whether the issue can be made without security holder approval under Listing Rule 7.1 requires a determination, at the date that the entity issues or agrees to issue the convertible security, whether or not the maximum number of underlying equity securities into which the convertible security can be converted exceeds the formulae in Listing Rule 7.1 and (if applicable) Listing Rule 7.1A.2.

This determination becomes problematical if the convertible security has a term of more than 12 months. The entity's 15% placement capacity under Listing Rule 7.1 will be replenished at each 12 month anniversary of the issue of the convertible security. Its approval to have the extra 10% placement capacity available under Listing Rule 7.1A, if applicable, can also be renewed at each AGM. Accordingly, the cumulative number of underlying equity securities the entity could issue over the term of the convertible security might well exceed its placement

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<sup>152</sup> ASX may be prepared to grant a waiver to allow the underlying securities to be issued outside the 3 month time constraint in Listing Rule 7.3.4 but only where there is a clear and compelling commercial reason for the issue to be made at a later date and security holders are in a position to know with certainty the dilutive impact the issue will have and can therefore give a meaningful approval to the issue (see the text accompanying note 187 below). If the conversion formula includes a variable component, this will generally require the imposition of a floor or ceiling on that variable (as applicable) so that the maximum number of underlying securities that can be issued upon conversion is known at the date of the meeting approving their issue.

<sup>153</sup> Listing Rule 7.3.4. Note however that if the securities are being issued to a related party or other person to whom Listing Rule 10.11 applies, they must be issued within 1 month of the date of the meeting approving the issue under that rule (Listing Rule 10.13.5).

<sup>154</sup> See '4.9 Exception 9 – conversion of convertible securities' on page 21.

<sup>155</sup> Variables C and E expressly exclude issues under an exception in Listing Rule 7.2.

<sup>156</sup> Of course, the entity would only be able to use its Listing Rule 7.1A.2 placement capacity to issue such a security if it was a class of security already quoted on ASX and the minimum pricing requirement was satisfied; see '3.5 The entity must be issuing securities in an existing class of quoted securities' on page 13 and '3.6 The consideration must be a cash amount not less the prescribed minimum issue price' on page 13.

capacity under Listing Rules 7.1 and 7.1A at the time of issue, even though the right of conversion is limited in a way that prevents this occurring at the point of each individual conversion.

ASX is likely to have other concerns with a convertible security issued on these terms, including:

- whether the entity has a structure that is appropriate for a listed entity, as required by Listing Rule 12.5;<sup>157</sup>
- whether the terms that apply to the convertible security are appropriate and equitable, as required by Listing Rule 6.1; and
- how Listing Rule 7.2 exceptions 9 and 16 operate in relation to the convertible security.<sup>158</sup>

On the first two issues above, if the convertible security is able to be held by retail investors, ASX will be particularly concerned whether they will understand the intricacies of Listing Rules 7.1 and 7.1A and the possibility that they may be precluded from exercising their right to convert the securities if and to the extent that the entity no longer has any placement capacity under those rules.

### 5.8 Convertible securities that convert into other convertible securities

An issue of convertible securities that convert into other convertible securities rather than fully paid ordinary securities (such as options to acquire options,<sup>159</sup> options to acquire convertible notes and convertible notes that convert in whole or in part to options) can raise much wider issues under the Listing Rules than just Listing Rules 7.1 and 7.1A, including:

- whether the entity has a structure that is appropriate for a listed entity, as required by Listing Rule 12.5;<sup>160</sup>
- whether the terms that apply to those securities are appropriate and equitable, as required by Listing Rule 6.1;
- whether the entity's capital structure is consistent with the policy underlying Listing Rule 7.16, which provides that a listed entity cannot have more options on issue than underlying securities; and
- how those securities will be treated for the purposes of variables C and E in Listing Rules 7.1 and 7.1A.2 and the consequential effect they will have on the entity's placement capacity for the next 12 months and beyond.

An entity that wishes to issue convertible securities that convert into other convertible securities rather than fully paid ordinary securities should discuss that proposal at the earliest opportunity with ASX to gauge its reaction. In an appropriate case, ASX may recommend that the entity obtain in-principle advice<sup>161</sup> on whether the securities are acceptable under the Listing Rules before it proceeds with the issue.

Generally speaking, if ASX allows an issue of convertible securities (primary convertible securities) that convert into other convertible securities (secondary convertible securities), it will apply Listing Rules 7.1 and 7.1A on a look through basis – that is, it will assume that the primary convertible securities convert into the maximum number of secondary convertible securities that can be issued under the terms of the primary convertible securities, and then look to the maximum number of fully paid ordinary securities that can be issued upon conversion or exercise of the secondary convertible securities.

<sup>157</sup> Having these types of securities in a capital structure may confuse investors and lead to difficulties in valuing the entity's securities. It may also have a significant overhang effect on the market price of its ordinary securities.

<sup>158</sup> See '4.9 Exception 9 – conversion of convertible securities' on page 21 and '4.16 Exception 16 – agreements to issue securities' on page 26.

<sup>159</sup> Sometimes referred to as 'piggy back' options.

<sup>160</sup> Again, having these types of securities in a capital structure may confuse investors and lead to difficulties in valuing the entity's securities. It may also have a significant overhang effect on the market price of its ordinary securities.

<sup>161</sup> See Guidance Note 17 *Waivers and In-Principle Advice*.



### 5.9 Seeking approval under Listing Rule 7.1 or 7.4 to an issue of convertible securities

A notice of meeting seeking approval to an issue of convertible securities under Listing Rule 7.1 or 7.4 must include the material terms of the convertible securities.<sup>162</sup> This should include:

- who can convert them;
- when they can be converted;
- any conditions that have to be met before they can be converted;
- the class of equity securities into which they convert;
- if they convert into something other than fully paid ordinary securities, a summary of the material terms of the underlying securities;
- the price at which they convert and the resulting number of underlying securities into which they convert; and
- if the price at which they convert is not fixed but determined by reference to a formula, a description of the formula and at least 3 worked examples showing how the formula will operate in practice under different assumptions.

On this last point, if the price at which the convertible securities convert is determined by the market price of the underlying securities at a future date or over a future period, the worked examples should show the number of underlying securities that would be issued at:

- the current market price (ie a market price at or shortly before the dispatch of the notice of meeting seeking approval to the issue which is representative of recent trading in the underlying security);
- twice the current market price; and
- half the current market price.

If there is no floor on the conversion price, the notice must prominently disclose that fact and that the issue could be highly dilutive to existing security holders if the market price of the underlying securities falls substantially.

### 5.10 Convertible loans and other contractual obligations

Where an entity has borrowed funds on terms that allow the entity or the lender to require any amount due under the loan to be paid or repaid in the form of equity securities, such an arrangement constitutes an agreement to issue equity securities. It is therefore subject to Listing Rule 7.1 and can only be entered into without security holder approval if the entity has the available placement capacity under Listing Rules 7.1 and 7.1A.2 at the time the loan is entered into.

The same applies to any other contract where the entity or the counterparty can require any of the entity's contractual obligations to be satisfied by an issue of equity securities.

ASX treats these as being the equivalent of convertible securities and applies the same principles as above in relation to them.

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<sup>162</sup> Listing Rules 7.3.3 and 7.5.3.

## 6. The ratification of issues or agreements under Listing Rule 7.4

### 6.1 The ability to ratify an issue or agreement to issue securities

Listing Rule 7.4 provides that an issue of, or agreement to issue, securities made without approval under Listing Rule 7.1 is treated as having been made with approval for the purpose of Listing Rule 7.1 if:

- the issue or agreement did not breach Listing Rule 7.1; and
- the holders of the entity's ordinary securities subsequently approve the issue.

To comply with the first requirement above, the issue must have come within the entity's placement capacity under Listing Rules 7.1 and (if applicable) 7.1A at the time it was made or agreed to be made. It is not possible to ratify under Listing Rule 7.4 an issue of, or agreement to issue, securities that exceeded an entity's placement capacities under those rules.

### 6.2 The effect of ratification on variable A

Where an issue of, or agreement to issue, fully paid ordinary securities is ratified under Listing Rule 7.4, it is counted in variable A, effectively increasing the base level of fully paid ordinary securities on which the 15% and 10% placement capacities in Listing Rules 7.1 and 7.1A are calculated to that extent.

### 6.3 The effect of ratification on variables C and E

Where an issue of, or agreement to issue, equity securities is ratified under Listing Rule 7.4, it is excluded from variables C and E in Listing Rules 7.1 and 7.1A.2, effectively replenishing the entity's placement capacity to that extent.<sup>163</sup>

## 7. Requirements for notices of meeting

### 7.1 The form of resolution

The resolution required to approve an issue of securities under Listing Rule 7.1 or 7.4 is an ordinary resolution passed at a general meeting of the holders of ordinary securities.<sup>164</sup> The resolution required to approve a 7.1A mandate is a special resolution passed at the entity's annual general meeting by the holders of its ordinary securities.<sup>165</sup>

Listing Rules 7.1, 7.1A and 7.4 do not specify the terms of the resolution required under those rules.

In case of Listing Rule 7.1 or 7.4, ASX considers that a resolution to the following effect will suffice:

"That the [*description of issue*] is approved under and for the purposes of Listing Rule [7.1/7.4]."

In the case of a resolution approving a 7.1A mandate, ASX considers that a resolution to the following effect will suffice:

"Resolved, as a special resolution, that [the entity] have the additional capacity to issue equity securities provided for in Listing Rule 7.1A."

<sup>163</sup> Listing Rule 7.1B.1(e). See also '2.7 Calculating variables C and E' on page 8.

<sup>164</sup> Listing Rule 14.9. If an entity has other securities on issue that might otherwise be entitled to vote on a resolution put to ordinary security holders at a general meeting, the notice of meeting should make it clear that, under the ASX Listing Rules, the holders of those other securities are not entitled to vote on the resolution under Listing Rule 7.1 or 7.4 (as the case may be) and that, if they do vote, their vote will be disregarded.

<sup>165</sup> Listing Rule 7.1A. Again, if an entity has other securities on issue that might otherwise be entitled to vote on a resolution put to ordinary security holders at a general meeting, the notice of meeting should make it clear that, under the ASX Listing Rules, the holders of those other securities are not entitled to vote on the resolution approving a 7.1A mandate and that, if they do vote, their vote will be disregarded.

### 7.2 Specific disclosure requirements for resolutions under Listing Rule 7.1

A notice of meeting proposing a resolution to approve an issue of, or an agreement to issue, equity securities under Listing Rule 7.1 must include:<sup>166</sup>

- a summary of Listing Rule 7.1 and what will happen if security holders give, or do not give, the approval sought under that rule,<sup>167</sup> including an explanation of the effect that giving the approval will have on the number of equity securities that the entity will be able to issue over the next 12 months under Listing Rule 7.1 without seeking any further approval from security holders;<sup>168</sup>
- the names of the persons to whom the entity will issue the securities or the basis upon which those persons will be identified or selected;<sup>169</sup>
- the number<sup>170</sup> and class of the securities the entity will issue;<sup>171</sup>
- if the securities are not fully paid ordinary securities, a summary of the material terms<sup>172</sup> of the securities;<sup>173</sup>
- the date or dates on or by which the entity will issue the securities – this must be:
  - if the securities are being issued under, or to fund, a reverse takeover, no later than 6 months after the date of the meeting;
  - if court approval of a reorganisation of capital (in the case of a trust, interests) is required before the issue, no later than 3 months after the date of the court approval; or
  - otherwise, no later than 3 months after the date of the meeting;<sup>174</sup>
- the price<sup>175</sup> or other consideration the entity will receive for the issue;<sup>176</sup>
- the purpose of the issue, including the intended use of any funds raised by the issue;<sup>177</sup>
- if the securities are being issued under an agreement, a summary of any other material terms of the agreement;<sup>178</sup>

<sup>166</sup> An approval of security holders is not effective under the Listing Rules unless the notice of meeting includes everything that the Listing Rules require it to include: Listing Rule 14.6.

<sup>167</sup> Listing Rule 14.1A.

<sup>168</sup> See the note to Listing Rule 14.1A.

<sup>169</sup> Listing Rule 7.3.1. In the case of an issue under a reverse takeover, it is sufficient to describe the class or classes of security holders in the reverse takeover target who will be issued securities in the entity (see the note to Listing Rule 7.3.1). In the case of a placement to 10 or fewer persons, ASX would generally expect the entity to name those persons in the notice of meeting rather than describe the basis on which they will be identified or selected.

<sup>170</sup> Where the number of securities to be issued is not fixed, this may be expressed as a maximum number or as a formula (see the note to Listing Rule 7.3.2). In the latter case, it may be appropriate for the entity to include some worked examples in the notice of meeting to show how the formula will operate in practice under different assumptions.

<sup>171</sup> Listing Rule 7.3.2.

<sup>172</sup> See also '5.9 Seeking approval under Listing Rule 7.1 or 7.4 to an issue of convertible securities' on page 33 for the information that should be disclosed in the notice of meeting about the material terms of a convertible security.

<sup>173</sup> Listing Rule 7.3.3.

<sup>174</sup> Listing Rule 7.3.4. Note that if the securities are being issued to a related party or other person to whom Listing Rule 10.11 applies, they must be issued within 1 month of the date of the meeting approving the issue under that rule (Listing Rule 10.13.5).

<sup>175</sup> Where the price at which the securities are to be issued is not fixed, this may be expressed as a minimum amount or as a formula (see the note to Listing Rule 7.3.5). In the latter case, it may be appropriate for the entity to include some worked examples in the notice of meeting to show how the formula will operate in practice under different assumptions.

<sup>176</sup> Listing Rule 7.3.5.

<sup>177</sup> Listing Rule 7.3.6.

<sup>178</sup> Listing Rule 7.3.7.

- if the securities are being issued under, or to fund, a reverse takeover, information about the reverse takeover;<sup>179</sup> and
- a voting exclusion statement that precludes:
  - where the resolution relates to a proposed issue under a reverse takeover, the reverse takeover target and any person who will obtain a material benefit as a result of the reverse takeover or the proposed issue (except a benefit solely by reason of being the holder of ordinary securities in the entity or the reverse takeover target);
  - where the resolution relates to a proposed issue to fund a reverse takeover, the reverse takeover target, any person who is expected to participate in the proposed issue, and any person who will obtain a material benefit as a result of the reverse takeover or the proposed issue (except a benefit solely by reason of being the holder of ordinary securities in the entity or the reverse takeover target); and
  - in any other case, any persons who are expected to participate in, or who will obtain a material benefit as a result of, the proposed issue (except a benefit solely by reason of being the holder of ordinary securities in the entity),

and their associates from voting in favour of the Listing Rule 7.1 resolution.<sup>180</sup>

This information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>181</sup>

This information must be set out with reasonable particularity. ASX will not accept a notice that seeks an approval in gross under Listing Rule 7.1 to allow an issue to be made on such terms as the entity or its board may decide. Nor will it accept something that is the practical equivalent, such as a resolution that seeks approval to an issue of an indeterminate number of securities<sup>182</sup> across a broad price range.<sup>183</sup>

ASX understands that entities seeking an approval under Listing Rule 7.1 to issue securities by way of a bookbuild or similar process will not be able to specify a fixed issue price and also may not be able to specify a fixed number of securities to be issued in their Listing Rule 7.1 resolution. Of necessity, they will need to specify a minimum issue price and possibly also a maximum number of securities to be issued. However, ASX expects the minimum issue price<sup>184</sup> and, where applicable the maximum number of securities to be issued,<sup>185</sup> to be expressed within a commercially reasonable range.

The requirement for reasonable particularity extends to the names of the persons to whom the entity will issue the securities or the basis upon which those persons will be identified or selected. In this regard, it is not sufficient to say, in relation to a placement, that the securities will be issued to unnamed “sophisticated and professional investors”, without more. The entity must name those investors or explain how those investors will be identified or selected. For example, if the entity is using a lead manager or broker to assist in the placement, it should identify the lead manager/broker and explain (briefly) the lead manager/broker’s process for identifying or selecting

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<sup>179</sup> Listing Rule 7.3.8.

<sup>180</sup> Listing Rules 7.3.9 and 14.11.1. See also ‘7.7 Voting exclusions’ on page 43.

<sup>181</sup> Listing Rule 14.1.

<sup>182</sup> For example, an issue of “up to X securities” or “between X and Y securities”.

<sup>183</sup> For example, an issue of securities at a price “between \$X and \$Y” or at a price “no less than \$X”, or at discount to the prevailing market price of “up to X%”, where that allows a potentially wide range of prices.

<sup>184</sup> For the avoidance of doubt, this includes a minimum issue price expressed within a range (eg “between \$X and \$Y”, at a price “no less than \$X” or at discount to the prevailing market price of “up to X%”), provided the range is commercially reasonable.

<sup>185</sup> Again, for the avoidance of doubt, this includes a maximum number of securities expressed within a range (eg “up to X securities” or “between X and Y securities”), provided the range is commercially reasonable.

prospective investors. If the entity is not using a lead manager/broker to assist with the placement, it should explain its process for identifying or selecting prospective investors.

The intended use of the funds raised by an issue is important information that security holders need to determine whether or not they should approve the issue under Listing Rule 7.1. Accordingly, the statement in the notice of meeting on this matter should be reasonably detailed and specific. A brief and uninformative statement such as “the entity intends to use the funds raised as additional working capital” is not sufficient, save where the entity genuinely has no specific purpose in mind for the use of the funds and it clearly states that fact in its notice of meeting. Likewise a statement that “the entity intends to use the funds for future investments” is not sufficient if the entity has a specific investment or investments in mind for which it will be using the funds.

If ASX finds that an entity has not been forthright in its disclosures about the intended use of funds in the notice of meeting approving an issue under Listing Rule 7.1, ASX will give careful consideration to whether or not the approval was effective for the purposes of the Listing Rules.<sup>186</sup>

ASX is sometimes approached for a waiver to allow an entity to issue securities at a date outside of the 3/6 month time constraint mentioned above. This constraint is designed to strike a balance between giving entities the time practically necessary to complete an issue of equity securities, and ensuring that the securities are issued within a reasonable time frame after security holder approval so that the approval can still be considered to be current and not rendered stale by subsequent events. ASX will generally only grant such a waiver where there is a clear and compelling commercial reason for the issue to be made at a later date<sup>187</sup> and security holders are in a position to know with certainty the dilutive impact the issue will have and can therefore give a meaningful approval to the issue. In the case of convertible securities, this may require the imposition of a floor price in the conversion formula so that the maximum dilutive impact can be determined at the date of the meeting approving their issue.

Otherwise ASX expects entities to arrange the date on which they seek approval to an issue under Listing Rule 7.1 to comply with the 3/6 month time constraint mentioned above and, if for any reason the issue is not completed within that timeframe following the approval, to seek a fresh approval under that rule.

### 7.3 Specific disclosure requirements for resolutions under Listing Rule 7.1A

A notice of meeting proposing a resolution to approve a 7.1A mandate must include:<sup>188</sup>

- a summary of Listing Rule 7.1A and what will happen if security holders give, or do not give, the approval sought under that rule;<sup>189</sup>
- a statement of the period for which the mandate will be valid (as set out in Listing Rule 7.1A.1);<sup>190</sup>
- a statement of the minimum price at which the equity securities may be issued under the mandate (as set out in Listing Rule 7.1A.3);<sup>191</sup>
- a statement of the purposes for which the funds raised by an issue of equity securities under the mandate may be used;<sup>192</sup>

<sup>186</sup> An approval of security holders is not effective under the Listing Rules unless the notice of meeting includes everything that the Listing Rules require it to include: Listing Rule 14.6.

<sup>187</sup> An example would be “deferred consideration securities”, that is, securities issued by an entity in consideration for an acquisition of an asset or undertaking where a future tranche of securities will be issued outside of the 3/6 month period mentioned in Listing Rule 7.3.4 if certain performance thresholds or other criteria are met.

<sup>188</sup> An approval of security holders is not effective under the Listing Rules unless the notice of meeting includes everything that the Listing Rules require it to include: Listing Rule 14.6.

<sup>189</sup> Listing Rule 14.1A.

<sup>190</sup> Listing Rule 7.3A.1.

<sup>191</sup> Listing Rule 7.3A.2.

<sup>192</sup> Listing Rule 7.3A.3.

- a statement of the risk of economic and voting dilution of existing ordinary security holders that may result from an issue of equity securities under the mandate, including the risk that:
  - the market price for equity securities in that class may be significantly lower on the issue date than on the date the 7.1A mandate was approved; and
  - the equity securities may be issued at a price that is at a discount to the market price for those equity securities on the issue date,

which is accompanied by a table describing the potential dilution of existing ordinary security holders on the basis of at least three different assumed issue prices and values for variable A in Listing Rule 7.1A.2, including at least one example that assumes that A is double the number of fully paid ordinary securities on issue at the time of the approval under Listing Rule 7.1A and that the price of fully paid ordinary securities has fallen by at least 50%;<sup>193</sup>

- details of the entity's allocation policy for issues under the mandate;<sup>194</sup>
- if the entity has issued or agreed to issue any equity securities under Listing Rule 7.1A.2 in the 12 months preceding the date of the AGM:
  - the total number of equity securities issued or agreed to be issued under Listing Rule 7.1A.2 in that 12 month period and the percentage they represent of the total number of equity securities on issue at the commencement of that 12 month period; and
  - for each such issue:
    - the names of the persons to whom the entity issued or agreed to issue the securities or the basis on which those persons were identified or selected;<sup>195</sup>
    - the number and class of equity securities issued or agreed to be issued;
    - the price at which the equity securities were issued or agreed to be issued and the discount (if any) that the issue price represented to closing market price on the date of issue or agreement; and
    - the total cash consideration received or to be received by the entity, the amount of that cash that has been spent, what it was spent on, and what is the intended use for the remaining amount of that cash (if any),

and, if the entity has agreed before that 12 month period to issue any equity securities under Listing Rule 7.1A.2 but as at the date of the meeting not yet issued those equity securities, a statement giving all material details of that agreement and an explanation why the equity securities have not yet been issued;<sup>196</sup> and

- if at the time of dispatching the notice the entity is proposing to make an issue of equity securities under the mandate, a voting exclusion statement that precludes any persons who are expected to participate in, or who will obtain a material benefit as a result of, the proposed issue (except a benefit solely by reason of

<sup>193</sup> Listing Rule 7.3A.4. Generally, ASX would expect one of the examples in the table to assume that A is the current number of fully paid ordinary securities on issue, and that the price of fully paid ordinary securities is their prevailing market price, at or around the time the notice of AGM is being finalised, and the third example to be a mid-point between the other two examples.

<sup>194</sup> Listing Rule 7.3A.5.

<sup>195</sup> Again, in the case of a placement to 10 or fewer persons, ASX would generally expect the entity to name those persons in its notice of meeting rather than describe the basis on which they were identified or selected.

<sup>196</sup> Listing Rule 7.3A.6.

being the holder of ordinary securities in the entity) and their associates from voting on the Listing Rule 7.1A resolution.<sup>197</sup>

Again, this information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>198</sup>

If at the time the entity is preparing its notice of AGM, its market capitalisation is close to \$300 million or it is close to inclusion in the S&P/ASX 300 Index, it would also be prudent for the notice to state that if on the date of the AGM its market capitalisation exceeds \$300 million or it has been included in the S&P/ASX 300 Index, then the resolution for the 7.1A mandate will no longer be effective and will be withdrawn.

Again, the purposes for which the funds raised by an issue of equity securities under a 7.1A mandate may be used is important information that security holders need to determine whether or not they should approve the mandate. However, as a 7.1A mandate is intended to cover prospective issues for up to 12 months after the date of the AGM, ASX understands that the entity may not be able to be as specific on this matter as it can be in relation to issues being approved under Listing Rule 7.1 or 7.4.

If ASX finds that an entity has not been forthright in its disclosures about the intended use of funds in the notice of meeting approving a 7.1A mandate, ASX will give careful consideration to whether or not the approval was effective for the purposes of the Listing Rules.<sup>199</sup>

The requirement for the notice to disclose the entity's allocation policy for issues of securities under the 7.1A mandate differs from the corresponding requirement for notices approving an issue under Listing Rule 7.1 or 7.4 to disclose the names of the persons who were or will be issued securities or the basis upon which those persons were or will be identified or selected. This difference recognises that an issue under a 7.1A mandate may take place up to 12 months after the date of the AGM and there is likely to be a greater degree of uncertainty about whether an issue of securities will ultimately be made, and if so, to whom.

The disclosure of the allocation policy should address the question of how the entity intends to decide who to offer securities to under its 7.1A mandate in as much detail as is reasonably practicable in the circumstances, taking into account:

- the entity's intentions to raise funds during the period of the mandate;
- the number of issues it intends to make under the mandate and the time frame over which they will be made;
- whether the entity has any specific intentions in relation to parties that it may approach to participate in an issue of securities under the mandate; and
- whether the entity has formed an intention to offer securities under the mandate to existing security holders, or to a class or group of existing security holders, or whether, alternatively, it has formed an intention to offer the securities exclusively to new investors who have not previously been security holders of the entity.

The entity will be required when it announces a proposed issue of equity securities under Listing Rule 7.1A to disclose in its Appendix 3B why it has chosen to undertake that particular form of issue rather than a pro rata issue or other type of issue in which existing ordinary security holders would have been eligible to participate. In light of this, the entity may wish to set out as part of its allocation policy whether or not it intends to give consideration before making any issue of securities under its 7.1A mandate to whether the issue could be carried out by means of a pro rata offer, a placement and a pro rata offer, or a placement and an offer under an SPP.

<sup>197</sup> Listing Rule 7.3A.7 and 14.11.1. See also '7.7 Voting exclusions' on page 43.

<sup>198</sup> Listing Rule 14.1.

<sup>199</sup> See note 186 above and accompanying text.

### 7.4 Specific disclosure requirements for resolutions under Listing Rule 7.4

A notice of meeting proposing a resolution to ratify an issue of, or agreement to issue, equity securities under Listing Rule 7.4 must include:<sup>200</sup>

- a summary of Listing Rule 7.4 and what will happen if security holders give, or do not give, the approval sought under that rule,<sup>201</sup> including an explanation of the effect that giving the approval will have on the number of equity securities that the entity will be able to issue over the next 12 months under Listing Rule 7.1 without seeking any further approval from security holders;<sup>202</sup>
- the names of the persons to whom the entity issued or agreed to issue the securities or the basis on which those persons were identified or selected;<sup>203</sup>
- the number<sup>204</sup> and class of securities the entity issued or agreed to issue;<sup>205</sup>
- if the securities are not fully paid ordinary securities, a summary of the material terms<sup>206</sup> of the securities;<sup>207</sup>
- the date or dates on which the securities were or will be issued – if the securities have not yet been issued, the date of issue must be no later than 3 months after the date of the meeting;<sup>208</sup>
- the price<sup>209</sup> or other consideration the entity has received or will receive for the issue;<sup>210</sup>
- the purpose of the issue, including the use or intended use of any funds raised by the issue;<sup>211</sup>
- if the securities were or will be issued under an agreement, a summary of any other material terms of the agreement;<sup>212</sup> and
- a voting exclusion statement that precludes any persons who participated in the issue being ratified and their associates from voting on the Listing Rule 7.4 resolution.<sup>213</sup>

<sup>200</sup> An approval of security holders is not effective under the Listing Rules unless the notice of meeting includes everything that the Listing Rules require it to include: Listing Rule 14.6.

<sup>201</sup> Listing Rule 14.1A.

<sup>202</sup> See the note to Listing Rule 14.1A.

<sup>203</sup> Listing Rule 7.5.1. Again, in the case of a placement to 10 or fewer persons, ASX would generally expect the entity to name those persons in the notice of meeting rather than describe the basis on which they were identified or selected.

<sup>204</sup> Where the securities have not yet been issued and the number of securities to be issued is not fixed, this may be expressed as a maximum number or as a formula (see the note to Listing Rule 7.5.2). In the latter case, it may be appropriate for the entity to include some worked examples in the notice of meeting to show how the formula will operate in practice under different assumptions.

<sup>205</sup> Listing Rule 7.5.2.

<sup>206</sup> See also '5.9 Seeking approval under Listing Rule 7.1 or 7.4 to an issue of convertible securities' on page 33 for the information that should be disclosed in the notice of meeting about the material terms of a convertible security.

<sup>207</sup> Listing Rule 7.5.3.

<sup>208</sup> Listing Rule 7.5.4. ASX may be prepared to grant a waiver to allow an issue of securities outside this 3 month time constraint but only where there is a clear and compelling commercial reason for the issue to be made at a later date and security holders are in a position to know with certainty the dilutive impact the issue will have and can therefore give a meaningful approval to the issue: see the text accompanying note 187 above.

<sup>209</sup> Where the securities have not yet been issued and the price at which the securities are to be issued is not fixed, this may be expressed as a minimum amount or as a formula (see the note to Listing Rule 7.5.5). In the latter case, it may be appropriate for the entity to include some worked examples in the notice of meeting to show how the formula will operate in practice under different assumptions.

<sup>210</sup> Listing Rule 7.5.5.

<sup>211</sup> Listing Rule 7.5.6.

<sup>212</sup> Listing Rule 7.5.7.

<sup>213</sup> Listing Rule 7.5.8. See also '7.7 Voting exclusions' on page 43.



Again, this information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>214</sup>

The use or intended use of the funds raised by an issue again is important information that security holders need to determine whether or not they should approve the issue under Listing Rule 7.4. The guidance given on this point in section 7.2 above in relation to Listing Rule 7.1 applies with equal force to Listing Rule 7.4.<sup>215</sup>

### 7.5 General disclosure requirements for a notice of meeting

As a matter of general law, a notice of meeting proposing a resolution under Listing Rule 7.1, 7.1A or 7.4 must include such material as will fully and fairly inform security holders of the matters to be considered at the meeting and enable them to make a properly informed judgment on those matters.<sup>216</sup> In some cases, this may require the entity to disclose additional information over and above that specifically required under the Listing Rules summarised in sections 7.2, 7.3 and 7.4 above.

For instance, where the notice relates to a resolution under Listing Rule 7.1 to approve an issue under, or to fund, a reverse takeover, ASX would expect the notice to include a reasonable level of information about the reverse takeover. Typically, this should include:

- the identity of the reverse takeover target;
- a summary of the reverse takeover target's principal activities and the jurisdictions in which it operates;
- a description of the reverse takeover target's business model, including any key dependencies and key risks;
- a copy of the reverse takeover target's most recent audited accounts or a link to where they can be viewed and downloaded;
- the consideration payable by the entity to security holders of the reverse takeover target;
- details of any regulatory approvals or waivers required or other material conditions that must be satisfied for the reverse takeover to proceed;
- information about the likely effect of the proposed issue and the reverse takeover on the entity, including its consolidated total assets, total equity interests, annual revenue, annual expenditure and annual profit before tax;
- a capital table showing the issued capital of the entity before and after the reverse takeover;
- if the entity is proposing to issue securities to raise funds in connection with the reverse takeover, the following information about the issue:
  - the nature of the issue (eg placement, pro rata offer or public offer pursuant to a prospectus, PDS or information memorandum);
  - the amount proposed to be raised by the issue;
  - any minimum subscription proposed; and
  - whether the issue will be underwritten and if so:
    - the name of the underwriter(s),

<sup>214</sup> Listing Rule 14.1.

<sup>215</sup> See note 186 above and accompanying text.

<sup>216</sup> See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

- the extent of the underwriting;
  - the fee or commission payable to the underwriter(s); and
  - a summary of the material circumstances where the underwriter(s) have the right to avoid or change their obligations;
- details of any person who will acquire control<sup>217</sup> of, or voting power<sup>218</sup> of 20% or more in, the entity as a result of the reverse takeover;
  - if any changes are proposed to the entity's board or senior management, details of those changes; and
  - the timetable for implementing the transaction including, if it has not already occurred, the timing for dispatch of the bidder's statement or scheme booklet to target security holders.

ASX notes that the bid or scheme documents provided to target security holders in a reverse takeover would typically include disclosures substantially equivalent to those set out above. Where the notice of meeting seeking bidder security holder approval under Listing Rule 7.1 is sent at the same time as, or after, the bid or scheme documents are sent to target security holders, the notice of meeting can, and should, include substantially equivalent disclosures to those made to the target security holders.

In some cases, bidder security holder approval may need to be sought before the bid or scheme documents for target security holders are finalised. In these cases, ASX will carefully monitor the disclosures made in the notice of meeting to ensure they satisfy the requirements above. If subsequently the bid or scheme documents provided to target security holders disclose materially new or different information that would have been relevant to a decision on how to vote on the Listing Rule 7.1 resolution, ASX may require an updated notice of meeting to be set to security holders or, if the resolution has already been passed, a fresh security holder approval to be obtained.<sup>219</sup>

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

Before a listed entity sends out a notice of meeting that includes a resolution under Listing Rule 7.1, 7.1A or 7.4, it must give ASX a copy of the draft notice for review. It must not finalise the notice until ASX tells it that ASX does not object to it.<sup>220</sup>

ASX may object to a draft notice of meeting<sup>221</sup> if it appears to ASX that:

- it does not include the information required under the Listing Rules summarised in sections 7.2, 7.3 and 7.4 above (as applicable);
- the draft notice does not satisfy the general law disclosure obligation mentioned in section 7.5 above;
- it does not include the required voting exclusion statement;
- in the case of a notice including a resolution approving an issue of securities under Listing Rule 7.1 or 7.4, the entity is trying to include multiple issues within the one approval resolution;<sup>222</sup> or

<sup>217</sup> As defined in the Corporations Act.

<sup>218</sup> As defined in the Corporations Act.

<sup>219</sup> Under Listing Rules 14.6 and 18.8. See also '7.12 Supplementary disclosures' on page 46.

<sup>220</sup> Listing Rules 15.1 and 15.1.4. The draft notice should be sent by way of email to the entity's ASX Listings Compliance adviser in accordance with Listing Rule 15.2.2. ASX generally tries to review and notify the entity whether it objects to a draft notice of meeting within 5 business days of receipt. ASX will tell an entity within 5 business days if it needs more time to examine a draft notice of meeting.

<sup>221</sup> The fact that ASX does not object to a draft notice of meeting does not prevent ASX from raising subsequently that a notice of meeting did not meet these requirements.

<sup>222</sup> Including multiple issues within the one approval resolution can be coercive. Security holders should be given the opportunity to approve each issue separately. For these purposes, an issue of securities on the same terms and conditions to multiple investors is regarded as one issue and not multiple issues.

- in the case of a notice for an AGM seeking a 7.1A mandate, the entity is not an “eligible entity”.

Where a larger entity is proposing to seek a 7.1A mandate at its AGM, to substantiate that it is an “eligible entity”, the entity should include with the draft notice for the AGM it gives to ASX for review a detailed calculation demonstrating that its market capitalisation at the time is less than \$300 million and confirmation that it has checked and it is not included in the S&P/ASX 300 Index.

### 7.7 Voting exclusions

A notice of meeting proposing a resolution to approve an issue or agreement to issue securities under Listing Rule 7.1 or 7.4 must include a voting exclusion statement in all cases.

A notice of meeting proposing a resolution approving a 7.1A mandate must include a voting exclusion statement if at the time of dispatching the notice the entity is proposing to make an issue of equity securities under the mandate.

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

- as proxy or attorney for another person who is entitled to vote on the resolution, in accordance with directions given to the proxy or attorney to vote in favour of the resolution; or
- by a holder acting solely in a nominee, trustee, custodial or other fiduciary capacity on behalf of a beneficiary provided the following conditions are met:
  - the beneficiary provides written confirmation to the holder that they are not excluded from voting, and are not an associate of a person excluded from voting, on the resolution; and
  - the holder votes on the resolution in accordance with directions given by the beneficiary to the holder to vote in favour of the resolution (Listing Rule 14.11).<sup>223</sup>

In the case of a resolution under Listing Rule 7.1, the excluded persons are:

- where the resolution relates to a proposed issue under a reverse takeover – the reverse takeover target and any person who will obtain a material benefit as a result of the reverse takeover or the proposed issue (except a benefit solely by reason of being the holder of ordinary securities in the entity or the reverse takeover target);<sup>224</sup>
- where the resolution relates to a proposed issue to fund a reverse takeover – the reverse takeover target, any person who is expected to participate in the proposed issue, and any person who will obtain a material benefit as a result of the reverse takeover or the proposed issue (except a benefit solely by reason of being the holder of ordinary securities in the entity or the reverse takeover target);<sup>225</sup> and
- in any other case – any person who is expected to participate in, or who will obtain a material benefit as a result of, the proposed issue (except a benefit solely by reason of being the holder of ordinary securities in the entity).

In the case of a resolution approving a 7.1A mandate, the excluded persons are any person who are expected to participate in, or who will obtain a material benefit as a result of, the proposed issue (except a benefit solely by reason of being the holder of ordinary securities in the entity).

<sup>223</sup> See Listing Rules 14.11 and 14.11.1.

<sup>224</sup> The voting exclusion generally would not prevent a person making a bid for the bidder or a competing bid for the reverse takeover target from voting on the resolution to approve the reverse takeover since typically they will not obtain a material benefit as a result of the reverse takeover or proposed issue (other than possibly as a holder of securities in the bidder or the reverse takeover target). More likely than not, it will be to their benefit if the reverse takeover does not proceed.

<sup>225</sup> Again, the voting exclusion generally would not prevent a person making a bid for the bidder or a competing bid for the reverse takeover target from voting on the resolution to approve an issue to fund the reverse takeover. See note 224 above.

In the case of a resolution under Listing Rule 7.4, the excluded persons are any person who participated in the issue or is a party to the agreement being ratified.

In addition, ASX has a general discretion to designate any other person whose votes, in ASX's opinion, should be disregarded. This discretion may be exercised both before<sup>226</sup> and after<sup>227</sup> the notice of meeting has been sent to security holders.

### 7.8 Persons who will receive a “material benefit” as a result of the transaction

The persons excluded from voting in favour of a resolution under Listing Rule 7.1 or 7.1A include any person who will obtain a material benefit as a result of the transaction.

For these purposes, ASX considers a “material benefit” to be one that is likely to incline the recipient of the benefit to vote differently to other ordinary security holders of the entity on the resolution in question. Examples include:

- if the issue is being made primarily for the purpose of raising cash to repay a debt or other amount owed by the entity to another person, that person;
- a professional adviser or other person who will be paid a success fee if the issue (or where the issue is being made under, or to fund, a reverse takeover, if the reverse takeover) proceeds;<sup>228</sup>
- an underwriter or sub-underwriter of the issue who will be paid an underwriting or sub-underwriting fee in relation to the issue; and
- a lead manager of, or broker to, the issue who will be paid a fee or commission on the proceeds of the issue.<sup>229</sup>

The material benefit must be obtained as a result of the transaction in question. This would not capture payments made in the ordinary course of business that are not commercially connected with the transaction.

In the context of a reverse takeover, ASX would not typically consider any of the following to be a material benefit resulting from the reverse takeover:

- an agreement that someone will be appointed as a director of the entity or the reverse takeover target if the reverse takeover is successful;
- consideration payable to a holder of another class of securities under or in connection with the reverse takeover on the same terms as all other holders of securities in that class (unless it appears to ASX that the consideration materially exceeds the fair value of those securities and is, in effect, a disguised material benefit); and
- redundancy or termination benefits payable to an officer or an employee of the entity or the reverse takeover target if the transaction proceeds, provided the benefit is a bona fide payment made in accordance with contractual entitlements or established policy and generally available to all officers and employees whose office or employment may be terminated.

<sup>226</sup> See the final entry in the table in Listing Rule 14.11.1. If ASX exercises this discretion, the person must be named in the voting exclusion statement in the notice of meeting.

<sup>227</sup> Listing Rule 14.11.2. If ASX exercises this discretion, it is not necessary for the entity to send a further notice of meeting naming the person in the voting exclusion statement (see the note to Listing Rule 14.11.2). However, ASX would expect the entity to make an announcement to the market of ASX's determination.

<sup>228</sup> This is not intended to capture normal fixed or time-based fees paid to a professional adviser advising on the transaction. It is only intended to capture fees that are directly related to the success of the transaction.

<sup>229</sup> This is not intended to capture normal handling fees payable to individual brokers who lodge acceptances or renunciations on behalf of security holders. It is only intended to capture fees and commissions payable to a lead manager of, or broker to, the issue that are directly related to the success of the transaction.

### 7.9 Associates excluded from voting

Where a person is expressly excluded from voting in favour of a resolution approving an issue of equity securities under Listing Rule 7.1 or 7.4 or approving a 7.1A mandate, their associates are also excluded from voting in favour of the resolution.

An excluded person's associates include:

- if the excluded person is a natural person, any entity<sup>230</sup> the excluded person controls;
- if the excluded person is an entity:
  - any entity the excluded person controls; or
  - any entity that controls the excluded person; or
  - any entity that is controlled by an entity that controls the excluded person;
- any person with whom the excluded person has, or proposes to enter into, a relevant agreement<sup>231</sup> for the purpose of controlling or influencing the composition of the listed entity's board<sup>232</sup> or the conduct of the listed entity's affairs; and
- any person with whom the excluded person is acting, or proposing to act, in concert in relation to the listed entity's affairs.<sup>233</sup>

Where the excluded person is a natural person, their related parties are taken to be their associates unless the contrary is established.<sup>234</sup>

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<sup>230</sup> "Entity" for these purposes means a body corporate, partnership, unincorporated body or a trust and includes, in the case of a trust, the responsible entity of the trust.

<sup>231</sup> "Relevant agreement" has the same meaning as in section 9 of the Corporations Act (see 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>232</sup> If the listed entity is a managed investment scheme, a reference to controlling or influencing the composition of the listed entity's board is taken to be a reference to controlling or influencing: (a) if the scheme is a registered scheme, whether a particular company becomes or remains the scheme's responsible entity ("RE"); or (b) if the scheme is not a registered scheme, whether a particular person is appointed, or remains appointed, to the office (by whatever name it is known) in relation to the scheme that corresponds most closely to the office of RE of a registered scheme.

<sup>233</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 230 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.

As mentioned in the text, 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. This provision exists as an evidentiary aid and 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. 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 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 shares 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>234</sup> See note 233 above.

### 7.10 The responsibility for identifying excluded persons and their associates

It is the responsibility of a listed entity to identify all security holders who are caught by a voting exclusion statement and to ensure either that they do not vote in favour of a resolution under Listing Rule 7.1, 7.1A or 7.4 or, if they do, their votes are identified and excluded from the result of the vote.

As a practical matter, this will require the entity to conduct a poll on a resolution under Listing Rule 7.1, 7.1A or 7.4. Such a resolution should not be passed on a show of hands.

ASX may require an entity to appoint its auditors, or some other person acceptable to ASX, to act as a scrutineer to decide the validity of votes cast on resolution under Listing Rule 7.1, 7.1A or 7.4 and whether the votes that should have been disregarded were in fact disregarded.<sup>235</sup> Whether ASX does so or not, the entity should ensure that it conducts a properly scrutineered voting process to validate that the resolution has been properly passed.

If ASX is not satisfied that an entity has conducted a properly scrutineered voting process in relation to a resolution under Listing Rule 7.1, 7.1A or 7.4, ASX may require the entity to seek a fresh approval from its security holders under that rule.<sup>236</sup>

### 7.11 Voting by employee incentive schemes

Securities held by or for an employee incentive scheme must only be voted on a resolution under Listing Rule 7.1, 7.1A or 7.4 if and to the extent that:

- they are held for the benefit of a nominated participant in the scheme;
- the nominated participant is not excluded from voting on the resolution under the Listing Rules; and
- the nominated participant has directed how the securities are to be voted.<sup>237</sup>

This limitation is separate to, and does not need to be mentioned in, the voting exclusion statement for the resolution.

### 7.12 Supplementary disclosures

Where materially new or different information emerges after a notice of meeting proposing a resolution under Listing Rule 7.1, 7.1A or 7.4 has been sent to security holders but before the vote on the resolution, the entity may need to make supplementary disclosure to security holders. This should be done in sufficient time ahead of the meeting to allow security holders to consider, and if necessary take advice on, how the new or different information should affect their vote on the resolution.

In line with ASIC guidance on similar matters,<sup>238</sup> ASX generally considers that security holders should receive<sup>239</sup> the supplementary information at least 10 days before they are required to vote. Anything less may warrant an adjournment of the meeting or the calling of a new meeting.

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<sup>235</sup> Listing Rule 14.8.

<sup>236</sup> ASX may do this either by treating the original resolution as not being effective for the purposes of Listing Rule 7.1, 7.1A or 7.4 (as applicable) or by imposing a requirement in that regard under Listing Rule 18.8.

<sup>237</sup> Listing Rule 14.10.

<sup>238</sup> See section E of ASIC Regulatory Guide 60 *Schemes of arrangement*.

<sup>239</sup> Generally speaking, this information should be sent to security holders in the same manner as the original notice of meeting. However, in an appropriate case, ASX may agree to allow the information to be disseminated by a market announcement published on the ASX Market Announcements Platform.

### 7.13 Notification of meeting results

Immediately after a meeting has been held to consider a resolution seeking the approval of security holders under Listing Rule 7.1, 7.1A or 7.4, the entity must notify ASX of the outcome of the resolution by way of a market announcement.<sup>240</sup>

### 7.14 Stale resolutions

Where security holders approve an issue of or agreement to issue securities under Listing Rule 7.1, the securities must be issued within the applicable 3 or 6 month period referred to in Listing Rule 7.3.4 or else the approval will lapse.<sup>241</sup>

Where security holders approve an agreement to issue securities under Listing Rule 7.4, the securities must be issued within 3 months of that approval or else the approval will lapse.<sup>242</sup>

In addition to these time constraints, where an entity's security holders vote in favour of a resolution under Listing Rule 7.1, 7.1A or 7.4 and in ASX's opinion:

- materially new or different information emerges after security holders have voted on the resolution;
- there is a material change to the terms of the securities from those approved by security holders; or
- there is a material change in the entity's circumstances from those applicable at the time of the resolution,

ASX may require the entity to seek a fresh approval from its security holders under that rule.<sup>243</sup>

This may occur, for example, if there is a material increase in the consideration being offered by the entity in a reverse takeover, compared to what was approved by security holders under Listing Rule 7.1.

For this purpose, ASX would suggest that entities apply the guidance on materiality that formerly appeared in the Australian accounting standards,<sup>244</sup> that is:

- an increase in the consideration being offered over what was approved by security holders equal to or less than 5% ought not be considered material; while
- an increase in the consideration being offered over what was approved by security holders of equal to or greater than 10% ought to be considered material and therefore a fresh approval sought,

unless, in either case, there is evidence or convincing argument to the contrary. Where the increase is between 5% and 10%, a judgment will need to be made as to whether or not it is material in the circumstances.

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<sup>240</sup> Listing Rule 3.13.2.

<sup>241</sup> Listing Rule 7.3.4. If the approval lapses, the securities can no longer be counted in variable A in the formula in Listing Rule 7.1 as securities issued with an approval under Listing Rule 7.1 and must instead be counted in variable C in that formula (see the note to Listing Rule 7.1).

<sup>242</sup> Listing Rule 7.5.4. Again, if the approval lapses, the securities can no longer be counted in variable A in the formula in Listing Rule 7.1 as securities issued with an approval under Listing Rule 7.4 and must instead be counted in variable C in that formula. Likewise, they can no longer be counted as securities issued with an approval under rule 7.4 in variable A in the formula in Listing Rule 7.1A.2 and must instead be counted in variable E in that formula (see the note to Listing Rule 7.4).

<sup>243</sup> Again, ASX may do this either by treating the original resolution as not being effective for the purposes of Listing Rule 7.1, 7.1A or 7.4 (as applicable) or by imposing a requirement in that regard under Listing Rule 18.8.

<sup>244</sup> See paragraph 15 of Accounting Standard AASB 1031 *Materiality* (July 2004). Under that Standard, an amount equal to or greater than 10% of the applicable base amount was generally presumed to be material, and an amount equal to or less than 5% of the applicable base amount was generally presumed not to be material, unless, in either case, there was evidence or convincing argument to the contrary. AASB 1031 was effectively withdrawn on 1 January 2014 as being "unnecessary local guidance on matters covered by IFRSs", although the Australian Accounting Standards Board did expressly note that "it would not expect the withdrawal to change practice regarding the application of materiality in financial reporting" (see Interim Accounting Standard AASB 1031 *Materiality* (December 2013)).

## 8. Notification requirements

### 8.1 The obligation to notify ASX of a proposed issue of securities

An entity is required under Listing Rule 3.10.3 to notify ASX immediately of any proposed issue of securities (other than a proposed issue to be made under a DRP<sup>245</sup> or an employee incentive scheme<sup>246</sup> or as a consequence of the conversion of any convertible securities<sup>247</sup>). This applies to both debt and equity securities. It also applies whether or not the securities are to be quoted on ASX and whether or not information about the issue is “market sensitive”.

Most proposed issues of securities under Listing Rule 7.1 or 7.1A, therefore, will have to be notified to ASX under Listing Rule 3.10.3.

Some proposed issues of equity securities under Listing Rule 7.1 or 7.1A may also require notification to ASX under Listing Rule 3.1 on the basis that information about the proposed issue is “market sensitive” (ie a reasonable person would expect the information to have a material effect on the price or value of the entity’s securities).<sup>248</sup>

ASX interprets the word “immediately” in the leader to Listing Rule 3.10.3 as having the same meaning as in Listing Rule 3.1 – that is, “promptly and without delay”.<sup>249</sup>

ASX also interprets the reference to a “proposed issue of securities” in Listing Rule 3.10.3 as meaning an issue of securities that the entity is committed to proceeding with, and not merely an issue of securities that it may be contemplating.<sup>250</sup>

Bringing these two concepts together, ASX considers that an entity will be obliged to notify ASX of a proposed issue of securities under Listing Rule 3.10.3 promptly and without delay after:

- if the issue is a placement, the entity has entered into a legally binding agreement with the placee for the placement;
- if the issue will arise from an underwritten offer of securities, the entity has entered into an underwriting agreement with the underwriter;<sup>251</sup>
- if the issue will arise from a non-underwritten offer of securities, the board or any other organ of the entity (such as a board committee) to which the board has delegated the power to decide to make the offer, formally resolves to proceed with the offer;<sup>252</sup> or

<sup>245</sup> A proposed issue under a DRP must be notified to ASX via an Appendix 3A.1. It does not require an Appendix 3B.

<sup>246</sup> An issue under an employee incentive scheme must be notified to ASX within 5 business day of the date of issue under Listing Rule 3.10.3A. It does not require an Appendix 3B.

<sup>247</sup> An issue made as a consequence of the conversion of any convertible securities must be notified to ASX within 5 business day of the date of issue under Listing Rule 3.10.3B. It does not require an Appendix 3B. An exercise of options is treated as a conversion of convertible securities for these purposes.

<sup>248</sup> See generally Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

<sup>249</sup> See section 4.5 of Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

<sup>250</sup> This is consistent with the manner in which ASX interprets the phrase “incomplete proposal” in Listing Rule 3.1A (see section 5.4 of Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*) and the phrase “proposes to make a significant change ... to the nature or scale of its activities” in Listing Rule 11.1 (see section 2.12 of Guidance Note 12 *Significant Changes to Activities*).

<sup>251</sup> Where an underwritten offer is being made under a disclosure document, PDS or information memorandum, as a practical matter, the entity will need to enter into the underwriting agreement before it lodges its disclosure document or PDS for the offer with ASIC or issues its information memorandum to prospective investors. Accordingly, the very latest an entity should be notifying ASX of the proposed issue is immediately upon lodging the disclosure document or PDS with ASIC or issuing the information memorandum to prospective investors.

<sup>252</sup> Where a non-underwritten offer is being made under a disclosure document, PDS or information memorandum, as a practical matter, the board or its delegate will need to formally approve the making of the offer before the entity lodges its disclosure document or PDS for the offer with ASIC or issues its information memorandum to prospective investors. Accordingly, the very latest an entity should be notifying ASX of the proposed issue is immediately upon lodging the disclosure document or PDS with ASIC or issuing the information memorandum to prospective investors.



- the entity is otherwise committed to proceeding with the issue.<sup>253</sup>

Guidance Note 30 *Applying for Quotation of Additional Securities* has detailed guidance on when ASX must be notified of a proposed issue of securities under Listing Rule 3.10.3 and what information must be included in the notification, as well as on the interaction between Listing Rules 3.1 and 3.10.3.

### 8.2 Appendix 3B disclosure requirements

A notification of a proposed issue of securities under Listing Rule 3.10.3 must be in the form of, or accompanied by, an Appendix 3B *Announcement of Proposed Issue of Securities*.<sup>254</sup> The Appendix 3B is a smart form with different information requirements for different types of issues.<sup>255</sup> It has been designed to elicit material information about the proposed issue, as well as any information needed by ASX to set up any associated corporate action in ASX's trading, clearing and settlement systems.

Where relevant, the Appendix 3B will ask whether any of the securities are proposed to be issued without security holder approval using the entity's 15% placement capacity under Listing Rule 7.1. If the entity answers "yes", it will be asked how many securities are being issued using that capacity and to complete and separately send to the entity's ASX Listings Compliance adviser a work sheet in the form of Annexure B to this Guidance Note confirming that the entity has the available capacity under Listing Rule 7.1 to issue that number of securities.

The Appendix 3B will also ask whether any of the securities are proposed to be issued without security holder approval using the entity's additional 10% placement capacity under Listing Rule 7.1A (if applicable). If the entity answers "yes", it will be asked how many securities are being issued using that capacity and to complete and separately send to the entity's ASX Listings Compliance adviser a work sheet in the form of Annexure C to this Guidance Note confirming that the entity has the available capacity under Listing Rule 7.1A to issue that number of securities.

If an entity is relying on both its Listing Rule 7.1 and 7.1A placement capacities to make an issue without security holder approval, it should answer yes to both of these questions and complete both the Annexure B and Annexure C work sheets and send them to its ASX Listings Compliance adviser.

As mentioned previously, the Annexure B and C work sheets are available on ASX Online and can also be downloaded in an editable form from:

[www.asx.com.au/regulation/compliance/compliance-downloads.htm](http://www.asx.com.au/regulation/compliance/compliance-downloads.htm).

### 8.3 Appendix 2A application for quotation

If the entity intends to apply for quotation of equity securities issued under Listing Rule 7.1 or 7.1A, it must give ASX<sup>256</sup> a completed Appendix 2A *Application for quotation of securities*.<sup>257</sup> The Appendix 2A is a smart form with different information requirements for different types of issues.

Where relevant, the Appendix 2A will ask whether the securities to be quoted are being issued as part of a transaction or transactions previously announced to the market in an Appendix 3B.

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<sup>253</sup> The references in the text to an entity otherwise being committed to proceeding with an issue of securities is intended to capture those situations where an entity may become legally bound to proceed with the issue without having signed a legally binding agreement (eg, through the principles of estoppel). It is also intended to capture those situations where an entity enters into an arrangement or understanding committing itself to proceed with an issue of securities without having signed a legally binding agreement. Once the entity is so committed, the transaction is no longer an incomplete proposal.

<sup>254</sup> Listing Rule 3.10.3.

<sup>255</sup> The Appendix 3B has different information requirements for bonus issues, standard non-renounceable pro rata issues, standard renounceable pro rata issues, accelerated non-renounceable entitlement offers, accelerated renounceable entitlement offers and simultaneous accelerated renounceable entitlement offers, accelerated renounceable entitlement offers with retail rights trading, offers under an SPP, other offers under a prospectus or PDS, and placements.

<sup>256</sup> Listing Rule 15.2.1 requires an Appendix 2A to be given to the ASX Market Announcements office.

<sup>257</sup> Listing Rule 2.7.

If the entity answers “no”, the Appendix 2A will go on to ask whether the issue is being made without security holder approval under the entity’s 15% placement capacity in Listing Rule 7.1. If the entity answers “yes”, it will be asked how many securities are being issued using that capacity and to complete and separately send to the entity’s ASX Listings Compliance adviser a work sheet in the form of Annexure B to this Guidance Note confirming that the entity has the available capacity under Listing Rule 7.1 to issue that number of securities. The Appendix 2A will also ask if the issue is being made without security holder approval under the entity’s additional 10% placement capacity in Listing Rule 7.1A (if applicable). If the entity answers “yes”, it will be asked how many securities are being issued using that capacity and to complete and separately send to the entity’s ASX Listings Compliance adviser a work sheet in the form of Annexure C to this Guidance Note confirming that the entity has the available capacity under Listing Rule 7.1A to issue that number of securities.

Again, if an entity is relying on both its Listing Rule 7.1 and 7.1A placement capacities to make an issue without security holder approval, it should answer yes to both of these questions and complete both the Annexure B and Annexure C work sheets and send them to its ASX Listings Compliance adviser.

#### **8.4 Additional disclosure requirements for issues under Listing Rule 7.1A**

If an entity issues equity securities under Listing Rule 7.1A, it must give to ASX immediately after the issue a list of names of the persons to whom the entity issued the equity securities and the number of equity securities issued to each.<sup>258</sup> This list is for ASX Listings Compliance’s internal purposes and not for release to the market.

#### **8.5 Additional disclosure requirements for issues that change a director’s “notifiable interests”**

Where an issue of securities leads to a change in the “notifiable interests”<sup>259</sup> of a director, the entity must give ASX an Appendix 3Y within 5 business days of the change occurring.<sup>260</sup>

### **9. Other Chapter 7 constraints on issues of equity securities**

#### **9.1 Listing Rule 7.6**

Listing Rule 7.6 prohibits an entity from issuing or agreeing to issue any equity securities, without the approval of the holders of its ordinary securities,<sup>261</sup> for 2 months after it is told in writing by the holders of more than 50% of the ordinary securities that they intend:

- to call, or request the directors to call, a general meeting to appoint or remove directors of the entity;<sup>262</sup> or
- if the entity is a trust, to call, or request the responsible entity to call, a general meeting to appoint or remove the responsible entity of the trust.<sup>263</sup>

The intent behind Listing Rule 7.6 is to prevent the directors or responsible entity from issuing securities with a view to altering the outcome of the general meeting.

There are a number of exceptions to Listing Rule 7.6 which are summarised in section 9.3 below.

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<sup>258</sup> Listing Rule 7.1A.4(b).

<sup>259</sup> As defined in Listing Rule 19.12.

<sup>260</sup> Listing Rule 3.19A. See also Guidance Note 22 *Notification of Directors’ Interests*.

<sup>261</sup> An approval by security holders of an eligible entity for the entity to have the additional placement capacity under Listing Rule 7.1A is not an approval for the purposes of Listing Rule 7.6.

<sup>262</sup> For example, under section 249D or 249F of the Corporations Act.

<sup>263</sup> For example, under section 252B or 252D of the Corporations Act.

### 9.2 Listing Rule 7.9

Listing Rule 7.9 provides that an entity must not issue or agree to issue equity securities, without the approval of the holders of its ordinary securities,<sup>264</sup> for 3 months after it is told in writing that a person is making, or proposes to make, a takeover for securities in the entity.

The intent behind Listing Rule 7.9 is to prevent the entity from issuing securities with a view to altering the outcome of the takeover.

Again, there are a number of exceptions to Listing Rule 7.9 which are summarised in section 9.3 below.

It should be noted that Listing Rule 7.9 is only triggered where an entity “is told in writing” that a person is making, or proposing to make, a “takeover” for securities in the entity. ASX considers an email to be a written notification for these purposes.<sup>265</sup> However, a verbal notification does not trigger Listing Rule 7.9.

“Takeover” is defined to mean a takeover bid under Chapter 6 of the Corporations Act or a similar bid under a foreign regime.<sup>266</sup> A proposal to enter into any other type of transaction (for example, a scheme of arrangement under Part 5.1 of the Corporations Act) does not trigger Listing Rule 7.9.

The reference to a person “proposing” to make a takeover bid does not require that all of the details of the bid have been finalised or communicated to the entity or that the person has expressed a definitive intention to proceed with the bid.<sup>267</sup> However, in ASX’s view, an indicative non-binding statement that a person may be willing to make a takeover bid if certain conditions are met is not a proposed takeover bid for the purposes of Listing Rule 7.9.

### 9.3 The exceptions to Listing Rules 7.6 and 7.9

Listing Rules 7.6 and 7.9 are subject to the following exceptions:

- (1) an issue notified to ASX before the entity was told, or made under an agreement to issue notified to ASX before the entity was told, of the intention to call the meeting or make the takeover (as applicable);
- (2) a pro rata issue to holders of ordinary securities and to holders of other equity securities to the extent that the terms of issue of the equity securities permit participation in the pro rata issue;
- (3) an issue made under a DRP that is in operation at the time the entity was told;
- (4) an issue made under a takeover bid or under a merger by way of scheme of arrangement under Part 5.1 of the Corporations Act;
- (5) an issue made on the exercise of rights of conversion;
- (6) an agreement to issue equity securities that is conditional on holders of ordinary securities approving the issue before the issue is made;<sup>268</sup>
- (7) an issue made after the person tells the entity in writing that it is no longer intending to call the meeting or make the takeover (as applicable); and

<sup>264</sup> An approval by security holders of an eligible entity for the entity to have the additional placement capacity under Listing Rule 7.1A is not an approval for the purposes of Listing Rule 7.9.

<sup>265</sup> This is on the basis that an email can be printed, if the recipient so desires, and by analogy with Listing Rule 19.10 (which requires an entity to tell ASX matters under the Listing Rules “in writing”) and Listing Rule 1.1 condition 14 (which requires an entity to communicate with ASX electronically).

<sup>266</sup> See Listing Rules 19.12 and 19.3.

<sup>267</sup> Cf ASIC Regulatory Guide 59 *Announcing and Withdrawing Takeover Bids*, especially at RG 59.20 – 59.22.

<sup>268</sup> If an entity relies on this exception it must not issue the equity securities without approval. The notice of meeting seeking the approval must include a voting exclusion statement precluding a person who is expected to participate in the proposed issue and their associates from voting in favour of the resolution (see Listing Rule 14.11.1).

- (8) an issue made with the approval of the person giving the notification referred to in Listing Rule 7.6 or 7.9 (as applicable).

The second, third, fourth, fifth and sixth exceptions above have broadly corresponding exceptions in Listing Rule 7.2 (although the third exception above for issues under a DRP is somewhat broader than the exception for issues under a DRP in Listing Rule 7.2).

The seventh and eighth exceptions above have no counterpart in Listing Rule 7.2 and so issues can only be made under these exceptions without security holder approval if the entity has the available placement capacity under Listing Rules 7.1 and 7.1A.

#### 9.4 The effect of Listing Rules 7.6 and 7.9

Listing Rules 7.6 and 7.9 take precedence over Listing Rules 7.1, 7.1A and 7.2, and so receipt of a written notification under Listing Rules 7.6 and 7.9 effectively suspends an entity's placement capacity under Listing Rule 7.1 and 7.1A and its capacity to issue securities under an exception in Listing Rule 7.2 (other than an exception which is also an exception to Listing Rules 7.6 and 7.9).

### 10. ASX's enforcement powers

ASX has a range of enforcement powers it can exercise if an entity issues, or proposes to issue, securities in breach of Chapter 7 of the Listing Rules.

ASX may:

- suspend the quotation of the entity's securities until the matter has been dealt with to ASX's satisfaction;<sup>269</sup>
- require the entity to impose a holding lock on the securities to prevent them being disposed of until the matter has been dealt with to ASX's satisfaction;<sup>270</sup>
- if the issue has not yet taken place, direct the entity not to proceed with the issue;<sup>271</sup>
- if the issue has already taken place, direct the entity to cancel or reverse the issue;<sup>272</sup> and/or
- direct the entity to convene a meeting of security holders to approve the issue under Listing Rule 7.1, 7.6 or 7.9 (as applicable).<sup>273</sup>

On the second last bullet point above, ASX recognises that in some cases there could be legal impediments to an entity cancelling or reversing an issue of securities at the direction of ASX.<sup>274</sup> In those cases, ASX may instead direct the entity not to make any further issue of equity securities under Listing Rules 7.1 or 7.1A.2 for a period determined by ASX (often referred to as a "placement holiday"). The period of the placement holiday will usually be the minimum period ASX calculates it would have taken the entity to issue the number of securities in question under Listing Rule 7.1 if it had issued them in tranches that complied with that rule.<sup>275</sup>

On the last bullet point above, it should be noted that ASX will not generally allow an entity that has issued securities in breach of Chapter 7 of the Listing Rules to leave the issue on foot and seek to have it ratified by the holders of

<sup>269</sup> Listing Rule 17.3.1.

<sup>270</sup> Listing Rule 18.8(h).

<sup>271</sup> Listing Rule 18.8(c).

<sup>272</sup> Listing Rule 18.8(d).

<sup>273</sup> Listing Rule 18.8(e). Where ASX imposes such a requirement and security holders do not approve the issue, ASX may impose such further requirements as it considers appropriate under Listing Rule 18.8.

<sup>274</sup> Those legal impediments will arise if the recipient of the securities was not aware of, and did not aid or abet, the breach of Chapter 7 and is unwilling to co-operate with the entity in having its securities cancelled to rectify the breach. A cancellation may also require approval from security holders or the court before it can be effected.

<sup>275</sup> Listing Rule 18.8.

its ordinary securities at a subsequent meeting. For ASX to condone that course would open Chapter 7 to abuse. ASX is more likely instead to impose a placement holiday.

More generally, where an entity issues securities in breach of Chapter 7 and ASX considers the breach to be an egregious one, ASX may:

- censure the entity for breaching the Listing Rules;<sup>276</sup>
- exercise ASX's discretion not to quote the securities;<sup>277</sup> and/or
- terminate the entity's admission to the official list.<sup>278</sup>

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

Whenever ASX takes enforcement action against an entity for breaching Chapter 7 of 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>276</sup> Listing Rule 18.8A.

<sup>277</sup> Listing Rule 2.9.

<sup>278</sup> Listing Rule 17.12.

### Annexure A: Worked examples of calculations of placement capacity

#### Example 1

An eligible entity has 200 million fully paid ordinary securities on issue at the time of its AGM. All of those securities have been on issue for at least 12 months. It has no other quoted securities on issue. At the AGM, a resolution conferring a 7.1A mandate is passed. No other resolution seeking approval for the issue of securities is voted on. Immediately after the AGM, the entity has the capacity to issue:

- 30 million (15% x 200 million) equity securities under Listing Rule 7.1; and
- 20 million (10% x 200 million) equity securities under Listing Rule 7.1A.2.

Six months after the AGM, the entity issues 10 million fully paid ordinary securities as a placement at 90% of the prevailing market price ("initial placement").<sup>279</sup> This placement can be made under Listing Rule 7.1A because it complies with the discount limitation in Listing Rule 7.1A.3 and the securities are in a class already quoted on ASX. Following this placement, the entity has the capacity to issue:

- 30 million equity securities under Listing Rule 7.1; and
- 10 million equity securities under Listing Rule 7.1A.2.

One month later, the entity wishes to issue by way of a placement 20 million fully paid ordinary securities at 80% of the prevailing market price, and 20 million free attaching options that convert to ordinary securities on a one for one basis. It can do so, using both:

- its remaining capacity of 10 million equity securities under Listing Rule 7.1A.2 for half of the ordinary securities (because the ordinary securities are in a class already quoted on ASX and their issue price complies with the discount limitation in Listing Rule 7.1A.3), and
- its capacity of 30 million equity securities under Listing Rule 7.1 for the other 10 million ordinary securities and all 20 million options.

Until 12 months have passed following the initial placement, the entity does not have any further ability to issue equity securities under a placement without prior security holder approval.

#### Example 2

An eligible entity has 400 million fully paid ordinary securities on issue at the time of its AGM. It has no other quoted class of equity securities. All of the ordinary securities have been on issue for at least 12 months. At the AGM, a resolution conferring a 7.1A mandate is passed. No other resolution seeking approval for the issue of securities is voted on. Immediately following the AGM, the entity has the capacity to issue:

- 60 million (15% x 400 million) equity securities under Listing Rule 7.1; and
- 40 million (10% x 400 million) equity securities under Listing Rule 7.1A.2.

Three months after the AGM, the entity issues 55 million fully paid ordinary securities as a placement at 70% of the prevailing market price. This placement has to come under Listing Rule 7.1 because it does not comply with discount limitation in Listing Rule 7.1A.3. Following this placement, the entity has the capacity to issue:

- 5 million equity securities under Listing Rule 7.1; and
- 40 million equity securities under Listing Rule 7.1A.2.

<sup>279</sup> References in the examples in this Annexure involving Listing Rule 7.1A to the "prevailing market price" mean the VWAP of the relevant class of equity securities over the 15 trading day pricing period referred to in Listing Rule 7.1A.3.

One month later, the entity wishes to issue 10 million options that convert to ordinary securities on a one for one basis under a placement. It cannot do so without obtaining prior ordinary security holder approval under Listing Rule 7.1. This is because it does not have sufficient capacity left under Listing Rule 7.1 to issue 10 million equity securities (it only has 5 million left), and it cannot use its capacity under Listing Rule 7.1A to issue equity securities in a new class.

### Example 3 (issue of convertible securities)

An entity is proposing to issue convertible notes with a face value of \$100 each, a floating interest rate payable semi-annually in cash, and a term of three years. The convertible notes are a new class of security that has not been quoted on ASX. At maturity, the holder can elect to receive the principal of the note in cash or in fully paid ordinary shares at a fixed issue price of \$2 per share.

Twelve months before the proposed date of issue of the convertible notes, the entity had 100 million fully paid ordinary shares, 20 million partly paid shares and 20 million options on issue. In the intervening 12 month period, no other equity securities have been issued, no options have been exercised and no partly paid shares have been paid up. The number calculated in accordance with the formula in Listing Rule 7.1 is therefore 15 million (15% of the 100 million fully paid ordinary securities).

The entity could therefore issue up to 300,000 convertible notes (ie notes having an aggregate face value of \$30 million and convertible into a maximum amount of 15 million fully paid ordinary shares at maturity)<sup>280</sup> without breaching the placement capacity in Listing Rule 7.1.

Suppose the entity decides to issue 200,000 convertible notes without shareholder approval under Listing Rule 7.1 or 7.4. For the next 12 months, that will reduce the entity's placement capacity under Listing Rule 7.1 by an amount equal to 10 million fully paid ordinary securities (being the maximum number of fully paid ordinary securities into which those notes may or will convert at maturity).<sup>281</sup>

### Example 4 (convertible securities with limited rights of conversion)

An entity issues a bond to an institutional investor with a face value of \$10 million and a term of ten years. The bond is not quoted on ASX. The bond is not convertible except where the entity is the subject of a takeover bid under Chapter 6 of the Corporations Act at any time while the bond is on issue, in which case the holder may within one month of the takeover bid elect to convert the principal amount of the bond into fully-paid ordinary shares in the entity at an issue price of \$1.00 per share.

The bond is a convertible security for the purposes of the Listing Rule even though the right of the holder to convert only applies if and when a takeover bid is made. The maximum number of ordinary securities that can be issued upon its conversion is 10 million. The issue of the bond will therefore require security holder approval under Listing Rule 7.1 if the entity does not have the capacity to issue at least 10 million fully paid ordinary securities under Listing Rule 7.1 at that time. If the bond is issued without security holder approval, it will reduce the entity's placement capacity under Listing Rule 7.1 by the equivalent of 10 million fully paid ordinary securities for the next 12 months.

### Example 5 (convertible securities where the conversion formula only includes fixed amounts)

An entity issues convertible notes with an aggregate face value of \$10 million, a term of two years and a fixed interest rate of 5% per annum compounding annually and payable at maturity. The convertible notes are a new class of security that has not been quoted on ASX. At maturity, the holder can elect to have the principal plus accumulated interest paid in cash or to receive fully-paid ordinary shares in the entity at a fixed issue price of \$1 per share. The maximum number of ordinary securities into which the note can convert is 11,025,000 (being the sum of the note's principal and accumulated interest at maturity divided by the issue price of \$1).

The entity can issue the convertible notes without security holder approval provided its Listing Rule 7.1 placement capacity at the time is at least 11,025,000 fully paid ordinary securities.

<sup>280</sup> Calculated as 300,000 notes times the \$100 face value, divided by the \$2 fixed conversion price.

<sup>281</sup> Calculated as 200,000 notes times the \$100 face value, divided by the \$2 fixed conversion price.

If issued without security holder approval, the convertible notes will reduce the entity's placement capacity under Listing Rule 7.1 by 11,025,000 fully paid ordinary securities for the 12 months following their issue.

### **Example 6 (conversion tied to the market price of the underlying security with no floor)**

An entity proposes to issue convertible notes with an aggregate face value of \$10 million. The convertible notes are a new class of security that has not been quoted on ASX. At maturity, the holder can elect to receive the principal of the note in cash or in fully paid ordinary shares. The issue price for the shares is an amount equal to 90% of the VWAP of the ordinary shares on ASX and Chi-X over a 10 trading day window that ends one week prior to the date of conversion. There is no floor price on conversion.

The VWAP of the entity's ordinary shares on ASX and Chi-X for the 10 day period ending one week prior to the proposed date of issue of the convertible notes was 50 cents. Using that value in the conversion formula, the maximum number of ordinary shares into which the notes would convert at the date of issue would therefore be  $(\$10,000,000/[90\% \times \$0.50])$ , or 22,222,222 ordinary shares.<sup>282</sup>

The entity can issue the convertible notes without security holder approval provided its Listing Rule 7.1 placement capacity at the time is at least 22,222,222 ordinary shares.

If issued without security holder approval, the convertible notes will reduce the entity's placement capacity under Listing Rule 7.1 at the date of their issue by 22,222,222 ordinary shares. They will continue to affect its placement capacity for the next 12 months following their issue but the amount by which they do so will change with changes in the value of the underlying shares.

For instance, suppose the entity issues \$10 million of convertible notes. Six months later it wants to issue a further tranche of convertible notes.<sup>283</sup> None of the initial tranche of convertible notes has been converted. The entity's ordinary shares have traded downwards since the issue of the first tranche of the convertible notes and the VWAP of the entity's ordinary shares on ASX and Chi-X for the 10 day period ending one week prior to the proposed date of issue of the second tranche of convertible notes is now 40 cents. ASX will use that price to calculate the maximum number of ordinary shares that can be issued under both the first tranche and the second tranche. Hence the value of the first tranche in variable C will now be  $(\$10,000,000/[90\% \times \$0.40])$ , or 27,777,777 ordinary shares.

The downward movement in the market price of the entity's ordinary shares over the 6 month period has effectively reduced its placement capacity under Listing Rule 7.1 by 5,555,555 ordinary shares.

Suppose instead that the entity's ordinary shares have traded upwards since the issue of the first tranche of the convertible notes and the VWAP of the entity's ordinary shares on ASX and Chi-X for the 10 day period ending one week prior to the proposed date of issue of the second tranche of convertible notes is now 60 cents. ASX will use that price to calculate the maximum number of ordinary shares that can be issued under both the first tranche and the second tranche. Hence the value of the first tranche in variable C will now be  $(\$10,000,000/[90\% \times \$0.60])$ , or 18,518,518 ordinary shares.

The upward movement in the market price of the entity's ordinary shares over the 6 month period has effectively increased its placement capacity under Listing Rule 7.1 by 3,703,704 ordinary shares.

### **Example 7 (conversion tied to the market price of the underlying security but with a floor higher than the current market price)**

An entity proposes to issue convertible notes with an aggregate face value of \$10 million. The convertible notes are a new class of security that has not been quoted on ASX. At maturity, the holder can elect to receive the principal of the note in cash or in fully paid ordinary shares. The issue price for the shares is an amount equal to

<sup>282</sup> As mentioned in '5.4 Determining the maximum number of securities that can be issued under a convertible security' on page 29, ASX will generally calculate the maximum number of underlying securities that can be issued under the terms of a convertible security assuming the security was being converted on the 'relevant date' and applying the conversion formula accordingly.

<sup>283</sup> Note that the requirement to re-determine the maximum number of securities that may be issued under the first tranche of the convertible securities will apply to any subsequent issue of, or agreement to issue, equity securities made within 12 months after their issue, not just a further issue of convertible securities within those 12 months.



the higher of \$1 per share and 90% of the VWAP of the ordinary shares on ASX and Chi-X over a 10 trading day window that ends one week prior to the date of conversion.

The VWAP of the entity's ordinary shares on ASX and Chi-X for the 10 day period ending one week prior to the proposed date of issue of the convertible notes was 50 cents. Using that value, but for the \$1 floor on the conversion price, the maximum number of ordinary shares into which the notes would convert at the proposed date of issue would be  $(\$10,000,000/[90\% \times \$0.50])$ , or 22,222,222 ordinary shares. However, because of the \$1 floor on the conversion price, the maximum number of ordinary securities into which the notes would convert at the proposed date of issue is in fact 10,000,000 ordinary shares.

The entity can issue the convertible notes without security holder approval provided its Listing Rule 7.1 placement capacity at the time is at least 10,000,000 fully paid ordinary securities.

If issued without security holder approval, the convertible notes will reduce the entity's placement capacity under Listing Rule 7.1 at the date of their issue by 10,000,000 fully paid ordinary securities. They will continue to affect its placement capacity for the next 12 months following their issue but the amount by which they do so may change with changes in the value of the underlying shares (particularly if the 10 day VWAP trades above \$1.11 and hence the conversion formula will yield a conversion price higher than the \$1 floor).

### **Example 8 (conversion tied to the market price of the underlying security but with a floor lower than the current market price)**

An entity proposes to issue convertible notes with an aggregate face value of \$10 million. The convertible notes are a new class of security that has not been quoted on ASX. At maturity, the holder can elect to receive the principal of the note in cash or in fully paid ordinary shares. The issue price for the shares is an amount equal to the higher of 25 cents per share and 90% of the VWAP of the ordinary shares on ASX and Chi-X over a 10 trading day window that ends one week prior to the date of conversion.

The VWAP of the entity's ordinary shares on ASX and Chi-X for the 10 day period ending one week prior to the proposed date of issue of the convertible notes was 50 cents. Using that value, the maximum number of ordinary shares into which the notes would convert at the proposed date of issue would be  $(\$10,000,000/[90\% \times \$0.50])$ , or 22,222,222 ordinary shares. This is not affected by the 25 cent floor on the conversion price since that does not come into play until the 10 day VWAP falls to under 27.78 cents.

The entity can issue the convertible notes without security holder approval provided its Listing Rule 7.1 placement capacity at the time is at least 22,222,222 ordinary shares.

If issued without security holder approval, the convertible notes will reduce the entity's placement capacity under Listing Rule 7.1 at the date of their issue by 22,222,222 ordinary shares. They will continue to affect its placement capacity for the next 12 months following their issue but the amount by which they do so will change with changes in the value of the underlying shares (as per example 6 above).

### Annexure B: Work sheet to calculate placement capacity under Listing Rule 7.1

<b>Step 1: calculate "A" in rule 7.1</b>	
Date of issue or agreement to issue securities	
The "relevant period" as defined in rule 7.1  Note: if the entity has been admitted to the official list for 12 months or more, this will be the 12 month period immediately preceding the date of the issue or agreement referred to in the previous cell; if the entity has been admitted to the official list for less than 12 months, this will be the period from the date the entity was admitted to the official list to the date immediately preceding the date of the issue or agreement).	
<b>A1:</b> total number of <b>fully paid ordinary securities</b> on issue at the commencement of the relevant period	
<b>A2:</b> number of <b>fully paid ordinary securities</b> issued in the relevant period under an exception in rule 7.2 other than exception 9, 16 or 17	
<b>A3:</b> number of <b>fully paid ordinary securities</b> issued in the relevant period on the conversion of convertible securities within rule 7.2 exception 9 where the issue of the convertible securities was approved or taken to be approved under rule 7.1 or 7.4	
<b>A4:</b> number of <b>fully paid ordinary securities</b> issued in the relevant period under an agreement to issue securities within rule 7.2 exception 16 where the agreement was approved or taken to be approved under rule 7.1 or 7.4	
<b>A5:</b> number of any other <b>fully paid ordinary securities</b> issued in the relevant period with approval under rule 7.1 or 7.4  Note: This may include fully paid ordinary securities issued in the relevant period under an agreement to issue securities within rule 7.2 exception 17 where the issue is subsequently approved under rule 7.1.	
<b>A6:</b> number of partly paid ordinary securities that <b>became fully paid ordinary securities</b> in the relevant period	
<b>A7:</b> number of <b>fully paid ordinary securities</b> cancelled in the relevant period	
<b>"A" = A1 + A2 + A3 + A4 + A5 + A6 – A7</b>	
<b>Step 2: calculate the aggregate rule 7.1 placement capacity available</b>	
<b>Rule 7.1 capacity = A x 15%</b>	
<b>Step 3: calculate "C" in rule 7.1 (placement capacity already used)</b>	
<b>C1:</b> total number of <b>equity securities</b> issued or agreed to be issued in the relevant period	

<b>C2:</b> number of <b>equity securities</b> issued in the relevant period with security holder approval under rule 7.1 or 7.4	
<b>C3:</b> number of <b>equity securities</b> issued in the relevant period under rule 7.1A	
<b>C4:</b> number of <b>equity securities</b> issued in the relevant period under an exception in rule 7.2	
<b>"C"</b> = C1 – C2 – C3 – C4	
<b>Step 4: calculate remaining rule 7.1 placement capacity</b>	
<b>Remaining capacity</b> = Rule 7.1 capacity – C	

### Annexure C: Work sheet to calculate placement capacity under Listing Rule 7.1A

<b>Step 1: confirm entitlement to use rule 7.1A placement capacity</b>	
Date of AGM approving additional placement capacity under rule 7.1A (must be not more than 12 months prior to the issue or agreement to issue securities in question)	
Confirm that at the date of the AGM above, the entity's market capitalisation was less than \$300 million and the entity was not included in the S&P/ASX 300 Index	
Confirm that since the date of the AGM above the entity has not had a subsequent AGM	
Confirm that since the date of the AGM above the entity's security holders have not passed a resolution approving a transaction under Listing Rule 11.1.2 or 11.2	
Confirm the securities being issued are in a class of securities presently quoted on ASX	
<p>If the securities were issued within 10 trading days of date on which the price for the issue of the securities was agreed, state:</p> <ul style="list-style-type: none"> <li>the date on which the price for the issue of the securities was agreed (the agreement date);</li> <li>the period covered by the 15 trading days on which trades in that class were recorded immediately before the agreement date; and</li> <li>the volume weighted average price ('VWAP') for securities in the relevant class over that period</li> </ul>	
<p>If the securities were not issued within 10 trading days of date on which the price for the issue of the securities was agreed, state:</p> <ul style="list-style-type: none"> <li>the date on which the securities were issued (the issue date);</li> <li>the period covered by the 15 trading days on which trades in that class were recorded immediately before the issue date; and</li> <li>the volume weighted average price ('VWAP') for securities in the relevant class over that period</li> </ul>	
Who was the source of the VWAP calculation referred to above	
Confirm the securities have been or are being issued for a cash consideration only	
State the cash consideration per security issued or being issued	

Confirm that the cash consideration per security issued or being issued is not less than 75% of the VWAP figure provided above	
<b>Step 2: calculate "A" in rule 7.1A.2</b>	
Date of issue or agreement to issue securities	
The "relevant period" as defined in rule 7.1  Note: if the entity has been admitted to the official list for 12 months or more, this will be the 12 month period immediately preceding the date of the issue or agreement referred to in the previous cell; if the entity has been admitted to the official list for less than 12 months, this will be the period from the date the entity was admitted to the official list to the date immediately preceding the date of the issue or agreement).	
<b>A1:</b> total number of <b>fully paid ordinary securities</b> on issue at the commencement of the relevant period	
<b>A2:</b> number of <b>fully paid ordinary securities</b> issued in the relevant period under an exception in rule 7.2 other than exception 9, 16 or 17	
<b>A3:</b> number of <b>fully paid ordinary securities</b> issued in the relevant period on the conversion of convertible securities within rule 7.2 exception 9 where the issue of the convertible securities was approved or taken to be approved under rule 7.1 or 7.4	
<b>A4:</b> number of <b>fully paid ordinary securities</b> issued in the relevant period under an agreement to issue securities within rule 7.2 exception 16 where the agreement was approved or taken to be approved under rule 7.1 or 7.4	
<b>A5:</b> number of any other <b>fully paid ordinary securities</b> issued in the relevant period with approval under rule 7.1 or 7.4  Note: This may include fully paid ordinary securities issued in the relevant period under an agreement to issue securities within rule 7.2 exception 17 where the issue is subsequently approved under rule 7.1.	
<b>A6:</b> number of partly paid ordinary securities that <b>became fully paid ordinary securities</b> in the relevant period	
<b>A7:</b> number of <b>fully paid ordinary securities</b> cancelled in the relevant period	
<b>"A" = A1 + A2 + A3 + A4 + A5 + A6 – A7</b>	
<b>Step 3: calculate the aggregate rule 7.1A placement capacity available</b>	
<b>Rule 7.1A capacity = A x 10%</b>	

**Step 4: calculate "E" in rule 7.1A.2 (placement capacity already used)**

**E1:** total number of **equity securities** issued or agreed to be issued in the relevant period under rule 7.1A.2

**E2:** number of **equity securities** issued in the relevant period under rule 7.1A.2 which were subsequently approved by security holders under rule 7.4

"E" = E1 – E2

**Step 5: calculate remaining rule 7.1A placement capacity**

**Remaining capacity** = Rule 7.1A capacity – E