Chapter 1 — Admission

ASX Listing

ASX Debt Listing

ASX Foreign Exempt Listing

Rules that apply to all entities

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **1** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 0::
bwservice::0::

[The next page is 0]

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **2** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 1::
bwservice::0::

ASX Listing

[1.1] Listing Rule 1.1 — Requirements for ASX Listing

[1.1.A] General principle and ASX policy

As mentioned in the Introduction (see para [0.1.A]), ASX is licensed under the Corporations Act to operate a financial market and is required to ensure that the ASX market is operated in a manner that is "fair, orderly and transparent". Chapter 1 of the Listing Rules is an important tool by which ASX satisfies its obligation to ensure that the market is orderly and transparent, by ensuring that:

- entities which have their securities traded on ASX satisfy minimum standards of quality, size, operations and disclosure; and
- that there is sufficient investor interest to warrant an entity's participation in the market by having its securities quoted.

See para [0.10.A] for notes on the principles underlying the Listing Rules.

In order for an entity to have its securities quoted on the ASX market, the entity must first be "admitted" by ASX to the official list of entities maintained by ASX. Chapter 1 sets out the Conditions that an entity must satisfy in order to be admitted to the official list. It is important to distinguish between:

- "admission" of a company, trust or other entity (which establishes the primary relationship between the entity and ASX); and
- "quotation" of the entity's securities, which may cover multiple classes of securities to be traded on ASX.

In the case of some entities admitted to ASX Debt Listing, the entity's securities may be quoted on ASX, but the debt instruments may be mainly traded between wholesale investors outside the ASX market.

ASX admits entities to listing in one of three categories:

- ASX Listing (covers most entities which have shares, options or trust units traded on ASX and also covers less common entity structures such as "stapled security" structures);
- ASX Debt Listing (covers entities which wish to be admitted to have only debt securities traded or quoted on ASX);
- ASX Foreign Exempt Listing (covers foreign entities which are already subject to the listing rules (or equivalent) of an "overseas home exchange").

A foreign entity can, of course, seek a full listing under ASX Listing Rule (LR) 1.1, in which case it will be subject to an assessment by ASX of whether it satisfies all of the Conditions for a full ASX listing. (There are a number of foreign entities with a full ASX Listing).

A foreign entity seeking a full ASX Listing may do so either as a primary listing or as a "secondary listing" (ie where the foreign entity has an existing listing in another country). By contrast, a Foreign Exempt Listing will always be secondary to a primary listing in the foreign entity's home jurisdiction: see para [1.1.D.01] for notes on ASX Guidance Note 4 — Foreign Entities.

ASX recognises in its Listing Rules that an "entity" which is seeking admission may not be a company or an incorporated entity and therefore does not stipulate any particular business structure to be adopted by an entity seeking admission. This is particularly relevant for a Foreign Exempt Listing where the primary requirement is that the entity has

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **3** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 0::
bwservice::0::

an existing listing on an overseas securities exchange and the business structure of the entity will be governed by the laws of the relevant foreign country. Instead, ASX has adopted the approach that, provided an entity satisfies the minimum Conditions set out in the Listing Rules, it will be entitled to admission. In the case of some business structures, ASX has exercised its discretion to grant waivers of particular Conditions, for example, in the case of "stapled securities".

See para [1.1.C.01] for notes on the listing of issuers of stapled securities, and see para [1.1.C.01] for notes on the listing of co-operatives and similar entities.

The most common situation where an entity seeks listing on ASX, that is where the initial listing of the entity is accompanied by an "Initial Public Offering" (IPO) of the entity's securities, involving:

- the sale by the existing owners of the entity's securities to the public; and/or
- the issue of new securities to the public by the entity itself to raise additional capital.

There are several other circumstances in which an entity may come to apply for ASX Listing:

Backdoor listing

One method by which a new business may seek to be listed on ASX is through what is referred to as a "backdoor" listing. This is where shares in an existing (usually unprofitable) ASX listed company are acquired by the vendor of a business with the intention that the listed company will acquire the business in return for the issue of further shares to the vendor and a capital raising from existing or new investors. Such an arrangement will usually require a number of approvals under the Listing Rules and in particular LR 11.1 which regulates any "significant" change to the nature and scale of activities of a listed entity. Under LR 11.1.3, ASX can require the listed entity to satisfy the requirements in Chs 1 and 2 as if it were applying to be admitted to listing: see para [11.1.A]* for notes on LR 11.1 and backdoor listings.

Spin-off listing

Another circumstance in which a new business may seek to be listed on ASX is through what is referred to as a "spin-off" listing. In this case an existing ASX listed entity may seek to separate part of its existing business into a new entity and apply for that entity to be admitted to ASX Listing. Where the new entity to be listed is being offered pro rata to existing shareholders, it may also be referred to as a "demerger". A spin-off listing or demerger may or may not be accompanied by a capital raising.

In addition to the requirement for the spin-off entity to qualify for admission to listing, the parent listed entity promoting such an arrangement will usually be affected by a number of Listing Rules, including:

- LR 7.17 which requires offers of securities in a separate entity to be made pro rata or in another way that is fair;
- LR 11.1 which regulates any "significant" change to the nature and scale of activities of a listed entity; and
- LR 11.4 which regulates disposal of a major asset with a view to the entity holding the asset becoming listed.

See para [7.17.A]* for notes on LR 7.17 and see paras [11.1.A]* and [11.4.A]* for notes on LR 11.1 and LR 11.4.

ASX may be more prepared to allow some flexibility by way of waivers when a spin-off entity applies to be listed, particularly in relation to the assets test or profits test, if it can be demonstrated that the existing business has a track record of profitability.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **4** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 1::
bwservice::0::

Compliance Listing

An entity may also apply to ASX in what is commonly referred to as a "compliance" listing. This is where the entity is usually fully funded and does not intend to raise any capital as part of its listing. The main purpose of listing in this situation is to gain access to the benefits of listing, such as access to the secondary market and additional liquidity for shareholders, rather than to raise capital.

Whether it is a normal listing accompanied by an IPO, a "backdoor" listing, a "spin-off" listing or a "compliance" listing, an entity will generally need to comply with all the requirements of the ASX Listing Rules, unless a waiver has been granted by ASX.

Listing Rule 1.1 sets out the Conditions which must be satisfied by an entity to be admitted under a full ASX Listing:

[1.1.A.10] Condition 1

This Condition gives ASX a broad discretion to decide whether an entity's structure and operations are "appropriate for a listed entity". As noted above, ASX has accommodated a variety of admitted entity structures (with particular flexibility required in relation to stapled entity structures), but ASX is unlikely to admit an entity where its business structure, for example, does not:

- allow for proper governance;
- ensure that assets are preserved within the business structure of the entity seeking admission; or
- facilitate transparent accounting or disclosure.

A note to this Condition indicates that ASX may have regard to whether the principles on which the Listing Rules are based have been and will be complied with, and the examples provided above are consistent with this. Listing Rule 12.5 imposes an ongoing requirement for the entity's structure and operations to be appropriate in order to maintain listing on ASX: see para [12.5.A]* for notes on LR 12.5.

It should be noted that there is no comparable requirement for an entity seeking a Foreign Exempt Listing – this reflects the primary consideration that such an entity will already be listed on an acceptable home exchange: see para [1.11.A] below for notes on the Conditions for a Foreign Exempt Listing.

ASX collects information about an entity's structure and operations through App 1A (ASX Listing Application and Agreement): see para [1.7.A] below for notes on the Listing Application and Agreement in App 1A.

[1.1.A.10A] Condition 1A

The requirement that an entity must have "a constitution" might limit the business structure which can be adopted by an entity seeking listing (if for example that structure would not ordinarily have a governing document that binds all members). This Condition is consistent with the principles of transparency and fairness to investors and ASX is unlikely to waive this Condition, although it may grant a waiver of the content requirements for a constitution (see Condition 2 below) in appropriate circumstances.

In the case of a trust this Condition is satisfied by having a trust constitution that complies with the requirements for managed investment schemes under Ch 5C of the Corporations Act.

See para [1.1.A.50] for notes on Condition 5 (requirement for a trust to be a registered managed investment scheme) and Guidance Note 6 (Trusts).

See para [1.1.C.50] for notes on the registration of managed investment schemes under Ch 5C of the Corporations Act and see para [1.1.C.20] for notes on the requirement for managed investment schemes to have a trust constitution.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **5** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 2::
bwservice::0::

[1.1.A.20] Condition 2

An entity seeking listing can choose between either ensuring that its constitution is "consistent with" the Listing Rules or can include in its constitution the additional provisions in Apps 15A or 15B (as applicable). These additional provisions operate to ensure that any inconsistency between the constitution and the Listing Rules is resolved by automatically modifying the constitution to the extent necessary to remove any inconsistency. Whilst there is no legal restriction on an Australian company including the Apps 15A or 15B provisions in its constitution, doing so may cause difficulties for other entities, in particular:

- trust entities which are registered managed investment schemes: see para [1.1.C.50] for notes on the registration of managed investment schemes under Ch 5C Corporations Act.
- foreign entities seeking full ASX Listing whose constitution may not be consistent with the Listing Rules because of a requirement of a foreign law or foreign listing requirement: see para [1.1.B.20] for relevant ASX waivers.

Where an entity chooses not to adopt the provisions in Apps 15A or 15B, it must complete a checklist to confirm that its constitution complies with the Listing Rules as part of its Listing Application in the form of App 1A: see para [1.7.A] for notes on the Listing Application and Agreement in App 1A and see para [1.1.B.20] for relevant ASX waivers.

[1.1.A.30] Condition 3

The prospectus, Product Disclosure Statement (PDS) or information memorandum is a key document used to support an entity's application for listing. These documents should provide investors with all material information about the entity and thus form the foundation of the entity's continuous disclosure regime.

A prospectus or PDS is a regulated disclosure document which complies with the Corporations Act. A note to the Condition indicates that an "offer information statement" will not satisfy the requirement for a prospectus: see para [1.1.C.30] for notes on when a prospectus, offer information statement or Product Disclosure Statement is required under the Corporations Act for an initial offering or sale of securities.

In certain circumstances ASX has allowed the use of an information memorandum instead of a prospectus or PDS to supports an entity's application for admission. These situations generally relate to demerger or spin-off schemes or when an entity does not need additional security holders to satisfy the spread test: see para [1.1.A] for notes on spin-off and demerger schemes and see para [1.1.A.70] for notes on the spread test.

Although an information memorandum is not a prospectus, as a general rule, an information memorandum must contain all the information as required by the Corporations Act as if it were a prospectus: see App 1A, item 108, in addition to the LR 1.1 and App 1A requirements. Further, the entity must not have raised any capital in the 3 months prior to admission, nor intend to raise capital in the 3 months after admission: see para [1.1.C.30] for notes on the on-sale restrictions where an entity does not issue a prospectus or PDS.

The requirement to issue a prospectus or PDS is consistent with the more common situation of where an entity seeks listing on ASX, that is where the initial listing of the entity is accompanied by an "Initial Public Offering" (IPO).

In an IPO there is an offer of the entity's securities to the public consisting of any or all of the following:

- a sell-down of securities to wholesale or retail investors by a private investor (eg a private equity fund);
- an offer of new securities to wholesale investors; and

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **6** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 3::
bwservice::0::

- an offer of new securities to retail investors.

Under the Corporations Act a prospectus (for an issue or offer of securities) or a PDS (for an issue or offer of trust units) will only be required under the Act where any of the securities or trust units are offered to retail investors. If the initial offering is only made to "professional or sophisticated investors" or "wholesale investors", a prospectus or PDS is not required under the Act. However, if securities or trust units are issued without a prospectus or PDS, they effectively can not be on-sold to retail investors for 12 months after the date of the IPO, because of the on-sale restrictions under the Act. As a result, it would be impractical for an entity seeking a new listing to seek to do so without issuing a prospectus or PDS as otherwise the securities or trust units could not be traded to retail investors on ASX, unless an exemption from the on-sale requirements is granted by ASIC.

See para [1.1.C.30] for notes on the restrictions on secondary trading which are imposed when securities or trust units are initially offered or issued without a prospectus or Product Disclosure Statement under the Corporations Act.

The prospectus (for the issue of securities) or PDS (for the issue of trust units) must contain all relevant information as required by the Corporations Act, the Listing Rules and App 1A. Appendix 1A provides a high level indication of the information required from a Listing Rule perspective. Note however that this is not exhaustive and ASX may form the view that additional information is required.

If ASX considers that the disclosure in a prospectus or PDS is inadequate, it will require the entity to rectify the deficiency. Generally, this may be by way of:

- a replacement or supplementary prospectus or PDS; and/or
- pre-quotation disclosure (PQD), after admission but prior to quotation.

It is not uncommon for ASX to request PQD on information not available at the date of the document, such as the top 20 security holders, a distribution schedule or escrowed security details.

Unlike ASIC, which generally has a 7 day exposure period (plus any extension) to review a prospectus or PDS, ASX may form the view that the level of disclosure is inadequate at any time prior to admission of the entity to listing. Further, even though ASIC may not have raised any objection in relation to an entity's prospectus or PDS, this does not preclude ASX from raising other issues or requesting remedial action.

A copy of any prospectus, PDS or information memorandum must be lodged with ASX as part of the Listing Application: see para [1.7.A] for notes on the Listing Application and Agreement in App 1A.

[1.1.A.40] Condition 4

The requirement for a foreign entity to be a registered foreign company and to appoint an agent for service of process in Australia reflects an understanding that a foreign entity whose securities are traded on ASX should be accessible and regulated under Australian law. This is consistent with the Corporations Act approach to when a foreign corporation will be taken to be "carrying on business in Australia": see para [1.1.C.40] for notes on registration of foreign corporations.

ASX operates its market on the basis of wholly paperless transfers of securities under the CHESS system. Ownership and registration of securities under the CHESS system is done without share certificates. It operates on the basis of a master electronic register with separate "subregisters" to accommodate both on-market and private transfers of securities. The ASX subsidiary which operates the CHESS system is ASX Settlement Pty Limited (ASX Settlement). Normally a company controls the transfer of its securities. Under the CHESS system, ASX Settlement causes on-market transfers of securities to occur as agent of the listed company: see para [1.1.C.40] for notes on transfer and ownership of paperless and uncertificated securities.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **7** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 4::
bwservice::0::

Once a foreign company has its securities quoted they must conform to the CHESS system, whether or not transfers are being conducted on-market. This means that the foreign company must establish subregisters as required by LR 8.2 and the ASX Settlement Operating Rules: see para [8.1.A]* for notes on Ch 8 of the Listing Rules.

If a foreign company, under its home jurisdiction, can only operate its securities register on the basis of paper based transfers and certificates for its securities, it must establish an Australian securities register or subregister, so that its securities can trade electronically under the CHESS system. Where the law of its home jurisdiction does not permit "paperless" securities transfers (ie transfers without the delivery of certificates), then the foreign company must issue CHESS Depositary Instruments (CDIs) in Australia and these instruments are quoted on ASX instead of the foreign company's shares. In a Note to Condition 4, ASX indicates that a subregister for CDIs satisfies the requirement to have a securities subregister in Australia: see paras [2.1.A.30] and [2.16.A] for notes on CDIs.

[1.1.A.50] Condition 5

The requirement for a listed trust to be a registered managed investment scheme under Ch 5C of the Corporations Act is consistent with the principle that there needs to be certainty about the structure of a listed entity and its quoted securities.

The registration of a trust as a managed investment scheme under the Corporations Act provides this certainty by ensuring that there is a consistent regulatory regime to govern:

- the issue and transfer of interests in the trust;
- the obligations of the trustee of the trust (the trustee is referred to as the "responsible entity" of the trust);
- the constitution of the trust; and
- rights of holders of interests in the trust.

A trust which is a registered managed investment scheme normally issues interests in the trust in the form of trust "units" and it is these units which are quoted and traded on ASX. The responsible entity of the trust must be a public company which holds an Australian Financial Services Licence (AFSL) under the Corporations Act. It is important to note that it is the trust which is listed on ASX not the responsible entity, which may be privately owned. In some cases, for example under a "stapled securities" structure (see below), the responsible entity may also be listed on ASX: see para [1.1.C.50] for notes on the Corporations Act provisions relating to the registration of managed investment schemes under Ch 5C and see paras [0.10.A] and [1.1.C.50] for notes on Corporations Act s 793C(4) which provides that a responsible entity has the obligation to comply with the Listing Rules as they apply to a listed trust.

A trust which does not operate as a registered managed investment scheme will instead be subject only to:

- the requirements stipulated in the Trust Deed establishing the trust;
- the relevant State trustee legislation; and
- the general law obligations of trustees;

and these may vary from trust to trust. This would be unsatisfactory from the viewpoint of certainty in a market for quoted securities.

A trust may also seek listing on the basis that the trust units will be "stapled" to shares in a listed company and/or units in other listed trusts: see para [1.1.D.01] for notes on ASX Guidance Note 2 re Stapled Securities.

A further requirement of Condition 5 is that the responsible entity of the trust must not be under an obligation to permit unit holders to withdraw from the trust. This is intended to ensure that trust units trade on the same basis as shares and other securities issued by listed companies, where a return of investor's money is only permitted under a formal reduction of capital or regulated buy-back arrangement.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **8** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 5::
bwservice::0::

There are several reasons why redemption of quoted securities on an ad hoc basis is undesirable, for example:

- it could result in a "dual market" for the securities, where securities are valued at one price in the traded market at the same time as the securities may have a different value on redemption;
- redemption of quoted securities may not be equally available to all security holders where there is only a limited pool of liquid assets to meet redemptions; and
- redemption of a significant proportion of the quoted securities of an entity could also affect the value at which the remaining securities trade on ASX, yet the redemption would not be transparent to investors until after the redemption had occurred.

Allowing an entity's main class of quoted securities to be redeemable would therefore be inconsistent with the principles of transparency and fairness and could more easily lead to a disorderly market in the listed entity's securities.

ASX has, in certain circumstances, permitted listed trusts to allow unit holders to withdraw from the trust, but will generally only allow this in circumstances where the trust itself invests in underlying quoted securities or where the trust has been specifically established to issue redeemeable or convertible structured securities: see para [1.1.B.50] for notes on ASX waivers for "investment trusts".

Companies regulated by the Corporations Act may only reduce their capital or buy-back shares in accordance with the formal process under Ch 2J of the Act: see para [1.1.C.50] for notes on company buy-backs and capital reductions under the Corporations Act and see paras [3.8A.A]* and [3.9.A]* for notes on ASX Listing Rules in relation to buy-backs and capital reductions under LRs 3.8A–3.9.

By contrast, a trust which is a registered managed investment scheme may, under Pt 5C.6 of the Corporations Act, allow unit holders to withdraw from the scheme by redeeming units at any time when the scheme is "liquid" and in other circumstances to the extent that assets are available to meet redemptions: see para [1.1.C.50] for notes on redemption of trust units under Pt 5C.6 of the Corporations Act.

Because of the general provisions for redeeming trust units under Pt 5C.6 mentioned above, there is no other formal mechanism under the Corporations Act for a trust to reduce its capital or buy-back trust units (ie there is no equivalent process to a company reduction of capital). This potentially creates an inconsistency between listed companies and listed trusts, with the risk that listed trusts may have less flexibility than listed companies to return surplus capital to investors. This inconsistency is at least partly remedied by ASX LR 7.36 under which a listed trust (which is not subject to the buy-back provisions of the Corporations Act) may buy back its units on-market, provided it complies with the Corporations Act as if it were a listed company, with such modifications as ASX requires: see para [7.36.A]* for notes on LR 7.36. ASIC has also issued a Class Order to facilitate on-market buy-backs by listed trusts which inserts a formal mechanism for buy-backs of trust units in Pt 5C.6A of the Corporations Act: see para [1.1.C.50] for notes on ASIC Class Order 07/422.

[1.1.A.60] Condition 6

A listed company or listed trust must have at least one class of its ordinary shares or units quoted on ASX, in order to be listed. The requirement for all of the securities in the "main class" (which is defined in LR 19.12 to mean ordinary shares or trust units) to be quoted is consistent with the requirement for transparency and an orderly market. By contrast, if ASX permitted only some of an entity's ordinary securities to be quoted:

- there could potentially be two markets for the entity's ordinary securities, a

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **9** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 6::
bwservice::0::

regulated market for the quoted securities and a relatively unregulated market for the unquoted securities in the same class; and
- it could also be difficult for investors to form a view as to the value of the entity's quoted securities, where the reporting to the market is made on a whole of enterprise basis, yet only a portion of the value of the enterprise is represented by the entity's quoted securities.

See paras [2.4.A] and [2.8.A] for notes on ASX LR 2.4 (quotation of all securities in a class which is already quoted) and ASX LR 2.8 (time limits for quotation of securities).

The exceptions to this Condition are:
- "restricted securities" (ie securities which are issued to persons in circumstances where trading in the securities must be restricted for a specified period under Ch 9 of the Listing Rules);
- securities where permission for quotation is granted by ASX subject to conditions being satisfied before trading commences; and
- securities where a foreign company is already listed on a foreign securities exchange and is seeking a "secondary listing" of only some of its ordinary securities on ASX: see para [1.1.B.60] for notes on ASX Waivers.

An entity's "main class" will not always be ordinary shares or ordinary trust units. ASX has the discretion to approve another class of securities as the "main class" of securities for a listed entity in appropriate circumstances.

Condition 6 ties in with the provisions in the Corporations Act that effectively prohibit the issue of securities or trust units where the prospectus or PDS states or implies that they will be able to be traded on ASX, unless:
- the securities or trust units are already quoted; or
- an application to ASX for quotation of the securities or trust units is made within 7 days of the date of the prospectus or PDS.

See para [1.1.C.60] for notes on ss 711(5), 724(1)(b) (prospectus) and 1016D (PDS) of the Corporations Act.

See para [1.1.C.60] for notes on ASIC Regulatory Guide 99 — Quotation of securities offered by prospectus (s 1031) which, although some references to provisions of the Act are outdated, is a good indication of ASIC policy in relation to quotation of securities and trust units offered under a prospectus and/or PDS.

See para [2.8.C] for notes on ASX Guidance Note 1, paras 5 and 6 in relation to applying for quotation of the maximum number of securities which could be issued under a prospectus or PDS.

Under s 1019B of the Corporations Act, a retail investor who subscribes for trust units is ordinarily entitled to a "cooling-off" period of 14 days during which the trust units can be returned to the issuer and a refund received. Because it would be impractical for the trust units to be quoted if retail investors could still seek return of their money, Corporations Regulation 7.9.64(1) provides that the cooling-off period does not apply where the PDS for the issue of the trust units states that the units will be quoted on ASX. This exemption is the same as the proposed exemption referred to in ASX Guidance Note 6, para 8.

[1.1.A.70] Condition 7

The "spread" requirement in Condition 7 is intended to ensure that there is sufficient investor interest at the time of listing to warrant an entity's participation in the market by having its securities quoted. There are two alternative ways in which an entity can satisfy the requirement:

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **10** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 7::
bwservice::0::

- by having 500 holders of at least $2,000 of securities in the entity's main class (this may include any number of related parties, provided they are genuine separate holders who have subscribed for shares); or
- by having only 400 holders of at least $2,000 of securities in the entity's main class (but with related parties holding less than 75% of the total securities).

Whilst there is no requirement for the holders of securities to be resident in Australia, ASX encourages entities seeking listing to have a sizeable base of Australian resident security holders.

In ASX Guidance Note 4, para 29, ASX has indicated that it would encourage a foreign entity seeking listing to have at least 300 Australian holders of at least $2,000 in value of securities.

In calculating whether the spread requirement is satisfied:

- holders of CHESS Depositary Interests (CDIs) can be included: see paras [2.1.A.30] and [2.16.A] for notes on CDIs;
- restricted securities must not be included: see para [9.1.A]* for discussion on restricted securities;
- securities held from a prior ASX listing of the entity must not be included; and
- the spread must not be obtained by "artificial means" (in a note to the Condition, ASX gives some examples of holdings which it will consider to be artificial, eg giving shares away; non-recourse loans; and multiple nominee holder names).

Whilst this is a threshold requirement for a company to initially gain listing, it is recognised that a listed entity's spread of holders may vary over time. As a result, the ongoing requirements to maintain listing are expressed in more general terms and involve a degree of discretion on the part of ASX: see para [12.4.A]* for notes on the ongoing listing requirements as to level of spread in ASX LR 12.4 (Level of spread).

ASX has allowed some flexibility in relation to this Condition, where the entity seeking listing is part of a broader structured arrangement, for example:

- issuers of stapled securities;
- a "spin-off" or "demerger" of a new entity from an existing listed entity; and
- in specie or bonus distributions of securities by another company.

See para [1.1.B.70] for notes on waivers and see para [0.30.A] for ASX Guidance Note on Stapled Securities.

ASX is unlikely to grant a waiver of this requirement in ordinary circumstances simply because the entity seeking listing falls marginally short of the spread requirement.

[1.1.A.80] Condition 8

The requirement that an entity must satisfy either the "profits test" (in LR 1.2) or the "assets test" (in LR 1.3) is consistent with ensuring that a listed entity is of sufficient quality and size to justify listing: see paras [1.2.A] and [1.3.A] for notes on LRs 1.2 and 1.3.

Whilst this is a threshold requirement for a company to initially gain listing, it is recognised that a listed entity's financial condition may vary over time. As a result, the ongoing requirements to maintain listing are expressed in more general terms and involve a degree of discretion on the part of ASX: see paras [12.1.A]* and [12.2.A]* for notes on the ongoing listing requirements in ASX LR 12.1 (Level of operations) and LR 12.2 (Financial condition).

There are various perceived benefits to listing under the "profits test" rather than the "assets test". These include the entity not having to apply ASX escrow to securities and not having the additional ongoing quarterly reporting requirements for commitment test

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **11** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 8::
bwservice::0::

entities: see para [4.7B.A]* for notes on reporting under LRs 4.7B and 5.3 (Apps 4C and 5B respectively) and para [1.1.A.90] for notes on restricted securities under LR 1.1, Condition 9, and LR 9.1.

ASX has allowed some flexibility in relation to Condition 8, where the entity seeking listing is part of a broader structured arrangement, for example:

- an issuer of stapled securities where the entities in the stapled may not individually satisfy the profits test or the assets test;
- a successor entity of an existing listed entity which satisfies the ongoing listing requirements (eg in a "backdoor" listing): see para [1.1.A] for notes on backdoor listings.

See para [1.1.B.80] for notes on waivers and see para [1.1.D.01] for ASX Guidance Note on Stapled Securities.

[1.1.A.90] Condition 9

It is common for persons associated with the proposed listing of an entity to hold securities in the entity to be listed. These persons may either have an existing holding in the entity to be listed or may receive securities as payment for services or payment for assets which they have provided to the entity to be listed. Often these securities are treated as "restricted securities", where the Listing Rules require a restriction on transfer to be imposed on the securities for a period after they are issued (this period is referred to as the "escrow period"). A restriction is generally applied to securities which are issued to or held by the following persons who have a pre-existing association with the listed entity:

- promoters;
- vendors of assets or shares; and
- directors or other related parties.

Unless ASX decides otherwise, ASX may decide not to impose escrow on entities that are admitted under the profits test, have a track record of profitability or can demonstrate to ASX that the entity has a substantial part of its assets as tangible assets, or that their assets have a readily ascertainable value.

The purpose of imposing an escrow period on certain securities is to ensure that a suitable period elapses before a vendor, promoter or related party can realise the value of its securities. This provides an opportunity for the value of an asset or business to become more apparent to all investors, before the vendor, promoter or related party can receive full value for the asset or business which it has effectively "sold" to other investors. Imposing a restriction on these securities is consistent with the principles of market integrity and fairness between investors.

This Condition ties in with the provisions in Ch 9 of the Listing Rules related to restricted securities: see para [9.1.A]* for notes on restricted securities and see para [0.30.A] for notes on ASX Guidance Note 11 on Restricted Securities.

[1.1.A.100] Condition 10

A "classified asset" is defined in LR 19.12. The purpose of this Condition is to ensure that any recently acquired assets which may be difficult to appropriately value, such as:

- mining exploration tenements or interests;
- speculative or unproven intellectual property or business systems; and
- other assets which in ASX's opinion cannot be readily valued;

are not paid for in cash but are instead paid for in restricted securities and therefore subject to an appropriate escrow period. Again, this restriction is consistent with the principles of market integrity and fairness between investors. This restriction does not apply in the following circumstances:

- where the vendor of the "classified asset" is not a promoter or a related party of the listed entity;

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **12** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 9::
bwservice::0::

- where the consideration for the classified asset was reimbursement of expenses incurred by the vendor in developing the classified asset; or
- where LR 9.1.3 would not otherwise require any restriction to be applied to securities issued to promoters or related parties (eg because the listed entity already has a track record of profitability or a substantial proportion of its assets are tangible assets or assets with a readily ascertainable value).

[1.1.A.110] Condition 11

This Condition supports the requirement in LR 2.1, Condition 2, which requires the issue or sale price of all securities included in quotation on admission to listing to be at least 20 cents. This is consistent with the principle that a listed entity must be of a minimum size and quality and helps to ensure market integrity by reducing the risk of volatility which can be associated with shares that trade at very low prices: see para [1.1.B.110] for notes on relevant ASX waivers.

Whilst the requirement in LR 2.1, Condition 2 is not imposed on shares issued under an employee incentive scheme, there is no similar carve-out in Condition 11.

Whilst this is a threshold requirement for an entity to initially gain listing, it is recognised that the price of a listed entity's securities may vary over time. As a result, there is no similar requirement imposed on the issue of securities or options following the initial quotation of shares on admission to listing.

[1.1.A.120] Condition 12

In selecting a person or persons to be responsible for communicating with ASX in relation to Listing Rule matters, the entity should be aware of the important role which that person will undertake in ensuring that the listed entity complies with the continuous disclosure requirements under Ch 3 of the Listing Rules and the need for the person to have ready access to senior management. The nominated person should be accessible to ASX at all reasonable times.

As ASX indicates in a Note to the condition, for many listed entities the company secretary may be the appropriate person to be appointed for this purpose, but this may not always be the case. It is also not uncommon for an entity to provide a number of secondary contacts to ASX to in the event that the primary contact is unavailable.

[1.1.A.130] Condition 13

Principles and recommendations for good corporate governance by ASX listed entities were introduced by ASX in 2003. Whilst the recommendations are generally not mandatory, a listed entity is required to report annually on whether it has complied with the ASX Corporate Governance Council Principles and Recommendations on an "if not why not" basis. Condition 13 ties in with:

- the ongoing requirement in LR 4.10.3 to report on compliance with the ASX Corporate Governance Council Principles and Recommendations; and
- the requirement in LR 12.7 to have an audit committee (which in some circumstances must comply with the independence requirements of the ASX Corporate Governance Council Principles and Recommendations.

See para [4.10.A]* for notes on the ASX Corporate Governance Council Principles and Recommendations, and see para [12.7.A]* for notes on the ongoing requirements in relation to audit committees.

[1.1.A.140] Condition 14

Condition 14 ties in with the requirement for electronic lodgment of documents imposed on a listed entity by ASX LRs 15.3 and 15.4A: see para [15.3.A]* for notes on document lodgment requirements and ASX Guidance Note 20 — ASX Online.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **13** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 10::
bwservice::0::

[1.1.A.150] Condition 15

Since 1 January 2010 all listed entities have been required to have a securities trading policy for directors, executives and other "key management personnel" and to disclose that securities trading policy (and any material amendments) to the market. Condition 15 ensures this is in place at the time of listing. Previously, having a securities trading policy was only a recommended practice under the ASX Corporate Governance Council Principles and Recommendations. It has now been replaced by the mandatory requirements set out in LRs 12.9–12.2: see paras [12.9.A]* and [3.19.A]* for notes on securities trading policies under LRs 12.9–12.12 and the disclosure requirements in LR 3.19A as they relate to notifications under the entity's securities trading policy.

[1.1.B] ASX waivers

[1.1.B.01] General

- See ASX Guidance Note 4, paras 19–26 re general waivers for foreign listed entities.

[1.1.B.10] Condition 1

- There are no relevant ASX waivers for the period 2006–11.

[1.1.B.10A] Condition 1A

- There are no relevant ASX waivers for the period 2006–11.

[1.1.B.20] Condition 2

- See ASX Guidance Note 4, paras 27 and 28 re waivers for constitutions of foreign listed entities.
- ASX has granted waivers in certain circumstances to foreign entities where the constitution of the foreign entity does not fully comply with the requirements of the Listing Rules (eg by permitting non-voting shares and not requiring the issue of restricted securities as required by the Listing Rules). Waivers have generally only been granted where:
  - the foreign entity is already listed in another jurisdiction and is merging with an existing ASX entity by way of a scheme of arrangement (so that an any amendment would affect existing security holders); or
  - the foreign entity is already listed in another jurisdiction and is seeking a secondary listing on ASX;

  and in either case the entity gives separate undertakings not to take actions which are inconsistent with the Listing Rules. See waivers: WLC110040-001 ANATOLIA MINERALS DEVELOPMENT LIMITED (2011); WLC100191-001 EUROPEAN NICKEL PLC (2010); WLC090624-001 ELDORADO GOLD CORPORATION (2009).

[1.1.B.30] Condition 3

- See ASX Guidance Note 4, paras 29–31 re prospectuses of foreign listed entities.
- ASX has granted waivers to permit an information memorandum (IM) to not comply with the strict requirements of App 1A in certain circumstances. The waivers have related only to specific content requirements which were unable to be satisfied in the particular circumstances. The types of situation where waivers have been granted are where:
  - the entity is a successor entity to an existing listed entity under a merger or substitution of a new entity by way of scheme of arrangement and the continuous disclosure of the existing ASX listed entity and/or the scheme booklet is seen as an adequate substitute for full disclosure in the IM;

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **14** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 11::
bwservice::0::

See waivers WLC110059-001, WLC110059-002 and WLC110059-003 SYLVANIA PLATINUM LIMITED (2011); WLC110040-026 ANATOLIA MINERALS DEVELOPMENT LIMITED (2011); WLC100191-002 EUROPEAN NICKEL PLC (2010); WLC090688-001 IOR GROUP LIMITED (2009); WLC100020-001UNILIFE CORPORATION (2010).

- the entity is a foreign entity which is already listed on a foreign exchange proposing to merge by way of scheme of arrangement and provides any disclosure documents filed on the foreign exchange for release to ASX in lieu of providing a supplementary IM;

  See waivers WLC110040-002ANATOLIA MINERALS DEVELOPMENT LIMITED (2011); WLC100191-015 EUROPEAN NICKEL PLC (2010).
- the entity is a foreign entity which is already listed on a foreign exchange proposing to merge by way of scheme of arrangement with an existing ASX listed entity and may raise capital outside Australia in the 3 months following issue of the IM;

  See waivers WLC100191-014 EUROPEAN NICKEL PLC (2010).
- the entity is being listed as a result of a demerger by way of scheme of arrangement from an existing ASX listed entity and may raise further capital in the 3 months following issue of the IM;

  See waivers WLC110033-001 STRAITS METALS LIMITED (2011); WLC100219-001 DART ENERGY LIMITED (2010).
- the entity is a government entity which is being privatised and listed on ASX and which is, under its governing law, not subject to the prospectus regime under the Corporations Act, on the basis that an alternative is to be included in the offer document by the issuer to demonstrate that the IM forms a suitable basis for the Company's disclosure.

  See waivers WLC100369-001 and WLC100369-002 QR NATIONAL LIMITED (2011).

[1.1.B.40] Condition 4

- There are no relevant ASX waivers for the period 2006–11.

[1.1.B.50] Condition 5

- ASX has granted waivers to permit a trust entity to allow withdrawals from the trust in certain limited circumstances as follows:
  - Where the trust is an "investment entity" (ie invests only in quoted securities and cash) and offers a continuous issue and withdrawal facility, provided that:
    - the management fees reduce proportionately as the funds under management reduce; and
    - the trust entity does not allow withdrawals at any time if it would cause the trust to cease to comply with the ongoing listing requirements in Ch 12.

  See waivers: WLC070423-001 AURORA INFRASTRUCTURE BUYWRITE INCOME TRUST (2007); WLC070454-001 CREDIT SUISSE PL100 EMERGING MARKETS INFRASTRUCTURE DEVELOPMENT TRUST (2007); WLC070208-001 CREDIT SUISSE PL100 - WORLD WATER TRUST (2007); WLC060100-001 EUROPEAN INVESTORS GLOBAL PROPERTY TRUST (2006); WLC060221-001 AURORA BUY-WRITE INCOME TRUST (2006);

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **15** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 12::
bwservice::0::

WLC060332-001 AUSTRALIAN ENHANCED INCOME FUND (2006); WLC070016-001 VAN EYK BLUEPRINT ALTERNATIVES PLUS (2006).

- Where the trust has been specifically established to issue structured hybrid securities which are by their terms convertible, exchangeable or redeemable into other securities, provided that:
  - all holders can redeem, convert or exchange on the same terms;
  - the exchange and redemption arrangements are fully disclosed to investors; and
  - a summary of the redemption, conversion or exchange arrangements is included in each annual report.

  See waivers: WLC080005-001 GOODMAN PLUS TRUST (2007); WLC070298-001 DYNO NOBEL SPS TRUST (2007); WLC070132-001 PAPERLINX SPS TRUST (2007); WLC060197-001 WESTPAC TPS TRUST (2006); WLC060268-001 TRANSPACIFIC SPS TRUST (2006).

[1.1.B.60] Condition 6

- ASX has granted waivers to permit foreign entities to apply for quotation only of those CDIs issued over its fully paid common stock or shares issued into the Australian market in circumstances where the foreign entity is already listed on a foreign exchange and is seeking either a secondary listing on ASX or is merging by way of scheme of arrangement with an existing ASX listed entity. As a condition of the waiver, ASX has required monthly updates to the market of the number of securities covered by CDIs.

  See waivers WLC110040-003 ANATOLIA MINERALS DEVELOPMENT LIMITED (2011); WLC110027-001 BIONICHE LIFE SCIENCES INC.(2011); WLC100020-002 UNILIFE CORPORATION (2010); WLC100191-003 EUROPEAN NICKEL PLC (2010); WLC100053-002 OLYMPUS PACIFIC MINERALS INC. (2010); WLC090624-003 ELDORADO GOLD CORPORATION (2009); WLC060417-002 GOLDEN CHINA RESOURCES CORPORATION (2006); WLC060078-003 IAMGOLD CORPORATION (2006); WLC070435-003 COEUR D'ALENE MINES CORPORATION; WLC060225-002 CAMBRIAN MINING PLC (2006).

[1.1.B.70] Condition 7

- See ASX Guidance Note 2, para 6 re waivers for stapled securities.
- ASX has granted waivers to issuers of stapled securities to allow the "value element" of the spread test to be satisfied by reference to the value of the stapled securities, rather than the value of the securities of each of the separate entities seeking admission to listing.

  See waivers: WLC100035-001 MACQUARIE ATLAS ROADS GROUP (2010); WLC100387-001 WESTFIELD RETAIL TRUST (2010); WLC090616-001 BABCOCK & BROWN INFRASTRUCTURE GROUP (2009); WLC090599-001 LEND LEASE GROUP (2009); WLC090586-001 ASTRO JAPAN PROPERTY GROUP (2009); WLC090347-001 ORCHARD INDUSTRIAL PROPERTY FUND (2009); WLC080003-001 COMPASS HOTEL GROUP (2008); WLC070341-001 APN/UKA EUROPEAN RETAIL TRUST (2007); WLC070300-001 HEDLEY LEISURE AND GAMING PROPERTY FUND (2007); WLC070306-001 PRIMELIFE CORPORATION LIMITED (2007); WLC070264-002 DUET GROUP (2007); WLC070235-008 TRANSFIELD SERVICES INFRASTRUCTURE FUND (2007); WLC070215-

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **16** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 13::
bwservice::0::

002 ASCIANO GROUP (2007); WLC070050-001 ING REAL ESTATE COMMUNITY LIVING FUND GROUP (2007); WLC070038-002 TRANSURBAN GROUP.

- ASX has granted waivers to allow some flexibility to the spread requirement in the case of "spin-off" listings and demergers, provided ASX is satisfied that the entity has a track record of revenue and profitability sufficient to demonstrate quality of spin-off asset and there are no concerns about spread being obtained artificially in the context of spin-off that takes form of pro rata in specie distribution of securities to existing shareholders.

  See waivers: WLC100051-001 KIMBERLEY METALS LIMITED (2010); WLC090612-001 ASTIVITA RENEWABLES LIMITED (2009); WLC080051-001 ANAECO LIMITED (2008); WLC070456-002 LODESTAR MINERALS LIMITED; WLC070305-001 MERCURY MOBILITY LIMITED (2007); WLC070238-001 LOOP MOBILE LIMITED (2007); WLC070209-002 GREAT WESTERN EXPLORATION LIMITED (2007); WLC070180-001 NUSEP LTD (2007); WLC070127-001 MAGNETIC RESOURCES NL (2007); WLC070121-001 NUPOWER RESOURCES LIMITED (2007); WLC060177-001 REY RESOURCES LIMITED (2006); WLC060116-002 ROYAL RESOURCES LIMITED (2006); WLC060297-001 SHIELD MINING LIMITED (2006).
- ASX has also granted similar waivers for a transfer of business by scheme of arrangement where the scope and scale of the business is substantially the same as the existing listed entity. See waivers: WLC070239-002 OCEANAGOLD CORPORATION (2007).

[1.1.B.80] Condition 8

- See ASX Guidance Note 2, para 6 re waivers for stapled securities.
- ASX has granted waivers to issuers of stapled securities to permit the assets test in LR 1.3 to be satisfied by reference to the combined assets of the entities in the stapled structure, even though each entity individually may not have satisfied the assets test.

  See waivers: WLC100035-002 MACQUARIE ATLAS ROADS GROUP (2010); WLC100387-002 WESTFIELD RETAIL TRUST (2010); WLC090616-002 BABCOCK & BROWN INFRASTRUCTURE GROUP (2009); WLC090599-002 LEND LEASE GROUP (2009); WLC090586-002 ASTRO JAPAN PROPERTY GROUP (2009); WLC090347-002 ORCHARD INDUSTRIAL PROPERTY FUND (2009); WLC080003-002 COMPASS HOTEL GROUP (2008); WLC070341-002 APN/UKA EUROPEAN RETAIL TRUST (2007); WLC070300-002 HEDLEY LEISURE AND GAMING PROPERTY FUND (2007); WLC070306-002 PRIMELIFE CORPORATION LIMITED (2007); WLC070264-001 DUET GROUP (2007); WLC070235-001 TRANSFIELD SERVICES INFRASTRUCTURE FUND (2007); WLC070215-003 ASCIANO GROUP (2007); WLC070050-002 ING REAL ESTATE COMMUNITY LIVING FUND GROUP (2007); WLC070038-003 TRANSURBAN GROUP (2007).
- ASX has granted waivers to allow an entity which is a successor entity to an existing listed, replacing the existing entity by scheme of arrangement to rely upon the fact that the existing listed entity's level of operations and financial condition were such as to satisfy the ongoing requirements of LRs 12.1 and 12.2, in lieu of satisfying the assets test or profits test.

  See waivers: WLC110059-004 SYLVANIA PLATINUM LIMITED (2011);

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **17** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 14::
bwservice::0::

WLC100020-003 UNILIFE CORPORATION (2010); WLC070394-002 MACQUARIE GROUP LIMITED (2007); WLC070367-010 PEPLIN, INC. (2007) WLC070239-003 OCEANAGOLD CORPORATION (2007; WLC060395-002 BRAMBLES LIMITED (2006).

[1.1.B.90] Condition 9

- There are no relevant ASX waivers for the period 2006–11.

[1.1.B.100] Condition 10

- There are no relevant ASX waivers for the period 2006–11.

[1.1.B.110] Condition 11

- ASX has granted waivers to permit an entity to have existing unquoted options with an exercise price of less than 20 cents, where the unquoted options represent a fairly small proportion of the entity's fully diluted issued capital (eg less than 5%) on a post-capital raising basis. Having only a small number of holders of such options may also be relevant in satisfying ASX that the existence of unquoted options with an exercise price of less than 20 cents each would not undermine the 20 cent rule in the circumstances. Where the entity is a foreign entity seeking a secondary listing on ASX, with an existing listed capital structure that includes unquoted options, this may also be a relevant consideration.

  See waivers: WLC110051-001 RIMCAPITAL LIMITED (2011); WLC110013-001 WAH NAM INTERNATIONAL HOLDINGS LIMITED (2011); WLC100359-001 BPH CORPORATE LTD (2010); WLC100191-004 EUROPEAN NICKEL PLC (2010); WLC090685-001 ETW CORPORATION LIMITED (2009); WLC090637-002 SKYWEST AIRLINES LTD (2009); WLC060347-001 XRF SCIENTIFIC LIMITED (2006); WLC060373-001 XRF SCIENTIFIC LIMITED (2006); WLC070433-001 AUSTEX OIL LIMITED (2008); WLC060303-001 THOR MINING PLC (2006).
- ASX has also granted a waiver for very low exercise price options where the proportion of the entity's capital is more significant (eg 25% of undiluted share capital), where the options are performance options issued to vendors and promoters as part of consideration for acquisition of assets by the company, in effect taking the form of deferred vendor consideration. Relevant considerations have included that the options were subject to an escrow period and that the number of options and the principal terms were to be reported to the market quarterly.

  See waiver: WLC060319-001 MINEMAKERS LIMITED (2006).

[1.1.B.120] Condition 12

- There are no relevant ASX waivers for the period 2006–11.

[1.1.B.130] Condition 13

- There are no relevant ASX waivers for the period 2006–11.

[1.1.B.140] Condition 14

- There are no relevant ASX waivers for the period 2006–11.

[1.1.B.150] Condition 15

- There are no relevant ASX waivers for the period 2006–11.

[1.1.C] Legislation and ASIC policy

[1.1.C.01] General

- The term "Stapled Securities" refers to an arrangement were two or more

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **18** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 15::
bwservice::0::

securities (whether it be a share and unit in a trust, or shares in different companies) are stapled or joined together in a manner so that they may be quoted and traded as a single security on ASX.

This 'joint quotation' has the effect that the individual stapled securities cannot be traded separately on ASX. Accordingly, the 'stapled security' is an interest in the corresponding interests of each individual component that makes up the stapled security, but can only be traded in its combined form.

Note however, even though 'stapled securities' are considered a single traded security on ASX, without ASIC exemption, the individual compliance obligation of each individual entity may still need to be complied with (eg if an entity's stapled security consists of shares from two companies, separate notices of meeting may be required for each of the companies when a general meeting is called).

When an entity (or a group) is seeking admission to ASX on the basis that its securities will be stapled, ASX will usually decide whether the admission criteria is met collectively, rather than individually.

ASX Guidance Note 2 sets out certain key issues ASX considers when listing stapled securities, including the granting of waivers from LR 1.1, condition 8 for one or more of the entities.

- Co-operatives are incorporated bodies with similar attributes to that of a company, such as limited liability for its members, being a separate legal entity and the ability to hold and dispose of property. A key difference however, is that a cooperative exists to provide a service to its members (rather than strict financial profit) and all members usually have one vote regardless of the size of their holding. Cooperatives are commonly seen in agricultural industries as it allows the members to pool their resources for a common purpose. Co-operatives are usually governed by state specific legislation (eg Cooperatives Act 1997 (Qld); Co-operatives Act 1992 (NSW); Co-operatives Act 1996 (Vic); etc).

  The ASX has indicated that it considers it appropriate for cooperatives (as well as friendly societies, co-operative housing societies, credit unions, rural and trading co-operatives and permanent building societies) to have access to the secondary market, and accordingly is generally willing to be flexible in granting relief from various listing rules in listing such entities.

  See ASX Guidance Note 3 (Co-operatives and Mutual Business Entities).

[1.1.C.20] Condition 2

- Trust entities which are registered managed investment schemes are required by Ch 5C of the Corporations Act to have a constitution which complies with ss 601GA–601GAC (content requirements) and s 601GC (requirements for changing the constitution). ASIC's view is that provisions that allow another document to override the terms of a registered scheme constitution do not comply with the Act because the terms of the constitution are not certain and complete and it would avoid the requirements in s 601GC for amendment of the constitution. However, ASIC has indicated that it is prepared to grant relief from the Act to allow provisions such as those in Apps 15A or 15B to be included in a trust constitution, because those provisions are seen to be appropriate in the context of an ASX listed entity.

  In particular, see ASIC Regulatory Guide 134: Managed Investment Schemes: Constitutions, which provides guidance on how ASIC will assess a scheme's constitution and how it decides whether the content requirements of s 601GA of the Act are satisfied.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **19** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 16::
bwservice::0::

Paragraph RG 134.26B of the Guide specifically states that ASIC is prepared to grant relief in situations where App 15A or 15B are incorporated by reference into a scheme's constitution, despite the general prohibition under para RG 134.26A that another document must not be able to override the provision of a scheme's constitution.

Further, ASIC Class Order [98/1808] provides relief from the requirement that a constitution of a scheme must be certain and complete, by allowing a constitution to include a provision to the effect of App 15A.

[1.1.C.30] Condition 3

Requirement for a Prospectus or PDS

- As an entity's admission to ASX is most commonly accompanied by a capital raising (ie an IPO to retail investors), a prospectus or PDS will usually be issued by the entity to support its application for admission.
- A prospectus or PDS is required for an IPO as the Corporations Act requires an entity that makes an offer of securities or trust units to retail investors to issue a prospectus or PDS. The issue of a prospectus relates to the issue of shares and debt securities, whilst the issue of a PDS relates to the issue of other financial products, such as units in a managed investment scheme or trust. The prospectus or PDS will need to be lodged with ASIC prior to the entity applying to ASX for admission.
- The Act and Regulatory Guides released by ASIC also directly prescribe the content requirements for a prospectus or PDS which generally must be presented in a 'clear, concise and effective manner'. In particular:
    - Pt 6D.2, Div 4 of the Act which generally provides that a prospectus must contain all the information that investors would reasonable require to make an informed assessment of the offer as well as specific content requirements of a prospectus, such as setting out the terms of the offer, disclosure of fees and interest of certain persons involved in the offer and naming directors or proposed directors of the entity. It must also state that no securities will be issued on the basis of the prospectus after the expiry date, which must not be more than 13 months after the date of the prospectus.

      Pt 6D.3 states that it is an offence for an entity to offer securities under a prospectus that is misleading or deceptive or contains a material omission or new circumstances that is materially adverse.
    - ASIC Regulatory Guide 56 — Prospectus, which provides detailed guidance on how ASIC interprets the prospectus provisions in the Act, including administration procedures, relief from the requirement to lodge a prospectus, secondary trading in securities, types of prospectuses, content and form requirements, registration of prospectus, surveillance, the life of a prospectus, advertising issues, securities hawking and applications for relief.
    - Pt 7.9, Div 2 of the Act which generally provides for the content and form requirements of a PDS, including the requirement to title the PDS as a "Product Disclosure Statement" and the information that must be contained within the PDS.
    - ASIC Regulatory Guide 168: Product Disclosure Statements (and other disclosure obligations), which provides guidance on the types of disclosure that must be given to retail investors before the investor acquires a financial product, such as a financial services guide, statement of advice

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **20** Date: **6/7/2011** Time: **22:28:9**
bwpageid:: 17::
bwservice::0::

and PDS. ASIC RG 168 also provides guidance on the requirements of each of these disclosures as well as guiding principles in which these documents should be prepared.

Refer to para [1.8.C] below for a discussion on the definition of "financial products" and the distinction between "retail clients" and "wholesale clients".

- ASIC Regulatory Guide 55: Disclosure documents and PDS: Consent to quote, which provides guidance on the s 716 and s 1013K requirement that a prospectus or PDS may only contain a statement by a person, if the person has consented to the statement being included, the document states that that person has consented and that the person has not withdrawn its consent before the document has been lodged with ASIC.

  RG 55 also sets out the circumstances in which ASIC may grant relief from the consent requirements for government officials, statements already published in book, journals or other comparable publications, certain statements taken from geological reports available from government departments, authorities and agencies and ASX and trading data.

  RG 55 no longer applies to credit agencies, such as *Standard & Poor's, Moody's Investor Services and Fitch Ratings*. See para [1.8.A.30] below for a discussion on ASIC Class Order [09/1084] and the requirement to obtain consent from credit rating agencies.

- Note on 12 April 2011, ASIC released *ASIC Consultation Paper 155: Prospectus disclosure: Improving disclosure for retail investors*, which sets out ASIC's intention to overhaul the current prospectus regime to make it easier for retail investors to use prospectuses and to improve the quality of information provided.

  CP 155 sets out a number of shortcomings of the existing prospectus regime, such as prospectuses being too long and complex, risk disclosure being too general and resembling 'shopping lists', the high ratio of 'marketing statements' in the front sections of a prospectus, fragmented information and absence of director and key management disclosures and provides for a number of proposed solutions to these shortcomings.

  Attached to back of CP 155 is a draft regulatory guide which aims to provide guidance for entities on how to word and present prospectuses in a 'clear, concise and effective' manner and how to satisfy the content requirements in s 710 of the Act. Though the final regulatory guide is proposed to be released in December 2011, ASIC encourages early compliance with the draft regulatory guide.
- ASIC will generally provide comments within the 7 day exposure period (or any applicable extension) after lodgment.
- If ASIC believes that the prospectus or PDS contains:
  - a misleading or deceptive statement;
  - an omission of information required under the Act; or
  - a new circumstances has arisen since the document was lodged,

  ASIC may issue a stop order against the entity, which prevents offers from being made under the document.

Consequence of not issuing a Prospectus or PDS

- There are a number of circumstances where an entity may not be required to issue a prospectus or PDS, such as offerings to "professional or sophisticated" or "wholesale investors", or if the Act specifies that a one is not required. See Corporations Act, ss 708–708AA and s 1012C and ACLPP, para [10.1.0085]*.
- Note however, if securities or trust units are issued without a prospectus or PDS

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **21** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 18::
bwservice::0::

(or without an exemption from ASIC), those securities effectively can not be on-sold to retail investors within 12 months of the IPO. This is because of the on-sale restrictions under s 707(3) and s 1012C(8) of the Act which are designed to ensure that retail investors receive adequate disclosure regardless of whether the securities are directly issued to them or through a secondary sale from an intermediary.

- Section 707(3) and s 1012C(8) generally prevents a person who has been issued securities to on sell to retail investors those securities within the first 12 months of their issue, without themselves issuing a prospectus, PDS or disclosure document. This applies if:
  - the original issue was not a prospectus, PDS or disclosure document; and
  - the securities were issued with the purpose of selling or transferring them. Generally, an entity is taken to have issued the securities for this purpose if the securities are subsequently sold or there are reasonable grounds for concluding that they will be transferred or sold (s 707(4) and s 1012C(9)), such as the securities being made available for trading on ASX.
- Sections 708A and 1012D sets out a number of situations in which the sale offers do not require disclosure. Further, ASIC Class Order 04/671 (as supported by ASIC Regulatory Guide 173) provides relief from the on-sale of certain financial products that were issued to persons without a prospectus or PDS, under various statutory or ASIC class order exemptions, such as those under employee share schemes, share purchase plans, options, convertible securities or products, dividend reinvestment or bonus share schemes, compromises and arrangements, takeovers and securities of exempt public authorities.
- ASIC may also grant relief for the on-sale of securities that have been issued pursuant to a rights issue exemption.
- Accordingly, though an entity may consider the issue of a prospectus or PDS is not required and an information memorandum is considered sufficient, without ASIC exemption from the on-sale requirements this would effectively make the securities proposed to be quoted on ASX unable to be on sold in the first 12 months of issue.

[1.1.C.40] Condition 4

Registration as a foreign company

- Generally, a foreign company which intends to "carry on a business in Australia" must be registered with ASIC under Pt 5B.2 of the Act (see s 601CD of the Act) and must comply with certain periodic reporting requirements and keeping ASIC up to date of changes in the company's details.
- The definition of "foreign company" has a broad reach and is defined to mean:
  - an incorporated body that is formed in an external territory to Australia and is not a corporate sole or an exempt public authority; or
  - an unincorporated body formed in an external territory to Australia that under its place of formation, may sue or be sued, or hold property in the name of its secretary or officer and does not have its head office or principal place of business in Australia.
- Whether a foreign company "carries on business in Australia" is dependent on the facts. Section 21 of the Act states that the phrase "carries on business in Australia" is defined to include a reference to the body establishing or using a share transfer office or share registration office in Australia, or any state or territory of Australia to administering, managing, or otherwise dealing with property situated in Australia. As entities proposing to list on ASX are required

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **22** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 19::
bwservice::0::

to have an Australian registrar, or CHESS depository holding, it is generally considered that foreign companies listing on ASX would be also carrying on a business in Australia.

Section 911A of the Act and ASIC Regulatory Guide 121 also sets out specific requirements for companies looking at carrying on a financial services business in Australia needing to hold an Australian Financial Services License (AFSL).

Title and Transfer of securities

- Part 7.11 of the Act sets out the title and transfer requirements of securities. Though the production of a share certificate is generally considered to be prima facie evidence of title by the holder (see s 1070C(2) of the Act), and shares are required to be identified and distinguished by an appropriate number (see s 1070B of the Act), these requirements do not strictly apply to securities quoted on ASX (see s 1071B(1) of the Act).

  This is because ASX operates a prescribed CS facility known as CHESS, which allows for the electronic transfer of uncertificated or paperless securities.

  Accordingly, entities with quoted securities on ASX will not issue 'share certificates' to each of its members, rather the more common approach is the issue 'holding statements' which sets out the total number of securities held by that particular member at the relevant time.

  Note that ASX has recently granted approval for Chi-X to operate an additional financial market in Australia for the trading of securities and financial products. Initial indications are that Chi-X intends to operate and facilitate trading of the securities in the listed entities on ASX with the most liquidity, and then expand to allow for the trading of all securities in the ASX/S&P 200.

[1.1.C.50] Condition 5

Registered managed Investment Schemes

- Managed investment schemes (MIS or scheme) are regulated by ASIC under Pt 5C of the Act. Part 5C sets out the various requirements of a scheme, including registration requirements under Pt 5C.1, the requirement to have a responsible entity (RE) under Pt 5C.2 and a constitution under Pt 5C.3, as well as compliance plan and compliance committee requirements under Pt 5C.4 and Pt 5C.5.

  An important component of operating a scheme is the requirement for the scheme to have a responsible entity (RE). As the name suggests, the RE is responsible for the operation of the scheme in accordance with the terms of the scheme's constitution and accordingly must be both a public company as well as hold an Australian Financial Services License (AFSL) (see s 601FA of the Act).

  Both schemes and RE's may be listed on ASX and thus it is possible for:
  - A scheme to be listed in its own right (with the RE remaining private);
  - An RE to be listed in its own right (as an RE for unlisted schemes); or
  - Both the scheme and RE to be listed as a 'stapled security': refer to para [1.1.C.01] for details on stapled securities.

  In any event, whether an RE is listed or not, s 793C(4) of the Act expressly requires REs to comply with the listing rules to the extent that they apply to the scheme. Accordingly, if a scheme is listed and the RE is not, the RE (though not listed) has a statutory obligation to comply with the listing rules to the extent that the listing rules apply to the scheme.

  Refer to the following paragraph below for a discussion on withdrawal rights from a scheme.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **23** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 20::
bwservice::0::

Withdrawal rights from listed managed investment schemes vs buy-backs

- A buy-back is where an entity purchases securities in itself (see s 9 of the Act) and is generally prohibited, unless the entity complies with the procedures set out in Ch 2J of the Act, such as obtaining shareholder approval and lodging various documents with ASIC.

  An overarching requirement of any buy-back is that the buy-back must not affect the entity's ability to pay its creditors (see s 257A of the Act). The Act sets out the formal requirement of five different types of buy-backs, including minimum holdings, employee share schemes, on-market, equal access schemes and selective buy-backs.

  ASX listed entities will usually be concerned with on-market buy-backs, which is where a listed entity makes an offer on the market to buy-back shares in the ordinary course of trading on that market (see s 257B(6)), and equal access schemes, where the entity makes an offer to all members of the entity on identical terms to buy-back a certain percentage of their securities.

  On-market and equal access scheme buy-back (alongside, employee share scheme) are also subject to the 10/12 limit rules, which caps the number of securities in which an entity may buy-back in a 12 month period to 10% of votes attaching to voting shares of the entity (see s 257B(4) of the Act).

  Though it is possible for an entity to exceed the 10/12 limit, additional procedural and reporting requirements are placed on the entity before such a buy-back may be conducted (refer to ss 257C–257D of the Act).
- In regards to on-market buy-backs by ASX listed schemes, Pt 5C.6 of the Act provides for member's rights to withdraw from schemes which are liquid (s 601KA) and those which are not (ss 601KB–601KE). A scheme is generally considered liquid if liquid assets account for 80% of the value of the schemes property (see s 601KA(4) of the Act).

  These provisions are supplemented by ASIC Class Order 07/422 and ASIC Regulatory Guide 101, which generally sets out ASIC's view on how a RE of a listed scheme may conduct an on-market buy-back without contravening the Act, provided certain requirements are satisfied. In effect, class order 07/422 reconciles the scheme buy-back requirements with the requirement in the listing rules.

  Class Order 07/422 generally provides conditional relief from the Act's requirements, from:
  - requiring withdrawal rights to be specified in a scheme's constitution (eg a market contract, rather than strictly under the constitution as required by the Act);
  - the extent of withdraw procedures for non-liquid schemes (and the additional requirements for withdrawing from an illiquid scheme not directly aligning with ASX requirements); and
  - the prohibition of certain interest in listed schemes.

[1.1.C.60] Condition 6

- If a prospectus implies or states that the securities subject to that document are or will be traded on ASX (or other financial market), then the prospectus must also state that an application will be made to ASX to apply for quotation of those securities within 7 days after the date of the prospectus (see s 711(5) of the Act).

  Practically, this means that once a prospectus (in respect of securities proposed to be listed on ASX) is finalised and lodged with ASIC, an application must be made to ASX within 7 days of date of that prospectus.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **24** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 21::
bwservice::0::

- Further, if those securities are not in fact quoted within 3 months of the date of the prospectus, then s 724(2) of the Act requires the entity to either repay any money received from applications, provide withdrawal rights or to supply certain documents and/or disclosures to the market, such as a supplementary prospectus.
- Similar requirements apply to a PDS, under s 1016D of the Act. Accordingly, when setting a timetable for the issue of a prospectus and its corresponding offer, it is important to ensure that the offer is closed, and the securities issued and quoted within 3 months of the date of the prospectus.
- ASIC Regulatory Guide 99 — Quotation of securities offered by prospectus, though containing references to the now repealed s 1031 of the Act, sets out ASIC's policy in regards to the quotation of securities issued under a prospectus or PDS and ASIC's modification powers.

  The former s 1031 of the Act is similar to the current ss 723 and 1016D of the Act, which generally requires an entity to make an application to ASX for admission of its securities for quotation within 7 days after the date of the prospectus or PDS and that those securities are to be issued within 3 months after the date of the prospectus or PDS.

  Though RG 99 must now be read in light of the revised ss 723 and 1016D, it provides general guidance on how ASIC is likely to interpret those sections such as the calculation of timing, how ASIC may grant relief, the policy considerations it will consider when granting relief and when ASIC will grant relief from such requirements.

[1.1.D] Further References

[1.1.D.01] General

- ASX Guidance Note 4 re Foreign Entities — ASX has indicated in para 19 of Guidance Note 4 that foreign entities applying for ASX Listing are generally required to comply fully with all of the ASX Listing Rules in the same manner as any other Australian listed entity, regardless of whether the foreign entity is also listed on a foreign exchange. However, ASX has indicated that it will, in very limited circumstances recognise compliance with comparable requirements under the listing rules of the foreign exchanges as constituting, in principle, sufficient reason to exempt the foreign entity from compliance with specific ASX Listing Rules. ASX sets out further considerations for the granting of such waivers in paras 20–26 of Guidance Note 4.
- ASX Guidance Note 2 re Stapled Securities — ASX has been flexible in its approach to listing trusts and companies which seek listing on the basis that the trust units will be "stapled" to shares in a company and/or units in other listed trusts. Stapled securities occur when the units in a trust and the shares in an associated company and/or units in another associated trust are quoted and trade jointly on ASX. (Stapled securities trade together at a single price, whilst still retaining the separate rights and obligations associated with their separate component securities). Whilst assets are held separately by the individual listed entities in a stapled listing, the entities are generally managed as a group and so "related party" transfers of assets between the entities in the stapled group is likely to be more common than with single listed entities.

[1.1.D.20] Condition 2

ASIC Regulatory Guide 134 (Managed investments: Constitutions)

- Generally each managed investment scheme must lodge its constitution with

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **25** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 22::
bwservice::0::

ASIC when it applies for registration of the scheme. The scheme constitution must comply with the content requirements of Pt 5C.3 of the Act.

- Part 2 of RG 134 provides guidance on the content requirements of s 601GA of the Act and sets out how ASIC will form the view on whether a constitution is "certain and complete".

  Generally, this involves the constitution containing sufficient detail and information for a person to understand how matters will be resolved without the need to refer to extrinsic material.

  Class Order [98/1808] grants relief from this requirement to allow a constitution to include a provision to the effect of App 15A and thus any changes to the terms of the constitution as a result of App 15A are not required to be made in accordance with s 601GC(1) and 601GC(2).
- See ASX Guidance Note 4 re Constitutions of foreign listed entities.

[1.1.D.30] Condition 3

- See ASX Guidance Note 4 re prospectuses of foreign listed entities.

[1.1.D.40] Condition 4

- See ASX Guidance Note 5 re CHESS Depositary Interests.

[1.1.D.50] Condition 5

- See ASX Guidance Note 6 re Trusts.

[1.2] Listing Rules 1.2–1.2.6 — The profit test

[1.2.A] General principle and ASX policy

As indicated in para [1.1.A.80] above the profit test is one of two alternate tests which an entity may use to support its application for listing on ASX. The principle behind the profits test is that an entity which has been operating profitably for the last 3 years and has demonstrated a minimum level of continuing profits, should be of sufficient size and quality to merit listing, regardless of the value of its assets.

There are four elements which must be satisfied to meet the profits test are:

- being a "going concern" at the time of admission (this is an accounting concept which requires an assessment not only that the entity is solvent but will also continue in operation without any intention or need to liquidate or wind up its operations for at least 12 months;
- having its main business activity the same for at least 3 years prior to listing;
- having at least $1 million in aggregated "profit from continuing operations" over the last 3 full financial years; and
- having at least $400,000 in consolidated "profit from continuing operations" in the most recent 12 month period (not being more than 2 months before applying for listing).

The expression "profit from continuing operations" is defined in LR 19.12 and essentially means profit before tax, with the special requirements that the profit:

- must be derived from ordinary operations of the entity (also defined in LR 19.12); and
- must not include revenue or other credits derived from discontinued operations (or operations which will be discontinued).

See para [19.2.A]* for notes on the definitions of "profit from continuing operations" and "operating profit (loss)" in LR 19.12.

In order to establish the elements of the profits test the entity must provide to ASX its

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **26** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 23::
bwservice::0::

audited financial accounts for the last 3 financial years, along with unqualified audit reports in relation to those accounts plus the other financial information required by LR 1.2.3, if applicable.

In order to establish a reasonable indication that net profits are likely to continue from existing operations, all of the directors of the entity must also provide a statement to ASX confirming that:

- they have made enquiries; and
- there is nothing known to the directors to suggest that the entity is not continuing to make a net profit up to the date of application.

ASX has adopted a flexible approach to the profits test in the case of issuers of stapled securities where each of the individual listed entities in the stapled group may not individually be able to satisfy the profits test: see paras [1.1.B.70] and [1.1.B.80] for notes on waivers for stapled securities and see para [1.1.C.01] for notes on ASX Guidance Note 2 on stapled securities.

[1.2.B] ASX waivers

- See para [1.1.B.80] for ASX waivers to allow stapled entities to qualify for the profits test on a collective basis.
- ASX has also granted a waiver to permit a company intending to merge with an existing ASX listed entity not to provide a reviewed pro forma balance sheet provided that the Scheme Booklet included a pro forma balance sheet of the merged entity and pre-quotation disclosure includes audited accounts for previous financial years.
  See waiver: WLC090688-002 IOR GROUP LIMITED (2009).

[1.2.C] Legislation and ASIC policy

- Where an entity applies for listing on the basis of the profits test, there will also be a discussion of past profits in the prospectus or PDS and there may also be included a forecast of projected profits for a period following listing.
- ASIC Regulatory Guide 170 sets outs ASIC's approach on how prospective financial information in a prospectus or PDS should be included. It covers issues involving:
  - When prospective financial information can or should be disclosed;
  - The reasonable grounds for stating prospective financial information; and
  - How prospective financial information should be disclosed.

  Generally, ASIC's view is that prospective financial information which is not based on reasonable grounds is not material to prospective investors and accordingly should not be included in a prospectus or PDS. A failure by an entity to comply with this requirement may lead to ASIC placing an interim or final stop order on the entity from issuing securities under the prospectus or from the offer going ahead.

  Note in April 2011, ASIC released *ASIC Consultation Paper 155 Prospectus Disclosure: Improving disclosure for retail investors* addressing IPO prospectuses and entities seeking admission to ASX.

  ASIC Consultation Paper 155 provides guidance on the 'clear, concise and effective' requirement of prospectus set out in s 715A of the Act and provides an indication on how entities can satisfy the Corporation Act requirements. In regards to financial information, the paper indicates that such information should not be more than 8 months old and the extent and basis of any pro forma financial statements should be clearly disclosed.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **27** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 24::
bwservice::0::

The requirement for an entity to be a "going concern" at the time of admission, ties in with the Corporations Act requirement that a company not trade whilst "insolvent".

Insolvent trading occurs when a company incurs a debt at a time when the company is unable to pay its debts as and when they fall due. This duty is imposed on directors of a company and generally requires the directors to prevent a company from engaging in insolvent trading or when a director has grounds to suspect that the entity is insolvent.

Section 588G of the Act sets out the core requirements of this obligation.

If a company engages in insolvent trading, s 588G gives rise to both civil liability in which the court may disqualify a person from managing a corporation and impose pecuniary penalties, along with criminal liability of criminal fines and imprisonment.

[1.2.D] Further References

- See joint Auditing and Assurance Standards Board (AUASB) and Australian Institute of Company Directors publication "Going Concern Issues in Financial Reporting" at:
  http://www.auasb.gov.au/admin/file/content102/c3/Going_Concern_Issues_in_Financial_Reporting.pdf
  and AUASB Compiled Auditing Standard ASA 570 Going Concern for further information on the definition of "going concern".

[1.3] Listing Rules 1.3–1.6.3 — The assets test

[1.3.A] General principle and ASX policy

An entity which does not have a track record of operating profitably may alternatively apply for admission on the basis of its net tangible assets or market capitalisation. The basic requirement under the assets test is for the entity to have either of the following at the time of listing:

- net tangible assets of at least $2 million after deducting the costs of fund raising; or
- a "market capitalisation" of at least $10 million.

Market capitalisation is normally the trading price of the entity's securities multiplied by the number of securities on issue. Because the trading price of an entity's securities at listing may be lower or higher than the issue price under an IPO, ASX retains a discretion as to what price it decides is appropriate to calculate market capitalisation (as defined in LR 19.12). In a note to the definition, ASX has indicated that it will usually apply the issue price under the prospectus, PDS or information memorandum.

The two additional requirements for an entity seeking admission under the assets test are that, at the time of listing, the entity:

- has half or more of its total tangible assets in a form other than cash or assets readily convertible into cash (the Cash Test); and
- has at least $1.5 million in working capital (after taking into account any budgeted revenue for the first full financial year after listing) and has enough working capital to carry out its stated objectives (the Working Capital Test).

Under the assets test a distinction is drawn between "investment entities" and all other entities. An investment entity is an entity whose principal business activities consist of "investing in listed or unlisted securities or futures contracts", solely for the purpose of investment (ie the entity's objectives do not include controlling or managing the business

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **28** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 25::
bwservice::0::

or company in which it invests). Whether or not an entity will be classified as an "investment entity" depends on ASX's opinion (see definition of "investment entity" in LR 19.12 where ASX indicates some factors relevant to its decision).

One purpose of distinguishing between an investment entity and other entities is to set a higher net tangible asset threshold for investment entities seeking admission. This is because an entity which does not have any operating business other than making investments can only generate growth from the investment activities it undertakes using the cash or existing investments available to it at the time of listing. Other start-up entities can generate growth through their operating business and external finance raised, which may not be fully reflected in the value of the entity's net tangible assets, and so a lower threshold is considered appropriate.

This distinction is recognised in the requirement in LR 1.3.1A that an investment entity must have net tangible assets of at least $15 million after deducting the costs of fund raising (compared to the $2 million of net tangible assets required for other listed entities). Also investment entities cannot qualify on the basis of market capitalisation. An investment entity which qualifies as a "pooled development fund" (under the Pooled Development Funds Act 1992) (see definition in LR 19.12) only has to satisfy the threshold of $2 million of net tangible assets applying to other listed entities.

The other reason for distinguishing between an investment entity and other entities is to exempt investment entities from the Cash Test. Because of the nature of an investment entity's business, an investment entity may be holding a substantial portion of its assets in the form of cash or which may be "readily convertible into cash": see discussion below of the "commitments test".

Prior to 1999, ASX required an entity seeking admission on the basis of its net assets to either satisfy the Cash Test (see above) or to have binding contracts to spend its cash to produce that outcome. The requirement for binding contracts has now been replaced with a requirement (under LR 1.3.2(b)) for an entity which cannot satisfy the Cash Test to instead have "commitments consistent with its business objectives" to spend at least half of its cash an assets in a form readily convertible into cash.

An entity (other than a mining exploration entity) which is subject to a "commitments requirement" is required to report quarterly on its cash flow, for at least 2 years, so that the market can be informed of its progress against business objectives, by lodging App 4C with ASX. (Mining exploration entities will already be reporting quarterly under LR 5.2 and so there is no need to impose an additional reporting requirement).

See LR 4.7B and annotations at paras [4.7B.A]* and [4.7B.B]* for general principles and ASX waivers; see also ASX Guidance Note 23.

To satisfy the Working Capital Test an entity must be able to demonstrate that it has or will have the required amount of working capital, and also must include a statement in its prospectus, PDS or information memorandum that it has enough working capital to carry out its stated objectives, or provide a statement from an expert to that effect. By including the statement in its prospectus or PDS, the entity will potentially have liability under the Corporations Act if that statement were made without reasonable ground for believing it to be correct: see para [1.1.C.30] for commentary on statements in a prospectus or PDS about future events or forecasts.

In order to establish the elements of the assets test the entity must provide to ASX its audited financial accounts for the last 3 financial years, along with unqualified audit reports in relation to those accounts plus the other financial information required by LR 1.3.5, if applicable. This requirement is very similar to the profits test, except that there is a recognition that an entity seeking admission under the assets test may not have financial accounts for the last 3 years, in which case ASX has discretion to only require

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **29** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 26::
bwservice::0::

accounts for a shorter period or alternatively (where there are no accounts) require more information in the Listing Application under LR 1.7.

As with the profits test, ASX has adopted a flexible approach to the assets test in the case of issuers of stapled securities where each of the individual listed entities in the stapled group may not individually be able to satisfy the assets test: see paras [1.1.B.70] and [1.1.B.80] for notes on waivers for stapled securities and see para [1.1.C.01] for notes on ASX Guidance Note 2 on stapled securities.

[1.3.B] ASX waivers

- See para [1.1.B.80] for ASX waivers to allow stapled entities to qualify for the assets test on a collective basis.
- ASX has also granted waivers to permit companies intending to merge with an existing ASX listed entity to not provide a reviewed pro forma balance sheet provided that the company makes certain pre-quotation disclosure (including audited accounts, reviewed pro forma accounts and unaudited consolidated statements, and review reports).

  See waivers: WLC100053-003 OLYMPUS PACIFIC MINERALS INC (2010); WLC090624-004 ELDORADO GOLD CORPORATION (2009); WLC070435-004 COEUR D'ALENE MINES CORPORATION (2007).

[1.3.C] Legislation and ASIC policy

- See para [1.1.C.60] for notes on ASIC Regulatory Guide 99 — Quotation of securities offered by prospectus.
- Pooled Development Funds Act 1992 (Cth);

  A pooled development fund (PDF) is a venture capital fund registered under and governed by the Pool Developed Funds Act 1992 (Cth). PDFs usually raise capital and make equity investments in small to medium size enterprises, with their shareholders receiving certain tax benefits on the income derived from their investment. Pre 1993, PDFs were known as Management and Investment Companies (MICs).

[1.3.D] Further References

- See ASX Guidance Note 23 — quarterly reporting.

[1.7] Listing Rule 1.7 — Applying for ASX Listing

[1.7.A] General principle and ASX policy

The requirement for an applicant to complete App 1A serves two primary purposes:

1. to collect the information needed to establish that the entity has satisfied the Conditions for admission to listing set out in LR 1.1; and
2. to create a contract (in the form of a Deed) between the entity and ASX which underpins the entity's continuing compliance with the Listing Rules and protects ASX from any third party claims which may arise from a breach by the entity: see para [0.1.A] for notes on how the Listing Rules take effect as a contract only and generally do not create rights or obligations under the Corporations Act.

The information required by App 1A falls into the following broad categories:

- information about the entity, its operations and the material documents relevant to its listing, including copies of the entity's prospectus, PDS or information memorandum;
- information about the securities to be quoted upon admission;
- information about the entity's capital structure (other than its quoted securities;

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **30** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 27::
bwservice::0::

- information about the entity's financial position, business plan and level of operations;
- where an information memorandum (IM) is issued rather than a prospectus, additional information about the contents of the IM, including confirming that the IM:
  - is equivalent in disclosure to a prospectus;
  - includes various disclosures about related party interests; and
  - includes a statement that the entity has not raised capital in the 3 months prior to issue of the IM and will not need to raise capital in the 3 months after issue of the IM.
- for mining exploration entities (and if ASX requires it other entities with "classified assets") certain additional disclosures; and
- information about material contracts with directors, previous disclosure documents, financial accounts and other information which is likely to have a material effect on the price or value of the entity's securities.

ASX Guidance Note 1 (paras 3–6 and 17–36) provides further guidance in relation to completing App 1A and how to deal with information which is not known at the time of completing the application and disclosure of additional information about bookbuilds.

ASX Guidance Note 17 provides further information on the application process and consultation with ASX as well as a Checklist for information to be included in App 1A as well as information to be included in relation to restricted securities.

See para [18.10.A]* for notes on the ASX Guidance Note to the Disciplinary procedures and Appeals Rulebook in relation to appeals from decisions of ASX in relation to admission.

See para [1.1.C.60] for notes on ASIC Regulatory Guide 99 — Quotation of securities offered by prospectus and timing for the listing application.

The Listing Agreement between the entity and ASX contained in Pt 3 of App 1A achieves four main objectives:

- to have the entity confirm its obligation contractually to comply with the Listing Rules (even if its securities are suspended from quotation);
- to confirm ASX's discretion in administering the Listing Rules and granting or suspending listing and quotation and to confirm that the Listing Rules are to be interpreted in accordance with their spirit, intent and purpose in a way that best promotes the principles on which the Listing Rules are based;
- to have the entity confirm that there is nothing which would restrict the secondary trading of its quoted securities and that its securities (or CDIs where appropriate) will satisfy the requirements for clearing and settlement of uncertificated securities in CHESS; and
- to have the entity indemnify ASX in relation to any claim, action or expense arising from the confirmations regarding secondary trading being incorrect or if any documents provided to ASX are not true and complete.

[1.7.B] Legislation and ASIC policy

- See para [1.1.C.60] above for a discussion on ASIC Regulatory Guide 99 — Quotation of securities offered by prospectus.
- In particular Pt IV of the RG 99 sets out the circumstances in which ASIC is likely to grant relief from the time limits imposed by the former s 1031 to prevent it from invalidating issued securities, as well as the conditions that ASIC will impose in granting such relief.
- Regulatory Guide 99.55 further states that ASIC will usually discuss an application for relief with ASX, and thus before an entity seeks relief from ASIC,

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **31** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 28::
bwservice::0::

it should also consult with ASX accordingly. Regulatory Guide 99.55 goes on to state that ASIC will only give relief from the former s 1031 time limits if the entity has applied to ASX and has met ASX's requirements in a timely manner and that ASX advises ASIC that the entity's application has a prospect of success.

- If ASX refuses to admit the entity, ASIC will not give relief to the entity to extent the relevant time limits, especially if it would delay the refund of subscription money to investors.

Part III of RG 99 sets out ASIC's policy in granting relief from it invalidating an issue of securities, such as the aim to promote market efficiency alongside ensuring that investors are adequately protected.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **32** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 29::
bwservice::0::

[1.8] Listing Rule 1.8 — Requirements for admission as an ASX Debt Listing

[1.8.A] General principle and ASX policy

It is possible for an entity to apply for admission on the basis that it will be seeking quotation of debt securities only. In such a situation, there will only be a limited number of Listing Rules with which the entity must comply. Also the requirements for admission are generally less stringent than for general ASX Listing, being limited to those requirements which go to the integrity and appropriateness of the entity's debt issuance. An entity which is already admitted to ASX Listing or Foreign Exempt Listing may issue and apply for quotation of debt securities without seeking further admission as an ASX Debt Issuer.

Under the Corporations Act, the issue of debt securities will generally require a prospectus to be prepared where the debt securities are issued to or traded by retail investors. Where the entity does not have other quoted securities on issue the prospectus will generally be more limited in the information which it needs to provide about the issuer itself and its operations and prospects. ASIC also has recently issued Class Order relief to facilitate the issue of retail debt securities which allows more limited prospectus disclosure for retail debt issues which qualify as "vanilla bond issues".

Where the issue of debt securities is limited to wholesale investors, there is no requirement for a prospectus to be prepared (although the issuer may still have other obligations in relation to the issue of the debt securities under the Corporations Act).

For these reasons an entity seeking admission as an ASX Debt Issuer is not subject to a specific requirement to issue a prospectus or information memorandum complying with ASX requirements. However, as part of its application for admission, the entity is required to provide copies to ASX of any prospectus, PDS or information memorandum which it has issued in relation to the debt issue. This recognises that there will generally be some type of offering document relevant to the issue of the debt securities (even if the issue is solely to wholesale investors).

Listing Rule 1.8 sets out the Conditions for admission as an ASX Debt Issuer.

[1.8.A.10] Condition 1

As noted above, this category of admission is reserved for those limited situations where an entity will only be seeking quotation of debt securities. Generally such an entity will either be:

- a subsidiary of a larger listed group which is designated as the issuer of retail or wholesale debt securities; or
- a special purpose entity (eg a securitisation entity) which has been established to issue wholesale debt securities or asset backed debt securities and where the listing on ASX is primarily for informational and compliance purposes, rather than for the purpose of the debt securities being traded (in this latter case waivers will generally be required).

[1.8.A.20] Condition 2

Structurally, the type of entity considered by ASX to be suitable for admission as a debt issuer is more limited than those for ASX listing and generally excludes trusts and

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **33** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 30::
bwservice::0::

managed investment schemes (although in a Note to this Condition, ASX has indicated the circumstances in which a trust may be suitable for admission as a debt issuer).

[1.8.A.30] Condition 3

The financial requirements for admission as a debt issuer are more targeted and do not directly require compliance with the general profits test or assets test for ASX Listing (although there is a modified assets test which can be used to support admission). The entity must satisfy only one of the following requirements:

- net tangible assets at the time of admission of at least $10 million (supported by audited financial statements);
- a guarantor of the debt securities which has net tangible assets at the time of admission of at least $10 million (supported by audited financial statements and an undertaking to continue to provide the same ongoing financial reporting as an ASX Debt Issuer); or
- a credit rating for the quoted debt securities of at least "investment grade" by one of the specified credit rating agencies (ASX has acknowledged that it may need to revise the list of specified credit rating agencies — this is likely to particularly be the case in relation to retail debt issues where some credit rating agencies have withdrawn from providing credit ratings for retail debt issues as a result of the revised ASIC policy on rating agencies).

In addition, if the entity is seeking quotation of retail debt securities then ASX must also be satisfied that the issuer's structure and the obligations or rights of both the issuer and "any other person" connected with the issue of the retail debt securities are "appropriate for retail securities". This Condition gives ASX a broad discretion to examine the structure of any proposed retail debt issue and recognises that more stringent standards may need to apply where debt securities are to be quoted and traded by retail investors.

Although the market for quoted retail debt securities is presently quite limited and structures are often fairly straightforward it is likely that awakened interest in the issue of quoted retail debt securities will be accompanied by an increase in complexity of the structure underlying the debt securities which are issued. The Listing Rules therefore provide ASX with the tools to supervise the issuance of such securities by ensuring that any structure is sufficiently transparent to enable retail investors to understand the risks and benefits of the quoted debt securities.

As indicated above, a number of debt listings are wholesale debt listings only, and do not involve trading of the quoted securities. Where a debt security is proposed to trade on ASX, it will always be classed as a "retail security" because in these circumstances it is not be possible to restrict the ownership of the debt securities to wholesale investors only.

See para [19.12.A]* for notes on the definition of "retail securities" in LR 19.12.

As mentioned above, ss 716 and 1013K of the Act requires that a disclosure document only contain a statement by a person, if that person has consented to the statement being included, the document states that that person has consented, and that the person has not withdrawn its consent before the document has been lodged with ASIC.

ASIC Regulatory Guide 55 (RG 55) provides guidance on the circumstances when ASIC may grant relief from this requirement which previously included relief for statements in a prospectus or PDS about credit ratings provided by credit ratings agencies.

For prospectus and PDS offerings dated from 1 January 2010, ASIC Class Order [09/1084] withdrew ASIC's prior relief (as granted in ASIC Class Order [07/428] and ASIC Class Order [07/429]) which allowed credit agencies (such as *Standard & Poor's, Moody's Investor Services and Fitch Ratings*) to be cited without consent in an entity's prospectus or PDS. Accordingly, entities proposing to use credit agency information in

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **34** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 31::
bwservice::0::

their prospectus or PDS which are dated 1 January 2010 must obtain consent from such credit agencies. This has caused some credit rating agencies to withdraw from providing credit ratings for retail offerings. This may make it more difficult for an entity seeking admission under ASX Debt Listing to satisfy the third limb of the financial requirements for admission.

Refer to para [1.1.C.30] above for additional notes on RG 55, which provides ASIC guidance on how consents are to be obtained and documented and the requirements of ss 716 and 1013K.

See para [1.8.C] below for notes on the Corporations Act distinction between "wholesale clients" and "retail clients".

[1.8.A.40] Condition 4

Where a foreign entity is seeking admission as a debt issuer, it must comply with similar requirements to a foreign entity seeking admission to listing, including:

- registration under the Corporations Act as a foreign company;
- appointing an agent for service; and
- having an Australian securities register (eg a register of CDIs) or other appropriate facilities for the registration of uncertificated transfers.

In addition ASX must be satisfied that the quoted debt securities would be "financial products" under the Corporations Act. This is presumably to ensure that the foreign entity is required to comply with Ch 7 of the Corporations Act in relation to the issue of financial products (including holding an AFSL if required).

However, the foreign entity is not required to have its constitution conform to the Listing Rules as it would if seeking admission to quote its equity securities under ASX Listing: see para [1.8.C] for notes on the issue of "financial products' under the Corporations Act and a summary of the licensing and disclosure implications for foreign debt issuers.

[1.8.A.50] Condition 5

The requirement for all debt securities in each "class" of securities to be quoted recognises that an ASX Debt Issuer may be seeking the quotation of a number of separate series of debt securities. However, the principle of having all securities in each class quoted is similar to that for equity securities. Securities will be in the same "class" if they have the same issue date and maturity date and all other terms (eg payment of interest and ranking as a creditor) are identical: see para [1.1.A.60] for notes on the equivalent condition in relation to the quotation of equity securities in LR 1.1, Condition 6.

In a note to this Condition, ASX has indicated that debt securities and convertible debt securities must have a deed under LR 2.1. It should be noted that LR 2.1 does not strictly require a deed for all debt securities (particularly where the securities are for issue to wholesale investors only): see para [2.1.A] for notes on LR 2.1 conditions to the quotation of debt securities and in particular the circumstances in which a trust deed for debt securities will be required.

[1.8.A.60] Condition 6

There is no Condition 6.

[1.8.A.70] Condition 7

There is no Condition 7.

[1.8.A.80] Condition 8

The requirement to appoint a person to be responsible for communications with ASX is the same as for entities seeking admission under ASX Listing: see para [1.1.A.120] for notes on Condition 12 of LR 1.1.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **35** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 32::
bwservice::0::

[1.8.A.90] Condition 9

The requirement for communicating electronically with ASX is the same as for entities seeking admission under ASX Listing: see para [1.1.A.140] for notes on Condition 14 of LR 1.1.

[1.8.A.100] Condition 10

Special requirements apply for admission if it is proposed to issue "asset-backed securities" (as defined in LR 19.12), including a requirement that there must be an independent person representing the interests of holders of the debt securities. ASX will want to examine the structure more closely where the asset backed securities are issued to retail investors.

Asset-backed securities may take a variety of forms. One general category of asset-backed securities is residential mortgage backed securities issued under securitisation arrangements. However, other assets such as receivables, real property and equity portfolios may also be quoted as debt securities: see para [19.12.A]* for notes on the definition of "asset-backed securities" in LR 19.12.

[1.8.B] ASX waivers

[1.8.B.40] Condition 4

- ASX has granted waivers to permit foreign entities seeking admission to ASX Debt Listing to not register as a foreign company under the Corporations Act, where this would not be required under s 601CD of the Act, because the company is only issuing debt securities to wholesale investors.

  See waivers: WLC100209-001 INDUSTRIAL BANK OF KOREA (2010); WLC070144-001 AXA (2007); WLC070079-001 PROVINCE OF ONTARIO (2007); WLC060408-001 NRW.BANK (2006); WLC070043-001 AB SVENSK EXPORTKREDIT (2006).

[1.8.C] Legislation and ASIC policy

- See para [1.8.A.30] above for a discussion on RG 55 and ASIC Class Order [09/1084] and the requirement to obtain consent of credit rating agencies.
- On 12 May 2010, ASIC released ASIC Class Order [10/321] in relation to the offer of "vanilla bonds", which aims to simplify and reduce the cost of issuing bonds to the retail market by existing listed entities.

  Class Order 10/321 generally allows the issue of vanilla bonds under a 'special prospectus', which is modeled on transaction-specific prospectuses or a two-part prospectus, which would comprise of a 'base' prospectus that may be used for different offers and a second prospectus in regards to the specific bonds on offer. To invoke CO 10/321, certain conditions must also be satisfied, such as having an aggregate bond issue size of at least $50 million, the entity being entitled to use a 'transaction-specific' prospectus as required under s 713 of the Act, the entity not having been suspended for more than 5 days over the past 12 months, the entity having an unmodified auditors report and specific content requirements as set out in the class order.
- Definition of "financial products" under the Corporations Act and summary of obligations of an issuer of financial products.

  Part 7.1, Div 3 of the Act provides a very broad definition of "financial product" and generally encompasses a facility that involves any of the following:
  - the making of a financial investment (refer to s 763B);
  - the managing of financial risk (refer to s 763C); or
  - the making of non-cash payments (refer to s 763D).

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **36** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 33::
bwservice::0::

The Act also provides for specific inclusions to the definition, such as a security, an interest in a registered scheme or managed investment, derivatives, some general and life insurance policies, superannuation interests, debentures, stock or bonds, some foreign exchange contracts, and margin lending facilities (refer to s 764A). It also provides for specific exclusions (refer to s 765A).

Generally, if an entity proposes to sell a financial product or provide a financial service, it must apply to ASIC for a license to do so (ie an Australian Financial Services License (AFSL)). There are also ongoing compliance requirements, such as regular reporting to ASIC, confirmation of transactions procedures, dispute resolution procedures, advertising requirements and cooling-off periods.

Further, the entity must also comply with disclosure requirements under the Act, such as the issue of a financial services guide, statement of advice and product disclosure statement (PDS): see para [1.1.C.30] above for a discussion on the requirements of a PDS.

The extent of such disclosures and obligations is usually dependent on whether the financial products or financial services are offered to "retail clients" or "wholesale clients".

- Corporations Act distinction between "wholesale clients" and "retail clients".

The distinction between a "retail client" and a "wholesale client" is essential to the operation of the financial services regulation, in that the Act imposes more stringent obligations and requirements on entities who provide services to retail clients than those who provide services to wholesale clients.

Generally under s 761G of the Act, a person is a retail client, unless that person is specifically designated as a wholesale client or satisfies certain criteria.

Generally, a client would be classified as being a wholesale client if it meets the following tests:

- The price for the provision of the financial product, or value of the financial services in which the financial services relate equals or exceeds $500,000 (refer to s 761G(7)(a) and r 7.1.19(2));
- The financial product or financial services is provided for use by a business that is not a small business, ie a business employing less than 20 people, or less than 100 people if the business is or includes the manufacture of goods (refer to ss 761G(7)(b) and 761G(12);
- The person can demonstrate, by way of an accounting certificate given within the preceding 6 months, that it has net assets of at least $2.5 million, or gross income for each of the past 2 financial years of at least $250,000 (refer to s 761G(7)(c) and r 7.1.28); and
- The person is a professional investor (refer to s 761G(7)(d)); or
- The person is a sophisticated investor (refer to s 761GA).

Further, the provision of financial products or financial services in relation to general insurance and superannuation products are treated differently to those stated above (refer to s 761G(5) and 761G(6)).

Note, on 24 January 2011 the Assistant Treasurer released an options paper proposing reform to the retail/wholesale client distinction under the Act. The options paper proposed the following four possible options for reform:

- Retain and update the current system;
- Remove the distinction between retail clients and wholesale clients;
- Introduce a "sophisticated investor" test as the sole way to distinguish between retail and wholesale clients;
- Do nothing.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **37** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 34::
bwservice::0::

Comments on the options paper were due by 25 February 2011, with legislation implementing the reforms proposed to be commenced on 1 July 2012.

[1.9] Listing Rule 1.9 — Applying for admission to the official list as an ASX Debt listing

[1.9.A] General principle and ASX policy

The requirement for an applicant to complete App 1B in order to apply for admissions as an ASX Debt Issuer serves the same primary purposes as the application for admission as an ASX Listing:

1. to collect the information needed to establish that the entity has satisfied the conditions for admission to listing set out in LR 1; and
2. to create a contract (in the form of a Deed) between the entity and ASX which underpins the entity's continuing compliance with the Listing Rules and protects ASX from any third party claims which may arise from a breach by the entity: see para [0.1.A] for notes on how the Listing Rules take effect as a contract only and generally do not create rights or obligations under the Corporations Act.

The information required by App 1B is similar to the information required under App 1A for admission as an ASX Listing, but is more limited because there needs to be less extensive information required about the entity itself, its material documents, related party contracts and the entity's business assets. The information required under App 1B falls into the following broad categories:

- information about the entity and its business operations;
- information about the debt securities to be quoted upon admission as an ASX Debt Issuer;
- information about the entity's debt capital structure (other than its quoted debt securities);
- information about the entity's business plan and level of operations;
- any other information which is likely to have a material effect on the price or value of the entity's debt securities.

As indicated above, there are no specific confirmations required in relation to the content of an information memorandum. It is therefore possible that, where the debt securities are issued to wholesale investors only, any information memorandum could be quite brief.

ASX Guidance Note 17 provides further information on the application process and consultation with ASX.

See para [18.10.A]* for notes on the ASX Guidance Note to the Disciplinary procedures and Appeals Rulebook in relation to appeals from decisions of ASX in relation to admission.

See para [1.1.C.60] for notes on ASIC Regulatory Guide 99 — Quotation of securities offered by prospectus and timing for the listing application.

The Listing Agreement between the entity and ASX contained in Pt 3 of App 1B achieves similar objectives to the Listing Agreement for a general ASX Listing, that is:

- to have the entity confirm its obligation contractually to comply with the Listing Rules (even if its securities are suspended from quotation);
- to confirm ASX's discretion in administering the Listing Rules and granting or suspending listing and quotation and to confirm that the Listing Rules are to be interpreted in accordance with their spirit, intent and purpose in a way that best promotes the principles on which the Listing Rules are based;
- to have the entity confirm that there is nothing which would restrict the

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **38** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 35::
bwservice::0::

secondary trading of its quoted debt securities and that its securities (or CDIs where appropriate) will satisfy the requirements for clearing and settlement of uncertificated securities in CHESS; and

- to have the entity indemnify ASX in relation to any claim action or expense arising the confirmations regarding secondary trading are incorrect or if any documents provided top ASX are not true and complete.

[1.10] Listing Rules 1.10–1.10.2 — Continuing obligations of an ASX Debt Listing

[1.10.A] General principle and ASX policy

Because an ASX Debt Issuer does not seek quotation of its equity securities, a large number of the Listing Rules are inappropriate, and therefore, an ASX Debt Issuer is only required to comply with the following categories of Listing Rules:

- Chapter 2 (quotation) rules which are specific to debt securities;
- The general continuous disclosure rule in LR 3.1, plus other disclosures under Ch 3 (continuous disclosure) which are relevant to new issues of securities and information about the entity itself and documents sent to security holders;
- Disclosure in relation to financial accounts under Ch 4 (periodic disclosure);
- Timetables for interest payments under Ch 6 and App 6A;
- Rules regarding transfer and registration of securities under CHESS in Ch 8;
- Procedural rules regarding documents sent to security holders and lodged with ASX under Ch 15; and
- General provisions relating to fees, suspensions, trading halts, definitions and application of the Listing Rules under Chs 16, 17, 18 and 19.

ASX has a discretion to specify other Listing Rules that apply to the entity, either before or after the entity is admitted.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **39** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 36::
bwservice::0::

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **40** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 37::
bwservice::0::

ASX Foreign Exempt Listing

[1.11] Listing Rule 1.11 — Requirements for admission as an ASX Foreign Exempt Listing

[1.11.A] General principle and ASX policy

The purpose of Foreign Exempt Listing is to provide an alternative to a full ASX Listing to foreign entities which are already listed on and regulated by a recognised securities exchange in another jurisdiction. This may not necessarily be the same as the entity's home jurisdiction, but is instead the securities exchange on which the entity has its "primary listing".

Although the Conditions for a Foreign Exempt Listing are not generally any less onerous (and in some cases are more onerous) than an application for admission to full ASX Listing, the benefits of applying for a Foreign Exempt Listing are in the reduced requirements for ongoing compliance under the Listing Rules.

[1.11.A.10] Condition 1

The important qualifying element to apply for Foreign Exempt Listing is that the foreign entity has its primary listing on a stock exchange or market which is a member of Federation Internationale des Bourses de Valeurs (FIBV), now called the World Federation of Stock Exchanges (WFE): see para [19.12.A]* for notes on the definition of "overseas home exchange" in LR 19.12.

[1.11.A.20] Condition 2

If the entity is not subject to the listing rules of the place where it has its primary listing, then it must be subject to the rules of another exchange (again being a member of the WFE), approved by ASX: see ASX Guidance Note 4, paras 8–16, which provides further information on Foreign Exempt Listing.

[1.11.A.30] Condition 3

ASX has indicated that one way in which the entity can provide evidence of compliance with the listing rules of its overseas home exchange is to provide a statement from its directors regarding compliance. Other ways may be to provide a copy to ASX of any internal or external compliance report which may have been prepared.

[1.11.A.40] Condition 4

Because a foreign entity seeking admission as a Foreign Exempt Listing will generally not be subject to reporting requirements under the ASX Listing Rules, it must provide a copy of its latest public reports and agree to give ASX further reports and information produced in its home jurisdiction. This will be similar to the obligation which the entity will have as a foreign company registered under the Corporations Act. Unless the foreign entity is raising capital in Australia it will generally not be preparing a prospectus, PDS or information memorandum, so there is no requirement to provide one to ASX as a condition of listing: see para [1.14.A] for notes on the requirements for documents under the application for Foreign Exempt Listing in App 1C.

[1.11.A.50] Condition 5

The requirement to have an uncertificated Australian register is the same requirement for a foreign entity applying for admission to ASX Listing: see para [1.1.A.40] for notes on Condition 4 of LR 1.1.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **41** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 38::
bwservice::0::

[1.11.A.60] Condition 6

Whilst a foreign entity does not have to have its "main class" of securities quoted on ASX where it does seek quotation of a class of securities, it must have all the securities in that class quoted, for the same reasons as in a full ASX Listing: see para [1.1.A.60] for notes on the equivalent condition in Condition 6 of LR 1.1.

[1.11.A.70] Condition 7

A foreign entity seeking admission as a Foreign Exempt Listing still needs to qualify under either a profits test or an assets test, both of which have higher thresholds than for admission as an ASX Listing. This reflects the fact that an entity seeking admission as a Foreign Exempt Listing will already be listed on an exchange in another jurisdiction and needs to have a significant profit history or significant net tangible assets in order for ASX to be satisfied it can be admitted without the usual supervision required under the ASX Listing Rules: see paras [1.12.A] and [1.13.A] for notes on the profits test and assets test for a Foreign Exempt Listing.

See ASX Guidance Note 4, para 3, in relation to the requirement for the entity to have a significant profit history or net tangible assets.

[1.11.A.80] Condition 8

A foreign entity seeking admission as a Foreign Exempt Listing is subject to a modified spread requirement of 1,000 holders each holding a parcel of securities in the quoted class of at least $500: see para [1.1.A.70] for notes on the corresponding spread requirement under Condition 7 of LR 1.1.

[1.11.A.90] Condition 9

A foreign entity seeking admission as a Foreign Exempt Listing is still required to register as a foreign company in Australia. Generally, a foreign company which maintains a share register in Australia will be required to register anyway as a foreign company because it will be deemed to be doing business in Australia: see para [1.1.A.40] for notes on the equivalent condition in Condition 4 of LR 1.1 and see para [1.1.C.40] for notes on the Corporations Act requirements for registration as a foreign company.

[1.11.A.100] Condition 10

This condition imposes two separate and unrelated requirements upon a foreign entity which is a trust foreign entity:

- a requirement to appoint and agent for service of process (note: a foreign company will not be relieved of the requirement to appoint an agent for service, as this is a requirement under the Corporations Act when registering as a foreign company, in compliance with Condition 9); and
- a requirement not to be under an obligation to buy back units in the trust or to allow a security holder to withdraw from the trust (this corresponds with the equivalent requirement for ASX Listing in Condition 5 of LR 1.1).

Note that a foreign trust entity applying for Foreign Exempt Listing is not required to be a registered managed investment scheme under the Corporations Act. This reflects the primacy of regulation under the foreign entity's home jurisdiction and the fact that the foreign entity trust structure will already be listed and established under the law of a foreign jurisdiction: see para [1.1.C.50] for notes on the equivalent condition re buy-backs or withdrawals from the trust in Condition 5 of LR 1.1 and see para [1.1.A.40] for notes on the requirement to appoint an agent for service in Condition 4 of LR 1.1.

[1.11.A.110] Condition 11

The requirement to appoint a person to be responsible for communications with ASX is the same as for entities seeking admission under ASX Listing: see para [1.1.A.120] for notes on Condition 12 of LR 1.1.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **42** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 39::
bwservice::0::

[1.11.A.120] Condition 12

The requirement for communicating electronically with ASX is the same as for entities seeking admission under ASX Listing: see para [1.1.A.140] for notes on Condition 14 of LR 1.1.

[1.12] Listing Rules 1.12–1.12.4 — The profit test for an ASX Foreign Exempt Listing

[1.12.A] General principle and ASX policy

As indicated in para [1.11.A.70] above, the profits test for a Foreign Exempt Listing requires a significantly higher threshold ($A200 million) than an ASX Listing. Otherwise the requirements are similar:

- the threshold must have been met for each of the last 3 full financial years;
- profit is calculated before tax;
- profit must be derived from ordinary operations (see definition of "operating profit" in LR 19.12 and also the requirement in LR 1.12.3); and
- the entity must be a "going concern" or the successor entity of a going concern.

Unlike the profits test for ASX Listing in LR 1.2, there is no need to exclude profits earned from operations which have been or will be discontinued. This reflects the fact that an entity seeking Foreign Exempt Listing is already an existing listed business in another jurisdiction: see para [1.2.A] for notes on the requirement to be a "going concern" under the general profits test in LR 1.2 and see para [19.12.A]* for notes on the definition of "operating profit (loss)" in LR 19.12.

As with the profits test for ASX Listing, there is a requirement to lodge unqualified audited accounts for the last 3 full financial years. The difference for a Foreign Exempt Listing is that the accounts will generally not be audited under Australian accounting standards, so the requirement is that the auditing standards be "acceptable to ASX" (see LR 1.12.4). ASX has indicated in a note to the LR 1.12.4 that it will accept the use of Financial Reporting Standards and International Standards on Auditing (ie the Standards published by the International Accounting Standards Board (IASB) and the International Auditing and Assurance Standards Board (IAASB) respectively).

There is no requirement for a pro forma balance sheet for a foreign entity seeking a Foreign Exempt Listing, again reflecting the intention that entities seeking Foreign Exempt Listing be already substantially established under their existing listing in a foreign jurisdiction.

[1.13] Listing Rule 1.13 — The net tangible assets test for an ASX Foreign Exempt Listing

[1.13.A] General principle and ASX policy

As indicated in para [1.11.A.70] above, compared to ASX Listing, the assets test for a Foreign Exempt Listing requires a significantly higher threshold ($A2 billion in net assets).

Reflecting the intention that entities seeking Foreign Exempt Listing be already substantially established under their existing listing in a foreign jurisdiction, there is no cash test or working capital requirement if proceeding under the assets test for a Foreign Exempt Listing. This means that an entity seeking Foreign Exempt Listing could have more than half of its assets in cash or assets readily convertible into cash, without having to demonstrate commitments to spend the cash. In practice, where a foreign entity has more than A$2 billion in net assets, it is unlikely it would be in this position.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **43** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 40::
bwservice::0::

[1.14] Listing Rule 1.14 — Applying for admission to the official list as an ASX Foreign Exempt Listing

[1.14.A] General principle and ASX policy

The requirement for a foreign entity to complete App 1C in order to apply for admission as Foreign Exempt Listing serves the same primary purposes as the application for admission as an ASX Listing:

1. to collect the information needed to establish that the entity has satisfied the conditions for admission to listing set out in LR 1.11; and
2. to create a contract (in the form of a Deed) between the entity and ASX which underpins the entity's continuing compliance with the Listing Rules and protects ASX from any third party claims which may arise from a breach by the entity: see para [0.1.A] for notes on how the Listing Rules take effect as a contract only and generally do not create rights or obligations under the Corporations Act.

The information required by App 1C is similar to the information required under App 1A for admission as an ASX Listing, but is more limited because there needs to be less extensive information required about the entity's structure, its material documents, related party contracts and the entity's business assets. The information required under App 1C falls into the following broad categories:

- information about the entity and its business operations;
- information about the class of securities to be quoted upon admission as a Foreign Exempt Listing;
- information about the entity's capital structure (other than its quoted securities);
- information about the entity's business plan and level of operations;

Note, unlike the application for ASX Listing, there is no specific requirement to provide any other information which is likely to have a material effect on the price or value of the entity's quoted securities. This is consistent with the principles of Foreign Exempt Listing, where the ASX Listing Rules on continuous disclosure do not apply and investor disclosure is instead satisfied by making available to ASX and investors all information which is required to be disclosed in accordance with the listing rules of the foreign entity's home exchange.

Also, there is no specific requirement to lodge a prospectus or PDS in relation to the securities to be quoted, and there are no specific confirmations required in relation to the content of an information memorandum. It is therefore possible that, where the securities are issued to wholesale investors only, any information memorandum could be quite brief. Instead, a foreign entity seeking admission as a Foreign Exempt Listing is required to lodge copies of its latest annual report, which will comply with the listing rules of its home exchange.

Of course, where a foreign entity is also making an offer of its securities to Australian retail investors in conjunction with its admission as a Foreign Exempt Listing, it will need to prepare a prospectus or PDS as appropriate.

See para [1.1.C.30] for notes on the circumstances in which a prospectus or PDS will be required for an offer to retail investors.

See para [1.1.C.30] for notes on the restrictions on secondary trading in securities issued under a wholesale offering where a prospectus or PDS has not been prepared and the implications for secondary trading of the securities on ASX.

ASX Guidance Note 17 provides further information on the application process and consultation with ASX.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **44** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 41::
bwservice::0::

See para [18.10.A]* for notes on the ASX Guidance Note to the Disciplinary procedures and Appeals Rulebook in relation to appeals from decisions of ASX in relation to admission.

See para [1.1.C.60] for notes on ASIC Regulatory Guide 99 — Quotation of securities offered by prospectus and timing for the listing application.

The Listing Agreement between the entity and ASX contained in Pt 3 of App 1C achieves similar objectives to the Listing Agreement for a general ASX Listing, that is:

- to have the entity confirm its obligation contractually to comply with the Listing Rules (even if its securities are suspended from quotation);
- to confirm ASX's discretion in administering the Listing Rules and granting or suspending listing and quotation and to confirm that the Listing Rules are to be interpreted in accordance with their spirit, intent and purpose in a way that best promotes the principles on which the Listing Rules are based;
- to have the entity confirm that there is nothing which would restrict the secondary trading of its quoted securities and that its securities (or CDIs where appropriate) will satisfy the requirements for clearing and settlement of uncertificated securities in CHESS; and
- to have the entity indemnify ASX in relation to any claim action or expense arising the confirmations regarding secondary trading are incorrect or if any documents provided to ASX are not true and complete.

[1.15] Listing Rules 1.15–1.15.3 — Continuing obligations of an ASX Foreign Exempt Listing

[1.15.A] General principle and ASX policy

The principle behind admission of a foreign entity as a Foreign Exempt Listing is that the majority of the regulation of the entity occurs in accordance with the listing rules (or equivalent) of its overseas home exchange. As a result, a foreign entity which is admitted to Foreign Exempt Listing is only required to comply with the following limited categories of Listing Rule:

- Chapter 2 (quotation) rules which relate to participation in CHESS of the quoted securities (or CDIs) of an entity admitted to Foreign Exempt Listing (if applicable);
- Particular procedural rules regarding transfer and registration of securities under CHESS in Ch 8 (to the extent applicable);
- Particular procedural rules regarding documents sent to security holders and lodged with ASX under Ch 15; and
- General provisions relating to fees, suspensions, trading halts, definitions and application of the Listing Rules under Chs 16, 17, 18 and 19.

In lieu of complying with the general continuous disclosure rule in LR 3.1 and other disclosures under Ch 3 (continuous disclosure) and Ch 4 (periodic disclosure) an entity admitted to Foreign Exempt Listing has only to provide to ASX, in English, all of the information which it provides to its overseas home exchange, or which is to be made available to the public. This is an absolute and fundamental requirement of being admitted to Foreign Exempt Listing and cannot be waived by ASX (see LR 1.15.2).

An entity admitted to Foreign Exempt Listing has an obligation to continue to comply with the listing rules of its overseas home exchange. This, and the disclosure obligation referred to above are the primary basis for regulation of an entity admitted to Foreign Exempt Listing

ASX has a discretion to specify other Listing Rules that apply to the entity, either before or after the entity is admitted.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **45** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 42::
bwservice::0::

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **46** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 43::
bwservice::0::

[1.16] Listing Rule 1.16 — ASX satisfied of compliance with the listing rules

[1.16.A] General principle and ASX policy

This Rule supports ASX's discretion in administering the Listing Rules, in that ASX must be satisfied that an entity applying for admission will comply with the Listing Rules. ASX will form this view by considering whether, on the information before it, an entity appears to be both capable and willing to comply with all of the Listing Rules which apply to it.

See para [1.1.A.10] for notes on the exercise of ASX's discretion and the application of the principles on which the Listing Rules are based.

See para [0.1.A] for notes on the admission application in the form of Apps 1A (ASX Listing), 1B (ASX Debt Issuer) or 1C (Foreign Exempt Listing) as applicable where the entity seeking admission enters into a contract with ASX to comply with the Listing Rules.

See para [0.15.A] for notes on ASX discretions.

See ASX Guidance Notes 1 and 17 in relation to the exercise of ASX discretions.

[1.17] Listing Rule 1.17 — Additional information in relation to application for admission

[1.17.A] General principle and ASX policy

This Listing Rule supports the exercise of ASX's discretion by requiring additional information if it decides this is necessary.

See para [0.15.A] for notes on ASX discretions.

See ASX Guidance Notes 1 and 17 in relation to the exercise of ASX discretions.

See para [1.1.A.30] for notes on pre-quotation disclosure.

[1.18] Listing Rule 1.18 — Payment of fees

[1.18.A] General principle and ASX policy

See commentary in relation to Ch 16 (Fees): see para [15.11.A]* for notes on Guidance Notes 15 and 15A.

[1.19] Listing Rule 1.19 — ASX's discretion concerning admission

[1.19.A] General principle and ASX policy

This Rule supports ASX's discretion in administering the Listing Rules and establishes ASX's right to admit or not admit an entity to listing in its absolute discretion. ASX may impose conditions relating to additional disclosure where it considers this to be necessary for an informed market: see para [1.1.A.10] for notes on the exercise of ASX's discretion and the application of the principles on which the Listing Rules are based.

See para [0.1.A] for notes on the application for admission to listing in the form of Apps 1A, 1B or 1C where the entity seeking admission enters into a contract with ASX to comply with the Listing Rules.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **47** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 44::
bwservice::0::

See para [0.15.A] for notes on ASX discretions.

See ASX Guidance Notes 1 and 17 in relation to the exercise of ASX discretions.

[1.20] Listing Rules 1.20–1.20.2 — How and when admission to the official list occurs

[1.20.A] General principle and ASX policy

Admission to listing occurs when ASX makes a resolution admitting the entity. That resolution may be conditional. This Rule supports ASX's discretion in administering the Listing Rules and establishes ASX's right to make admission subject to the entity satisfying conditions, in which case the entity will not be admitted to listing until the conditions are satisfied or ASX accepts undertakings from the entity: see para [1.1.A.10] for notes on the exercise of ASX's discretion and the application of the principles on which the Listing Rules are based.

See para [0.15.A] for notes on ASX discretions.

See ASX Guidance Notes 1 and 17 in relation to the exercise of ASX discretions.

Job: commercial/annlr/allvols/serv_0/chapter_1_251271
Page: **48** Date: **6/7/2011** Time: **22:28:10**
bwpageid:: 45::
bwservice::0::