

# **Listing and Waiver Applications Declined by ASX**

**1 October 2016 – 31 December 2016**



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### Background

ASX's Listing Rules serve the interests of listed entities and investors, both of whom have a vital interest in maintaining the reputation and integrity of the ASX market and ensuring that it is internationally competitive and facilitates efficient capital raising.

ASX has an absolute discretion concerning the admission of an entity to the official list and the quotation of its securities. ASX also has broad discretions under the Listing Rules whether to require or waive compliance with the Listing Rules in a particular case, to remove an entity from the official list and to suspend its securities from quotation.

In exercising these discretions, ASX takes into account the principles on which the Listing Rules are based (as set out in the introduction to the Listing Rules) and the imperative of maintaining the reputation, integrity and efficiency of the ASX market.

To enhance transparency and assist stakeholders to understand how ASX interprets and applies the Listing Rules, ASX publishes on a quarterly basis high level reasons why it has declined certain listing and waiver applications.<sup>1</sup>

### Listing applications declined over the period

The table below summarises for the period of this report:<sup>2</sup>

- applications for admission to the official list that ASX has declined;
- requests to approve a notice of meeting containing a resolution of security holders approving a backdoor listing transaction which ASX has declined on the basis that ASX is likely to reject the entity's application for readmission to the official list in due course; and
- requests for preliminary advice on the suitability of an entity for listing where ASX has indicated that the entity is not suitable for listing.

Entity	Reasons
Entity A	Entity A's primary assets were located in emerging markets. ASX declined Entity A's application for admission to the official list because ASX was not satisfied that its structure and operations were appropriate for a listed entity. Entity A was proposing to list with a free float of less than 20%, contrary to ASX's published policy at the time requiring an applicant for listing to have a free float of at least 20% (this policy has since been formalised in condition 7 of Listing Rule 1.1, introduced on 19 December 2016). ASX also held concerns about the paucity of information in Entity A's prospectus about its business, the directors' lack of experience in directing an ASX listed entity, and the fact that the entity's prospectus did not name any legal representatives and did not include

<sup>1</sup> ASX also publishes details of waivers that are granted by ASX on the ASX website twice monthly in the form of a waivers register. See the "Waivers" tab at <http://www.asx.com.au/regulation/rules/asx-listing-rules.htm>.

<sup>2</sup> This publication is a point-in-time publication reflecting listing applications declined by ASX over the period of this report. It should be noted that some of the entities whose listing applications have been declined by ASX and mentioned in this or in earlier editions of this publication may have since restructured their proposals to address ASX's concerns.

	an intellectual property report when intellectual property appeared to be one of the key assets of the entity.
Entity B	Entity B proposed a back door listing transaction involving the acquisition of a private company carrying on business in the mining sector. ASX determined to exercise its discretion to refuse Entity B's application for re-admission to the ASX official list. ASX was concerned about information that had emerged about the fame and character of the former founder and controller of a major shareholder in Entity B and other persons associated with him. Even though the entity proposed arrangements to restructure its board and to restrict the voting rights that could be exercised by the major shareholder, ASX was not satisfied that persons associated with the former founder and controller would not be able to directly or indirectly influence the affairs of Entity B.

### Waiver applications declined over the period

ASX Listing Rule	Reasons for declining waiver
Listing Rule 6.23.3	The entity had issued options to related parties and promoters exercisable on or before 30 June 2017. The entity had completed a back door listing and was required to re-comply with ASX's admission and quotation requirements, resulting in the options being subject to escrow restrictions. The entity sought a waiver from Listing Rule 6.23.3 to amend the terms of the options to extend the expiry date to 28 February 2018, so that the options could be exercised after the expiry of the escrow period. Listing Rule 6.23.3 stipulates that changes to option terms which have the effect of increasing the exercise period are prohibited. The waiver was declined for being inconsistent with the policy underlying the rule.
Listing Rule 7.1	The entity had conducted a pro-rata rights issue in order to raise funds for additional working capital and to allow it to identify, evaluate and conduct due diligence enquiries in respect of a potential acquisition. The rights issue closed under-subscribed. To fall within Listing Rule 7.2 exception 3 and therefore fall outside the restriction on new issues of equity securities in Listing Rule 7.1, an issue of the shortfall from a pro rata offer to shareholders must occur within 3 months of the close of the pro rata offer. The entity requested a waiver extending this period by a further 2 months to allow it more time to place the shortfall. The waiver was declined for being inconsistent with the policy underlying the rule.
Listing Rules 7.3.2 – two separate waivers	<p>In the first case, the entity had entered into an earn-out arrangement in connection with an acquisition, providing for shares to be issued each year for 3 years, subject to profit hurdles being met. The entity sought a waiver from Listing Rule 7.3.2 to permit the notice of meeting seeking shareholder approval not to state that the earn-out shares would be issued no later than 3 months after the date of the meeting. The maximum number of earn-out shares that could be issued was not known and therefore was not specified in the notice of meeting because it was based on a formula linked to the future profitability of the business being acquired and was uncapped. This had the consequence that shareholders were not in a position to give their informed consent to the issue of the earn-out shares over the 3 year period as they did not know the potential dilution involved. The waiver was declined for being inconsistent with the policy underlying the rule.</p> <p>The entity had also undertaken a capital raising by way of a placement of bonds to sophisticated and professional investors, including a related party of the entity.</p>

	<p>The bonds were convertible into shares and also provided that if more than 50% of the bonds converted to shares within six months, 10 million unquoted options were to be issued pro-rata to all bond holders. The issue of the bonds was conditional on the entity seeking shareholder approval pursuant to Listing Rules 7.1 and 10.11 to issue the maximum number of shares that could be issued under the bonds and the entity being granted waivers in respect of Listing Rules 7.3.2 and 10.13.3 in relation to the shares and options to be issued to the bond holders. The maximum number of shares to be issued pursuant to the bonds could not be calculated because the conversion mechanism provided for the shares to be issued at a fixed price or 80% of any future equity issue priced below that fixed price per share. The issue of the shares and options could occur up to 2 years after the issue of the bonds. Again, this had the consequence that shareholders were not in a position to give their informed consent to the issue of the earn-out shares over the 2 year period as they did not know the potential dilution involved. The waiver was declined for being inconsistent with the policy underlying the rule.</p> <p>In the second case, the entity had issued warrants in connection with a debt re-financing without approval from its ordinary shareholders under Listing Rule 7.1. The warrants were exercisable by the warrant holders during a set window. Upon exercise the entity could either pay a cash sum to the warrant holder or elect to issue a number of ordinary shares corresponding to the number of warrants. ASX considered the warrants to be equity securities for the purposes of Listing Rule 7.1. The issue of the warrants exceeded the entity's available issuance capacity under Listing Rule 7.1 at the time and, consequently, ASX determined the issue to be a breach of Listing Rule 7.1 and directed that the entity could not make any further issues of equity securities under Listing Rule 7.1 for a set period. In response, the entity proposed to convene a meeting of its shareholders to seek approval under Listing Rule 7.1 to the issue of the shares under the warrants, so as to restore its 15% issuance capacity under Listing Rule 7.1. The entity sought a waiver from Listing Rule 7.3.2 to permit the notice of meeting seeking shareholder approval not to state that the shares would be issued no later than 3 months after the date of the meeting. The waiver was declined for being inconsistent with the policy underlying the rule.</p>
Listing Rule 9.1.3	<p>The entity had acquired the issued capital of an unlisted technology company for an issue of shares in the entity. The transaction constituted a backdoor listing and, under Listing Rule 11.1.3, the entity was required to comply with Chapters 1 and 2 of the Listing Rules as if it were applying for admission to the official list for the first time. The securities of the entity issued to the shareholders of the unlisted company were subject to escrow restrictions under Chapter 9 and Appendix 9B of the Listing Rules. The entity requested a waiver of the escrow restrictions in respect of shares that had been transferred by a promoter to third parties prior to the entity's re-instatement to quotation on ASX. The waiver was declined for being inconsistent with the policy underlying the rule.</p>

Listing Rule 9.7	<p>ASX had imposed escrow requirements in relation to securities issued to the vendor of a classified asset for a period of 24 months from the date of the entity's re-instatement to quotation on ASX following a backdoor listing transaction. Subsequently the entity proposed to enter into an agreement with the vendor of the classified asset to unwind the transaction and to buy back and cancel the restricted securities held by the vendor shareholder. At the same time the entity also requested a waiver from Listing Rule 9.7 to permit a restriction agreement it had entered into with another security holder to be cancelled. The other security holder was not the vendor of the classified assets and was not a party to the unwinding proposal. The waiver was declined for being inconsistent with the policy underlying the rule.</p>
Listing Rule 10.13.3 – 3 separate waivers	<p>The first case was the same as the first case explained above under Listing Rule 7.3.2 and declined for the same reasons.</p> <p>In the second case, the entity proposed to issue shares to the holders of convertible notes to satisfy the interest obligations owing on the notes over a four year period, at their prevailing market price at the time the interest was payable. A related party held some of the notes. The shareholder approval that the entity had obtained under Listing Rule 10.11 in relation to the original issue of the convertible notes did not cover the shares to be issued in lieu of interest. The entity was intending to seek shareholder approval under Listing Rule 10.11 to cover the issue of the shares in lieu of interest and requested a waiver of the requirement in Listing Rule 10.13.3 that the issue take place within one month of the meeting approving the issue. The waiver was not granted because the four year time period was considered too long and that too much could change over that period for the shareholder approval to be considered informed and meaningful.</p> <p>In the third case, the entity requested a waiver from Listing Rule 10.13.3 to delay the issue of securities to a related party resident offshore beyond one month after the date of the meeting approving the issue under Listing Rule 10.11. The reason given was for tax reasons personal to the related party. The waiver was declined as this was not considered a sufficiently compelling reason to justify the grant of the waiver.</p>
Listing Rule 10.13.5	<p>The entity requested a waiver from Listing Rule 10.13.5 for the notice of meeting approving an issue of securities under Listing Rule 10.11 not to include the issue price of the securities. The waiver was declined for being inconsistent with the policy underlying the rule.</p>
Listing Rule 14.7	<p>The entity requested a waiver to allow additional time to issue securities which had been approved by shareholders under Listing Rule 7.1 and which, by virtue of Listing Rule 7.3.2, had to be issued within 3 months of the date of the shareholder approval. The reason given for the delay was because the investor had been tardy in meeting its obligations under the subscription agreement it had entered into with the entity. The waiver was declined as this was not considered a sufficiently compelling reason to justify the grant of the waiver.</p>