

SIGNIFICANT CHANGES TO ACTIVITIES

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Introduction

This Guidance Note is published to assist listed entities and their advisers to understand how ASX Limited (ASX) applies Listing Rules 11.1 to 11.3 to transactions that may result in a significant change to the nature or scale of a listed entity's activities.¹

Listing Rules 11.1 to 11.3 provide:

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

Listing Rule 11.1 was originally inserted into the Listing Rules primarily to regulate "back door listings".² Being party to a back door listing transaction will invariably involve a significant change to the nature and/or scale of a listed entity's activities. Listing Rules 11.1.2 and 11.1.3 empower ASX to require such a transaction to be approved by the entity's security holders, to ensure their interests are protected, and also to require the entity to re-comply with ASX's requirements for admission to the official list, so that the important controls and protections built into those requirements are not circumvented.

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

¹ It should be noted that in addressing whether a transaction that may result in a significant change to the nature or scale of a listed entity's activities should be subject to security holder approval, this Guidance Note does so solely from the perspective of the Listing Rules. A transaction of this type may require security holder approval under the Corporations Act, the entity's constitution or the general law governing the duties of directors. The board of a listed entity may also determine that it is appropriate, as a matter of good corporate governance, to submit such a transaction to security holders for approval even where there is no Listing Rule or other legal requirement to do so.

² Although, as this Guidance Note indicates, in addition to back door listings, ASX can and does apply its discretions under Listing Rules 11.1.2 and 11.1.3 in certain other circumstances.

Back door listings

The term “back door listing” refers to a process where someone seeking to have an undertaking³ listed does so by injecting the undertaking into an existing listed entity rather than the more conventional process of applying to be admitted to the official list under Listing Rule 1.1 (a “front door listing”).

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

- an issue of securities⁴ to the vendor(s) of the undertaking (perhaps with a cash payment⁵ and/or other consideration as well); or
- a payment of cash⁶ to the vendor(s) of the undertaking with the cash raised through an offer of securities by the listed entity. In this case, it is common for the vendor(s) or their associates to participate to some extent in the offering so that they receive an equity interest in the listed entity.⁷

Occasionally, a back door listing may be effected via a scheme of arrangement under which a listed entity merges or amalgamates with a non-ASX listed entity, with the scheme providing for an issue of securities by the listed entity to the owner(s) of the non-ASX listed entity.⁸

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

Sometimes (but not always), a back door listing will involve a significant change to the nature of the listed entity's activities and/or result in a significant change to the make-up of the listed entity's board of directors, with representatives of the vendor(s) being appointed to the board. In either case where that is so, ASX considers this

³ Listing Rule 19.12 defines the expression “undertaking” to include both assets and businesses.

⁴ ASX will typically apply escrow requirements to these securities (see chapter 9 of the Listing Rules and Guidance Note 11 *Restricted Securities and Voluntary Escrow*).

⁵ Note, however, that an entity which has in the preceding 2 years acquired, or proposes to acquire, a “classified asset” and which ASX requires under Listing Rule 11.1.3 to re-comply with the admission requirements will need to satisfy Listing Rule 1.1 condition 10. That condition explicitly requires the entity to have issued restricted securities as the consideration for the acquisition, and therefore prohibits cash payments as part of the consideration, unless the consideration was reimbursement of expenditure incurred in developing the classified asset or, under Listing Rule 9.1.3, the entity is not required to apply the restrictions in Appendix 9B. For these purposes, a “classified asset” is defined in listing rule 19.12 as:

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

⁶ See note 5 above.

⁷ Again, ASX will typically apply escrow requirements to these securities (see note 4 above).

⁸ In other jurisdictions that have friendlier merger statutes than Australia, a back door listing will often involve a “reverse merger” between a listed entity and the entity seeking the back door listing.

to be a further factor that warrants the imposition of a requirement under Listing Rule 11.1.2 that the transaction be approved by security holders.⁹

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

ASX does not treat a transaction between 2 ASX listed entities, such as:

- a takeover offer by one listed entity for another listed entity under chapter 6 of the Corporations Act;
- a scheme of arrangement involving a merger or amalgamation of two listed entities or an acquisition by one listed entity of another listed entity; or
- a sale of assets from one listed entity to another listed entity,

as a back door listing for these purposes. These transactions may still need to be notified to ASX under Listing Rule 11.1 if they involve a significant change to the nature or scale of the activities of either listed entity. Further, while they are not regarded as a back door listing and therefore will not attract the application of ASX's discretions under Listing Rules 11.1.2 or 11.1.3 on that score, they may still do so if they fit within one of the other cases mentioned below where ASX will generally exercise those discretions.¹⁰

The significance of an entity's main undertaking

The concept of a listed entity's main undertaking is an important one under the Listing Rules. Listing Rule 11.2 requires security holder approval to a disposal by a listed entity of its main undertaking. In addition, whether a proposed transaction will lead to a change in the nature of a listed entity's main undertaking is an important consideration in ASX's decision as to whether it ought to exercise its discretion under Listing Rule 11.1.2 to require security holder approval.¹¹

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

The meaning of "main undertaking"

While Listing Rule 19.12 defines the expression "undertaking" to include both assets and businesses, the addition of the descriptor "main" carries with it a particular connotation. ASX considers the term "main undertaking" means something different to, and is to be distinguished from, "main asset" or "main investment" and is essentially synonymous with "main business activity".¹²

In many cases, identifying an entity's main undertaking will be relatively straightforward. If an entity only conducts one business, as many smaller entities do, then plainly that business will be its main undertaking. Similarly, if an

⁹ A back door listing that does result in a significant change to the nature of a listed entity's main undertaking raises similar sorts of policy considerations to a disposal by an entity of its main undertaking and, by analogy with Listing Rule 11.2, therefore warrants security holder approval.

¹⁰ That is, cases (2), (3) or (4) mentioned under the heading "The circumstances in which ASX will exercise its discretions under Listing Rules 11.1.2 and 11.1.3" below.

¹¹ As mentioned above, it is also not uncommon for a back door listing to involve a significant change to the nature of a listed entity's main undertaking and, where it does, ASX considers that to be a factor that warrants the imposition of a requirement under Listing Rule 11.1.2 that the transaction be approved by security holders. However, ASX will exercise its power to require security holder approval to a back door listing even where it does not involve a significant change to the nature of a listed entity's main undertaking.

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

entity conducts a number of businesses but one business so obviously and significantly outweighs all of the others that it is clearly identifiable as its main business, then that business will be its main undertaking.

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

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

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

then ASX considers that to be reasonably compelling evidence that the business is not the entity’s main undertaking. If a business accounts for more than 50% of all 3 of the above measures, then ASX considers that to be reasonably compelling evidence that the business is its main undertaking. If a business accounts for more than 50% of one or two of these measures but not the other(s), then ASX will examine the situation more closely to determine whether or not the business should be regarded as the entity’s main undertaking.

In applying this rule of thumb, it is important to ensure that the rule is being applied to the main undertaking itself rather than to a component part of the main undertaking. The fact that the component parts of an entity’s main undertaking may be conducted by different child entities or divisions or in different jurisdictions, or may be treated as different segments for the purposes of preparing its financial statements,¹³ does not make them different undertakings for these purposes. An entity can dispose of part of its main undertaking (for example, by disposing of a particular child entity or division or its business activities in a particular jurisdiction), including a part that accounts for more than 50% of all 3 of the above measures, without that constituting a disposal of its main undertaking. This point is elaborated further in the discussion below of how ASX treats partial disposals of an entity’s main undertaking under Listing Rule 11.2.

Listing Rules 11.1 and 11.1.1: notification of significant transactions

The policy objectives of the notification requirement

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

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

in each case before the transaction is consummated.

¹³ It depends on the basis for segmentation. Sometimes, for example, segmentation may occur by reference to different regions or different divisions without regard to the nature of the business activities in question.

The meaning of “activities”

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

In determining whether a proposed transaction will involve a significant change to the nature or scale of a listed entity’s business activities, those activities need to be looked at in their totality. Where a listed entity conducts some of its business operations through child entities, the entire group needs to be looked at on a consolidated basis to make this determination.

What constitutes a significant change in the nature of an entity’s activities?

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

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

- an entity whose main business activity is manufacturing consumer goods deciding to switch its main business activity to mining exploration (or vice versa);
- an entity whose main business activity is exploring for minerals deciding to switch its main business activity to exploring for oil and gas (or vice versa);¹⁴
- an entity whose main business activity is trading in financial products deciding to switch its main business activity to making strategic long term investments in a particular sector;
- a conglomerate entity that conducts a number of different businesses deciding to dispose of all of those businesses and to acquire a new business (its main undertaking changes from conducting conglomerate businesses to conducting the new business).

At the other end of the spectrum, ASX would not regard the following examples as a significant change to the nature of an entity’s activities:¹⁵

- a manufacturing entity whose main business activity is manufacturing one type of consumer good reconfiguring its manufacturing facility to manufacture a different type of consumer good (its main undertaking is, and remains, manufacturing consumer goods);
- a mining exploration entity whose main business activity is exploring for one type of mineral on particular tenements deciding to explore for a different type of mineral on the same tenements (its main undertaking is, and remains, exploring for minerals on those tenements);
- a mining exploration entity that is successful in its exploration endeavours consequently becoming a mining producing entity (this is a natural extension of, rather than a major change to, its main business activity);

¹⁴ ASX considers that exploring for minerals is a fundamentally different business activity to exploring for oil and gas.

¹⁵ Depending on the circumstances, some of these examples could involve a significant change to the scale (as distinct from the nature) of the entity’s activities and therefore may need to be notified to ASX on that score under Listing Rule 11.1.

- an entity whose main business activity is trading in financial products and whose investment portfolio is invested wholly in equity products making a trading decision to sell all of those investments and to invest the proceeds in fixed interest products (its main undertaking is, and remains, trading in financial products);
- a conglomerate entity that conducts a number of different businesses deciding to dispose of some of those businesses or to acquire new businesses (its main undertaking is, and remains, conducting conglomerate businesses).

In between these two ends of the spectrum, ASX will examine the situation carefully and in its totality to determine whether what is proposed is a significant change to the nature of an entity's activities.¹⁶

What constitutes a significant change in the scale of an entity's activities?

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

ASX notes that under accounting standards an amount which is equal to or greater than 10% of the applicable base amount is generally presumed to be material unless there is evidence or convincing argument to the contrary.¹⁷ The word "significant" has a different connotation to the word "material" and imports something substantially larger. This would suggest that for something to be significant it would need to involve a change of substantially more than 10%.

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

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

Guidelines for notification of transactions

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

- an entity is proposing to embark on a transaction,¹⁸ or a series of transactions,¹⁹ that will result in a change to the nature of its main undertaking;
- an entity is proposing to dispose of, or to embark on a series of disposals that together will result in a disposal of, its main undertaking;
- an entity is proposing:
 - to acquire a business and the acquisition is likely to result in an increase of 25% or more in; or

¹⁶ In making this determination, ASX may have regard to whether the transaction is likely to lead to a change in the industry or sub-industry group into which the entity has been classified under Standard & Poor's Global Industry Classification Standard.

¹⁷ See paragraph 15 of Accounting Standard AASB 1031 *Materiality*.

¹⁸ This applies whether the transaction involves an acquisition or a disposal.

¹⁹ This applies whether the series of transactions involve acquisitions, disposals or a mixture of acquisitions and disposals and regardless of the size of each individual transaction in the series.

- to dispose of or abandon an existing business, if the business in question accounts for 25% or more of,

any of the following measures:

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

These notification guidelines apply:

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

Interaction with other disclosure obligations

The obligation of a listed entity to notify ASX of a significant change to the nature or scale of its activities is separate to, but operates in tandem with, its continuous disclosure obligations under Listing Rule 3.1.²⁰

A proposal to make a significant change to the nature or scale of a listed entity's activities will usually require notification to ASX under Listing Rule 3.1, once the proposal is no longer incomplete or subject to negotiation.²¹ For that reason, the announcement an entity makes about a proposal to make a significant change to the nature or scale of its activities under Listing Rule 3.1, and the formal notification it gives to ASX about that proposal under Listing Rule 11.1, will often be one and the same.

Initial discussions in advance of notification

ASX recommends that listed entities which are contemplating a transaction that will lead to a significant change to the nature or scale of their activities discuss the matter with the ASX Listings Unit at the earliest opportunity, given the potential complexities involved. The Listings Unit will be able to provide general advice on the application of Listing Rules 11.1-11.3 and a preliminary view on:

²⁰ See generally Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

²¹ In most situations, this will typically occur at the same point, mentioned in the text below, when the entity comes under an obligation to give a notice about the proposal under Listing Rule 11.1, namely when the entity becomes committed to proceeding with the proposal. In the case of unilateral action by the entity (such as a decision to call for tenders to purchase the entity's main undertaking), this will usually happen at the point when the board of directors of the entity formally approves the proposed action and resolves to proceed with it. In the case of a transaction between the entity and another party or parties (such as a transaction to facilitate a back door listing), this will usually happen at the point when the transaction agreements have been signed with the relevant party or parties. Information about a proposed transaction may, however, need to be disclosed to ASX at an earlier point under Listing Rule 3.1 if it ceases to be confidential (by virtue of Listing Rule 3.1A.2 ceasing to apply) or under Listing Rule 3.1B if ASX considers that there is a need for information about the proposal to be disclosed to avoid or correct a false market in the entity's securities.

- the likelihood of ASX exercising its discretion under Listing Rules 11.1.2 or 11.1.3 in relation to, or applying Listing Rule 11.2 to, the transaction;
- where applicable, what steps the entity will need to take to re-comply with the admission requirements under Listing Rule 11.1.3; and
- the application of conditions 9 and 10 of Listing Rule 1.1, chapter 9 and Appendix 9B in relation to any securities that are proposed to be issued, or other consideration that is proposed to be paid, as part of the transaction.

Form and timing of notification

A notification under Listing Rule 11.1 must be in writing²² and given to the ASX Market Announcements office for release to the market.²³

Listing Rule 11.1 requires the notification to be given “as soon as practicable”. ASX interprets this phrase as meaning “as soon as reasonably practicable after the entity commits to proceeding with the proposal”. In the case of unilateral action by the entity (such as a decision to call for tenders to purchase the entity’s main undertaking), this will usually happen at the point when the board of directors of the entity²⁴ formally approves the proposed action and resolves to proceed with it. In the case of a transaction between the entity and another party or parties (such as a transaction to facilitate a back door listing), this will usually happen at the point when the transaction agreements have been signed with the relevant party or parties.

There are essentially two approaches an entity may take to notifying ASX of a transaction under Listing Rule 11.1:

- (a) preferably, apply for in-principle advice²⁵ from ASX about the application of Listing Rules 11.1.2, 11.1.3 or 11.2 to a proposed transaction before the entity commits to proceeding with the transaction. By doing this, the entity can have a high degree of certainty about ASX’s position and can reflect that position in any announcement it makes of its intention to proceed with the transaction.

The application for in-principle advice should include detailed information about the proposed transaction, including all of the information mentioned below that ASX would be expect to be included in the formal announcement of the transaction to the market under Listing Rule 11.1.

In due course, if and when the entity decides to proceed with the transaction, it will need to give a separate notification of that fact to ASX under Listing Rule 11.1 via the lodgement of an announcement with the ASX Market Announcement Office. The announcement should include information about ASX’s in-principle advice and, if ASX has advised that the approval of security holders will be required under Listing Rule 11.1.2 or 11.2, about the process and timetable for seeking that approval.

If ASX has advised that the entity will be required to re-comply with the requirements for admission to the official list under Listing Rule 11.1.3, the announcement should also include information about the process and timetable for meeting that requirement.

²² Listing Rule 19.10.

²³ Listing Rule 15.2.1.

²⁴ In the case of a listed trust, references to the board of directors of the listed entity should be read as references to the board of directors of the responsible entity of the trust.

²⁵ An in-principle advice is a non-binding expression of ASX’s intent based on the facts known at the time. It may be given subject to conditions and will usually be expressed to apply for a limited time only. For further guidance on applications for in-principle advice, see Guidance Note 17 *Waivers and In-Principle Advice*.

- (b) less preferably, notify ASX of the proposed transaction under Listing Rule 11.1 via the lodgement of an announcement with the ASX Market Announcements office and, if necessary,²⁶ then apply to ASX for a determination about the application of Listing Rules 11.1.2, 11.1.3 or 11.2 to the transaction.

The notification under Listing Rule 11.1 should take the form of an announcement to the market lodged with the ASX Market Announcements office.²⁷

If the entity is intending to seek the approval of security holders to the proposed transaction, for example, because:

- it anticipates that ASX may exercise its discretion to require security holder approval under Listing Rule 11.1.2 and it intends to seek that approval without approaching ASX for a formal determination as to whether or not it is required;
- it acknowledges that the proposed transaction is a disposal of its main undertaking and therefore requires security holder approval under Listing Rule 11.2; or
- it otherwise requires or will be subject to security holder approval,²⁸

the announcement should state that fact and include information about the process and timetable for seeking that approval.

Conversely, if the entity is not intending to seek the approval of security holders to the transaction unless ASX requires it under Listing Rule 11.1.2 or 11.2, the announcement should state that fact and indicate that the entity is applying to ASX for a determination as to whether security holder approval is required under the Listing Rules. In such a case, at the same time as lodging the announcement with the ASX Market Announcements office under Listing Rule 11.1, the entity should contact its Home Office by phone or email to alert the Home Office to the announcement and to advise when it intends to apply for a determination as to whether security holder approval is required.

After ASX makes its determination in respect of the application, ASX will expect the entity promptly to make a further announcement to the market under Listing Rule 3.1 about the determination and, where ASX determines that the approval of security holders is required under Listing Rule 11.1.2 or 11.2, about the process and timetable for seeking that approval. If ASX determines under Listing Rule 11.1.3 that the entity must re-comply with the requirements for admission to the official list, the announcement should also explain the effect of that determination and the timetable for meeting that requirement.

In either case, the formal announcement under Listing Rule 11.1 should be in a form suitable for release to the market and include detailed information about the proposed transaction, including:

- details of the assets or businesses proposed to be acquired or disposed of;
- information about the likely effect of the transaction on the entity's total assets, total equity interests, annual revenue (or, in the case of a mining exploration entity or other entity that is not earning material revenue from operations, annual expenditure) and annual profit before tax and extraordinary items;²⁹

²⁶ An application to ASX for a determination about the application of Listing Rules 11.1.2 or 11.2 to the transaction may not be necessary if the entity is intending to seek the approval of security holders to the proposed transaction in any event (see note 28 below).

²⁷ As noted previously, this will often be the same announcement as the entity makes about the proposed transaction under Listing Rule 3.1.

²⁸ For example, because:

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

- if the entity is proposing to issue securities as part of, or in conjunction with, the transaction, detailed information about the issue, including its effect on the total issued capital of the entity and the purposes for which the funds raised will be used;
- if there are any changes to the board or senior management proposed as a consequence of the transaction, details of those changes; and
- the timetable for implementing the transaction.

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

An application for in-principle advice before the announcement of the transaction or for a formal determination after the announcement of the transaction should be in writing, addressed to the entity's Home Office and clearly marked "Not for public release".³⁰ The application should include any submissions that the entity may wish to make on whether or not ASX should exercise its discretion under Listing Rules 11.1.2 and/or 11.1.3 in relation to the transaction and, where relevant, whether or not the transaction involves a disposal of the entity's main undertaking to which Listing Rule 11.2 applies.

Requests for further information

If ASX considers it appropriate, it may request an entity to provide further information about a proposed transaction that has been notified to it under Listing Rule 11.1.³¹ Depending on the nature of the information requested, ASX may or may not require that information to be released to the market. ASX's request for the information will make it clear whether ASX is intending to release, or reserves the right to release, the information to the market so that the entity will have the opportunity to respond in a suitable form.³²

If ASX becomes aware of an actual or proposed transaction that has not been formally notified to it under Listing Rule 11.1 which ASX considers may involve a significant change to the nature or scale of a listed entity's activities, ASX may require the entity to provide it with information about the transaction to enable ASX to be satisfied that the entity has complied with its obligations under the Listing Rules.³³

ASX's discretions under Listing Rules 11.1.2 and 11.1.3

The policy objectives of Listing Rule 11.1.2

Listing Rule 11.1.2 confers a discretion³⁴ on ASX to require a significant change to the nature or scale of a listed entity's activities to be approved by the holders of its ordinary securities. As mentioned previously, the rule was primarily designed to allow ASX to regulate "back door listings". While ASX can exercise its discretion in other circumstances, it is generally reluctant to do so, unless there are clear and compelling reasons to justify that course of action. This reflects the following considerations:

- The Corporations Act and the Listing Rules already specify an extensive range of transactions that are deemed to be so significant that they warrant the approval of security holders. In the case of the

²⁹ An entity may choose to provide this information by way of comparison to those measures as at the end of, or for, the previous reporting period (as applicable). If the entity has only been admitted to the official list for a short period and has not yet filed financial statements with ASX pursuant to Chapter 4 of the Listing Rules, the comparison should be made to the pro forma financial information included in the prospectus, PDS or information memorandum provided to ASX in connection with the entity's admission pursuant to Listing Rule 1.1 Condition 3. If the entity has filed financial statements with ASX pursuant to Chapter 4 of the Listing Rules but they are for a period of less than a full financial year, the comparison should be made to annualised revenue, expenditure and profit.

³⁰ Listing Rule 15.6.

³¹ Listing Rule 11.1.1.

³² Listing Rule 18.7A.

³³ Listing Rule 18.7.

³⁴ This is to be compared and contrasted with Listing Rule 11.2, which requires a disposal by a listed entity of its main undertaking, in all cases, to be subject to security holder approval.

Corporations Act, these include name changes, changes to company type, constitutional changes, alteration of class rights; schemes of arrangement, reductions of capital, a voluntary winding up, capital reconstructions, most buybacks, the giving of some financial assistance in relation to an acquisition of shares, some acquisitions and partial takeovers, some retirement benefits and some related party transactions.³⁵ To this catalogue, the Listing Rules add a disposal of a main undertaking, various transactions with persons in a position of influence, some security issues and some option reconstructions.³⁶

- Under the Corporations Act and the constitution of most listed entities,³⁷ the directors are charged with the responsibility and the authority to manage the business of the entity and to make decisions on its behalf on all matters other than those that are specifically reserved to security holders under the Act, the Listing Rules or its constitution.³⁸
- Given that responsibility and authority, most listed entity security holders would expect their directors to be proactively managing the entity's portfolio of businesses, including where appropriate expanding or culling that portfolio, in the interests of the entity and its security holders.
- The imposition of a requirement that a commercial transaction otherwise within the authority of the directors must be submitted to security holders for approval will invariably introduce additional transaction costs, as well as delays and uncertainties that add risk to the transaction. In some cases, it could even threaten the transaction's viability or success. These added costs and risks could well be contrary to the interests of the entity and its security holders.

The policy objectives of Listing Rule 11.1.3

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

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

³⁵ See respectively sections 157; 162; 136(2) and 601GC(1)(a); 246B(2); 411(4); 256B(1)(c); 491; 254H; 257B-257D; 260B; 611 (item 7) and 648D-648H; 200E; and 208 of the Corporations Act.

³⁶ See respectively Listing Rules 11.2; 10.1 and 10.11, 10.17 and 10.19; 7.1; and 6.23.

³⁷ In the case of listed companies, see the replaceable rule in section 198A of the Corporations Act, which invariably has its counterpart in the constitutions of most listed companies. *Strong v J Brough & Son (Strathfield) Pty Ltd* (1991) 5 ACSR 296 confirms that the inclusion of such a provision in a listed company's constitution would, in the absence of Listing Rule 11.2, empower its directors to dispose of its assets, including its main undertaking, without reference to security holders.

The directors of a listed company are, of course, accountable to its security holders through the board election process (Listing Rules 14.4 and 14.5) and through their capacity to remove a director under section 203D of the Corporations Act.

³⁸ In the case of listed trusts, this authority and responsibility is effectively conferred on the directors of the responsible entity through section 601FB of the Corporations Act. The directors of the responsible entity are accountable to the security holders in the trust through the latter's capacity to remove the responsible entity under section 601FM.

- Listing Rule 12.4, which obliges a listed entity to maintain a spread of security holdings in its main class which is sufficient to ensure that there is an orderly and liquid market in those securities.

The circumstances in which ASX will exercise its discretion under Listing Rules 11.1.2 and 11.1.3

There are 2 main circumstances³⁹ in which ASX will invariably exercise both of its discretions to require a significant change to the nature or scale of a listed entity's activities to be approved by the holders of its ordinary securities under Listing Rule 11.1.2 and to require the entity to re-comply with the admission requirements under Listing Rule 11.1.3:

- (1) where the entity is proposing to be party to a transaction which, in ASX's opinion, is a back door listing of another undertaking (this applies whether the undertaking is of the same nature as, or a different nature to, its existing business activities); or
- (2) where the entity is proposing to acquire a business soon after its admission to the official list and the transaction is not consistent with the business objectives of the entity stated in the prospectus or PDS it lodged in connection with its admission under Listing Rule 1.1 condition 3 and/or the commitments disclosed to ASX in connection with its admission under Listing Rule 1.3.2(b) (again, this applies whether the business proposed to be acquired is of the same nature as, or a different nature to, its existing business activities).

The reasons for imposing these requirements in case (1) are explained under the heading "Back door listings" above. Case (2) raises concerns about the veracity of the representations on which the entity was admitted to the official list and on which security holders have invested in the entity, which ASX considers justify the imposition of these requirements.

In relation to case (1) above, ASX will carefully examine any proposed transaction that is notified to it under Listing Rule 11.1 that involves a listed entity acquiring a business from, or merging or amalgamating with, a non-ASX listed entity which is likely to result in an increase of 100% or more in any of the following measures for the listed entity:

- consolidated total assets;
- consolidated total equity interests;
- consolidated annual revenue or, in the case of a mining exploration entity or other entity that is not earning material revenue from operations, consolidated annual expenditure;
- consolidated annual profit before tax and extraordinary items; or
- total securities on issue,

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

Again, this 100% benchmark is solely for the purposes of giving clear guidance to listed entities as to what transactions ASX will examine more closely to determine whether or not they involve a back door listing. The fact that a transaction may result in a change of scale of that magnitude does not necessarily mean that ASX will regard the transaction as a back door listing.

³⁹ This is not to say that these are the only circumstances in which ASX will exercise its discretions under Listing Rules 11.1.2 and 11.1.3 – simply that these are the main circumstances that arise in practice where ASX will usually do so. ASX reserves the right, where it considers that there are clear and compelling reasons to do so, to exercise its discretions under Listing Rules 11.1.2 and 11.1.3 to require that a significant change to the nature or scale of a listed entity's activities is approved by security holders and/or that the entity re-comply with its admission requirements.

In addition to the 2 main circumstances described above, ASX will also usually exercise its discretion to require a significant change to the nature or scale of a listed entity's activities to be approved by the holders of its ordinary securities under Listing Rule 11.1.2 in the following circumstances:

- (3) where the entity is proposing to acquire a business, or to make a series of acquisitions of businesses,⁴⁰ that will result in a major change to the nature of its main undertaking;⁴¹ or
- (4) where the entity has previously disposed of or abandoned its main undertaking and it is proposing to acquire a business, or to make a series of acquisitions of businesses,⁴² that will become its new main undertaking (this applies whether its new main undertaking is of the same nature as, or a different nature to, its former main undertaking).

Cases (3) and (4) raise similar policy considerations to the disposal of an entity's main undertaking and, by analogy with Listing Rule 11.2, warrant security holder approval even where they do not involve a back door listing.

In cases (3) and (4) above, if ASX exercises its discretion under Listing Rule 11.1.2, it will also usually exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with the admission requirements unless ASX is satisfied that:

- the entity unequivocally meets, and after the transaction will continue to meet, Listing Rules 12.1, 12.2 and 12.4; and
- security holders in the entity and the market generally have received (either through the announcement lodged under Listing Rule 11.1 or through the notice of meeting sent to security holders in connection with a resolution to approve the transaction under Listing Rule 11.1.2) sufficient information about the proposed change for trading in its securities to be occurring on a reasonably informed basis.

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

Occasionally, an entity may move into a new business activity without initially planning to change the nature of its main undertaking but, by virtue of making a series of acquisitions of similar businesses over time, that activity evolves to become its main undertaking. ASX will not generally exercise its discretion under Listing Rule 11.1.2 to require security holder approval to changes in the nature of an entity's main undertaking that do not involve a back door listing⁴³ and that evolve gradually over time, where security holders have a reasonable opportunity to assess the cumulative effect of those changes. ASX will generally treat 24 months (two full accounting cycles) as a reasonable period for these purposes. However, if within a 24 month period, an entity has made one or more acquisitions without security holder approval under Listing Rule 11.1.2 and is proposing to make a further acquisition that will have the result that its main undertaking is something different in nature to what it was at the commencement of that period, ASX will generally treat the proposed transaction as falling within case (3) above and require security holder approval to the proposed transaction.

⁴⁰ This applies regardless of the size of each individual acquisition.

⁴¹ This change in the nature of the entity's main undertaking may arise because, at the same time as proposing to acquire the new undertaking, the entity is also proposing to dispose of some or all of its existing undertaking. Alternatively, it may arise because the new undertaking being acquired dwarfs its existing undertaking.

⁴² Again, this applies regardless of the size of each individual acquisition.

⁴³ If an entity is proposing to be party to a transaction which, in ASX's opinion, is a back door listing of another undertaking, ASX will require security holder approval and re-compliance with the admission requirements regardless of any prior acquisitions of similar undertakings that the entity may have made, whether in the preceding 24 months or otherwise.

It will be noted that each of cases (1) – (4) above involves an acquisition of some sort. With one exception, ASX would rarely, if ever, exercise its discretion under Listing Rule 11.1.2 to require security holder approval to a disposal by an entity of something less than its main undertaking.⁴⁴ The one exception is where there is a difference of opinion between ASX and a listed entity as to whether a disposal or series of disposals involves its main undertaking and therefore requires security holder approval under Listing Rule 11.2. In that case, ASX may resolve that difference by exercising its power under Listing Rule 11.1.2 to require the disposal or series of disposals to be subject to security holder approval regardless of whether Listing Rule 11.2 technically applies.

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

Where ASX exercises its discretion under Listing Rule 11.1.2 to require security holder approval to a significant change to the nature or scale of a listed entity's activities, or under Listing Rule 11.1.3 to require an entity to re-comply with the admission requirements, the proposed transaction must not be consummated until ASX's requirements have been met. This includes any security issue that is proposed as part of, or in conjunction with, the proposed transaction.

If an entity has taken, or is proposing to take, any steps towards consummating a transaction before ASX's requirements have been met, ASX may require the entity respectively to unwind, or not to proceed with, those steps under Listing Rule 18.8.

The steps involved in re-compliance with the admission requirements

Re-complying with the admission requirements involves (among other things):

- issuing a prospectus, PDS or information memorandum (Listing Rule 1.1 condition 3);
- meeting ASX's minimum spread requirement (Listing Rule 1.1 condition 7), that is, either:
 - at least 500 holders each with a parcel of the main class of securities with a value of at least \$2,000 (excluding restricted securities), or
 - 400 holders with a parcel of the main class of securities with a value of at least A\$2,000 (excluding restricted securities), and persons who are not related parties must hold at least 25% of the securities in the main class;
- meeting the profit test or assets test⁴⁵ (Listing Rule 1.1 condition 8);
- complying with chapter 9 of the Listing Rules in relation to any "restricted securities" it has on issue or is proposing to issue (Listing Rule 1.1 condition 9);
- any options the entity has issued being exercisable for at least 20 cents in cash (Listing Rule 1.1 condition 11);
- satisfying ASX that each director or proposed director at the date of admission is of good fame and character and high business integrity (Listing Rule 1.1 condition 17); and
- having the entity's quoted securities (except options) issued or sold for at least 20 cents in cash (Listing Rule 2.1 condition 2).

⁴⁴ A disposal by a listed entity of its main undertaking requires security holder approval under Listing Rule 11.2 in any event and therefore does not require ASX to exercise its discretion under Listing Rule 11.1.2. A disposal by a listed entity of something less than its main undertaking does not raise the sorts of policy considerations that a disposal of its main undertaking raises.

⁴⁵ An entity which re-complies with the admission requirements on the basis of the assets test and its "commitments" under Listing Rule 1.3.2(b) must also comply with the ongoing requirements that apply to such entities. Listing Rule 4.7B requires the entity to lodge quarterly cash flow reports for the first 8 quarters after satisfying the admission test. Listing Rule 4.10.19 requires the entity to include a statement about whether it used its cash in a way consistent with its objectives in its annual reports for the first 2 years after satisfying the admission test.

If the existing price at which an entity's securities are trading is less than 20 cents in cash, which is often the case in a back door listing, then the entity will have to consolidate its securities or restructure them in some other way so as to comply with this last requirement.

Detailed guidance on each of these requirements can be found in Guidance Note 1 *Applying for Admission – ASX Listings*, Guidance Note 4 *Foreign Entities Listing on ASX* and Guidance Note 11 *Restricted Securities and Voluntary Escrow*. The commentary under the subheadings below provides additional guidance on issues that often arise in the context of Listing Rule 11.1.3.

Prospectus / PDS / information memorandum

It is not uncommon for an entity that is proposing to make a significant change to the nature or scale of its activities to be undertaking a capital raising as part of, or in conjunction with, the transaction.⁴⁶ In that case, the entity may use the prospectus or PDS it prepares for that capital raising to satisfy Listing Rule 1.1 condition 3, provided it otherwise complies with the content requirements in section 710 (in the case of a prospectus) and sections 1013D and 1013E (in the case of a PDS) of the Corporations Act. ASX will not accept a prospectus or PDS that has been prepared relying on the abridged content requirements applicable for continuously quoted securities in sections 713 or 1013FA of the Corporations Act.

If an entity is not undertaking a capital raising as part of, or in conjunction with, a significant change to the nature or scale of its activities, ASX may agree, for the purposes of Listing Rule 1.1 condition 3, to accept an information memorandum which complies with Appendix 1A.

Directors must be of good fame and character

Listing Rule 1.1 condition 17 requires an entity seeking admission to the official list to satisfy ASX that each director or proposed director of the entity⁴⁷ at the date of listing is of good fame and character. This is considered to be an appropriate safeguard to apply in relation to directors who have been installed by the promoters of an entity before its listing, particularly in a context where the entity is usually seeking to raise funds from investors.

In summary, an entity applying for admission to the official list is required to provide to ASX for each director or proposed director at the date of listing:

- a police/CrimTrac national criminal history check (or an overseas equivalent);
- an ITSA bankruptcy check (or an overseas equivalent); and
- a completed statutory declaration at the date of listing confirming various matters (including that the director has not been the subject of relevant disciplinary or enforcement action by an exchange or securities market regulator) or, if the director is not able to give such confirmation, a statement to that effect and a detailed explanation of the circumstances involved.

An entity may also be required to provide additional information about its directors or proposed directors to ASX, if ASX requires. Guidance Note 1 *Applying for Admission – ASX Listings*, has more detailed guidance about these requirements.

The Listing Rules do not impose any equivalent requirement in relation to directors appointed following admission. This is on the basis that those directors must submit to an election by security holders and the listed entity has an obligation, in that context, to put all material information about the director in its possession⁴⁸ in the notice of meeting proposing his or her election. Security holders therefore get an opportunity to express their

⁴⁶ For example, as the consideration for, or to raise the money required to pay the purchase price for, an acquisition.

⁴⁷ For these purposes, if the entity is a trust, references to the directors or proposed directors of the entity, are to be taken to mean the directors or proposed directors of the responsible entity of the trust.

⁴⁸ In this regard, ASX would expect the board of a listed entity to undertake appropriate background checks on any person it proposes to appoint as a director in its own right or to put forward at a meeting of security holders for election as a director.

opinion on whether the director is of good fame and character and someone to whom they wish to entrust the management of the listed entity.

To maintain symmetry with this approach, where an entity is required under Listing Rule 11.1.3 to re-comply with the admission requirements, ASX will require the entity to satisfy it that each director:

- who has been appointed in the past 12 months as a director other than pursuant to an election of security holders; or
- is proposed to be appointed in connection with the transaction,

is of good fame and character. ASX will not require any director who has previously been elected by security holders to meet this requirement.

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

The policy objective of Listing Rule 11.2

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

The application of Listing Rule 11.2

Listing Rule 11.2 only applies to a disposal of an entity's "main undertaking".⁴⁹

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

If an entity is proposing to dispose of something less than all, or substantially all, of its assets and businesses, Listing Rule 11.2 will only apply if what is being disposed of constitutes its main undertaking.⁵⁰

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

In the case of a listed entity that conducts a business of trading in financial products,⁵¹ its main undertaking is the business of trading in financial products, not the individual investments it holds. In such a case, Listing Rule 11.2 will only apply if the entity is proposing to dispose of its business of trading in financial products. It will not apply to a disposal of some or even all of its investments, provided that happens because of a trading decision to convert those investments to cash rather than a strategic decision to exit the trading business.

⁴⁹ See the discussion above of the significance and meaning of an entity's main undertaking.

⁵⁰ Although, as noted previously, if there is a difference of opinion between ASX and a listed entity as to whether a disposal or series of disposals involves its main undertaking and therefore requires security holder approval under Listing Rule 11.2, ASX may resolve that difference by exercising its power under Listing Rule 11.1.2 to require the disposal or series of disposals to be subject to the security holder approval regardless of whether Listing Rule 11.2 technically applies.

⁵¹ An entity conducting a business of trading in financial products is to be differentiated from an entity whose business consists of holding strategic investments in other entities. In the latter case, depending on the circumstances, it is possible that one of those strategic investments could amount to the main undertaking of the entity.

What constitutes a “disposal” of a main undertaking?

It is not necessary for an entity to dispose of all of the assets used in its main undertaking⁵² for it to dispose of its main undertaking. If it disposes of the key assets needed to conduct its main undertaking and the commercial outcome is that it will no longer continue to conduct its main undertaking, ASX will regard that as a disposal of its main undertaking. For example, a mining exploration entity that disposes of all of its mining tenements will be regarded as having disposed of its main undertaking, even though it may retain some or all of its mining exploration equipment.

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

Partial disposals of an entity's main undertaking

Where an entity is proposing to dispose of part only of its main undertaking, ASX will apply Listing Rule 11.2, as it is required to do under Listing Rule 19.2, looking beyond form to substance and in a way that best promotes the principles on which the Listing Rules are based. ASX will have regard to whether or not the disposal will cause a change in the nature of the entity's main undertaking. If the nature of the entity's main undertaking will remain the same after the disposal as it was before the disposal, the transaction will not be regarded as a disposal of its main undertaking. This applies regardless of the change in the scale of the business (that is, regardless of the proportion of the main business undertaking that is proposed to be disposed of). On the other hand, if the entity's main undertaking after the proposed disposal will be different in nature to what it was before the disposal, the transaction will be regarded as a disposal of its main undertaking.

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

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

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

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

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

Example 3: *entity C is a mining exploration entity and it has interests in 3 exploration tenements, each of which accounts for around a third of its value. It wants to get out of the mining exploration business altogether and do something else, however, the pre-emption arrangements in the joint venture agreement for one of the tenements effectively makes it uneconomical for it to dispose of that interest. It proposes to sell its interests in the other 2 tenements and invest the proceeds until it can identify a better use for them.*

⁵² Indeed, it is quite common for an entity that disposes of a business to retain some of the assets (such as cash and receivables) used in, or generated by, that business.

ASX is likely to treat this as a disposal of C's main undertaking, notwithstanding that it proposes to retain one of its mining tenements. C's main undertaking after the disposal (investment activities) is different from its main undertaking before the disposal (mining exploration).⁵³

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

This is not a disposal of D's main undertaking as the sale and leaseback does not result in any change to the nature of its main undertaking (operating an airline).⁵⁴

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

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

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

If an entity has taken, or is proposing to take, any steps towards consummating a disposal of its main undertaking before security holder approval has been obtained, ASX may require the entity respectively to unwind, or not to proceed with, those steps under Listing Rule 18.8.

Disposals by a receiver or under a deed of company arrangement

ASX does not regard Listing Rule 11.2 as applying to a disposal of a listed entity's main undertaking by a receiver acting on behalf of a secured creditor or creditors, or an administrator acting under a deed of company arrangement, even though the receiver or administrator may technically be acting as agent for and on behalf of the entity. In the former case, a receiver of property of a company has a statutory power to convert the property of the company to cash that would override any requirement in the Listing Rules for the transaction to be approved by members.⁵⁵ In the latter case, a deed of company arrangement that is approved by the creditors of a company in the manner required under the Corporations Act is binding on the company and its members, without the need for any separate approval by members.⁵⁶

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

Other Listing Rule issues

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

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

⁵³ Listing Rule 12.3 may also apply to B once it is holding more than half of its assets in cash or in a form readily convertible to cash.

⁵⁴ See also the observations of Windeyer J in *ASC v Cracow Resources Ltd*, note 49 above, that:

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

⁵⁵ Section 420(2)(g) of the Corporations Act.

⁵⁶ Section 444G of the Corporations Act.

- A bank or a non-bank financial institution.
- A mining exploration entity, unless ASX decides otherwise.

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

Sometimes, this may be a precursor to the listed entity being wound up, with any surplus cash remaining after the payment of creditors being distributed to security holders. In such a case, notwithstanding Listing Rule 12.3, ASX will, in the absence of any other reason to suspend the quotation of the entity’s securities, generally continue the quotation of its securities for up to 6 months to allow it time to complete the formalities needed to commence its winding up.⁵⁷

Other times, the disposal by a listed entity of its main undertaking may be a precursor to the entity embarking on a new business venture, either immediately or once a suitable business has been identified and acquired.⁵⁸ In the latter case, notwithstanding Listing Rule 12.3, ASX will, in the absence of any other reason to suspend the quotation of the entity’s securities, generally continue the quotation of its securities for up to 6 months to allow it time to identify, and make an announcement of its intention to acquire, a suitable new business.

If an entity is not able, in the former case to complete the formalities for its winding up, or in the latter case to make an announcement of its intention to acquire a new business, within 6 months of completing the disposal of its main undertaking, ASX will generally exercise its discretion under Listing Rules 12.3, 17.3.2 and/or 17.3.4 to suspend the quotation of its securities at the end of that 6 month period. The suspension will continue until the entity makes an announcement acceptable to ASX about its future activities.

Requirements for agreements

Conditionality of agreements

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

Unlike Listing Rule 11.2, there is no express requirement in Listing Rule 11.1 that an agreement relating to a transaction which will result in a significant change to the nature or scale of a listed entity’s activities must be subject to the approval of its security holders or to the entity re-complying with ASX’s admission requirements.⁵⁹ This is in keeping with the fact that Listing Rules 11.1.2 and 11.1.3 simply confer a discretion on ASX to impose these conditions, rather than mandate that all such changes must be subject to these conditions.

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

- to seek in-principle advice from ASX in advance of entering into the agreement that ASX will not exercise its discretion to require security holder approval or re-compliance with the admission requirements; or
- to include in the agreement appropriate safeguards to protect the interests of the entity and its security holders in the event that ASX does exercise that discretion.⁶⁰

⁵⁷ Such as the making of a court order under section 459A, or the passage of a special resolution under section 491, of the Corporations Act. ASX will normally suspend trading in the entity’s securities as soon as those formalities have been completed and the entity has been placed into winding up.

⁵⁸ As noted above, in such a case, ASX will generally exercise its discretion under Listing Rule 11.1.2 to require security holder approval to the acquisition of the new business. Depending on the circumstances, it may also exercise its discretion under Listing Rule 11.1.3 to require the entity to re-comply with the conditions for admission to the official list.

⁵⁹ This is to be compared and contrasted with Listing Rule 11.2, which requires all agreements for the disposal of a main undertaking by a listed entity to be conditional on security holder approval.

⁶⁰ A failure to take these precautions could well raise issues for the directors and other officers of the listed entity in terms of their statutory and common law obligations to exercise due care and diligence: see, in particular, section 180 (officers of listed companies) and section 601FD (officers of responsible entities of listed trusts) of the Corporations Act.

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

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

Break fees

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

- a change of directors' recommendation (except where the change of recommendation occurs because an expert opines that the transaction is not fair and reasonable to security holders);
- a competing transaction that successfully completes;
- a material condition precedent within the entity's control not being satisfied; or
- a material breach by the entity of the transaction agreements.

ASX will apply the guidance in Takeovers Panel Guidance Note 7 *Lock-up devices*⁶¹ in determining what constitutes a reasonable break fee for these purposes and when the triggers for a break fee are unreasonable or coercive.⁶²

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

Option arrangements

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

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

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

Requirements for notices of meeting

The contents of the notice

As a general proposition, a notice of meeting must include such material as will fully and fairly inform security holders of the matters to be considered at the meeting and enable them to make a properly informed judgment on

⁶¹ This is available on the Takeovers Panel's website: <http://www.takeovers.gov.au/>.

⁶² See, in particular, paragraphs 9 and 10 of Takeovers Panel Guidance Note 7 *Lock-up devices*.

those matters.⁶³ Where the notice relates to a resolution by security holders approving a transaction for the purposes of Listing Rule 11.1.2 or 11.2, this includes a reasonable level of detail about the transaction, including an assessment of the financial effect of the transaction on the listed entity and on the interests of security holders in the entity.⁶⁴

The required information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.⁶⁵

Listed entities and their advisers should note the comments of Austin J in *ENT v Sunraysia*⁶⁶ that:

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

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

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

Draft notice to be given to ASX

Before a listed entity sends out a notice of meeting that includes a resolution by security holders approving a transaction for the purposes of Listing Rule 11.1.2 or 11.2, it must give ASX a copy of the draft notice for review. It must not finalise the notice until ASX tells it that ASX does not object to it.⁶⁷

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

It should be noted that each of Listing Rules 11.1.2 and 11.2 empowers ASX to impose additional requirements in relation to the notice of meeting. If there is a difference of opinion between ASX and a listed entity as to whether certain material is required to be included in the notice of meeting, ASX may resolve that difference by exercising its power under the relevant Listing Rule to require that material to be included.

⁶³ See *Bulfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

⁶⁴ *ENT v Sunraysia* [2007] NSWSC 270.

⁶⁵ Listing Rule 14.1.

⁶⁶ See note 64 above.

⁶⁷ Listing Rule 15.1.7.

Voting exclusion statement

A notice of meeting that includes a resolution by security holders approving a transaction for the purposes of Listing Rule 11.1.2 or 11.2 must include a voting exclusion statement,⁶⁸ that is, a statement that the entity will disregard votes cast on the resolution by:

- a person who might obtain a benefit, except a benefit solely in the capacity of a security holder, if the resolution is passed; and
- an associate of that person,

except where the votes are cast: (a) by a person as proxy for a person who is entitled to vote, in accordance with the directions on the proxy form; or (b) by the person chairing the meeting as proxy for a person who is entitled to vote, in accordance with a direction on the proxy form to vote as the proxy decides.⁶⁹

The form of resolution required

The resolution required to approve a transaction for the purposes of Listing Rule 11.1.2 or 11.2 is an ordinary resolution passed at a general meeting of the holders of ordinary securities.⁷⁰

Typically, the resolution will be couched in terms that the transaction described in the notice of meeting or explanatory statement given to security holders for the meeting is “approved for the purposes of” Listing Rule 11.1.2 or 11.2 (as applicable).

Where multiple approvals are required under the Listing Rules (eg where the transaction requires approval under Listing Rule 7.1, 10.1 or 10.11, as well as under Listing Rule 11.1.2 or 11.2), ASX has no objection to the approvals being combined in the one resolution and being expressed in terms that the transaction “is approved for the purposes of the Listing Rules”, provided:

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

The requirement to include a voting exclusion statement for a resolution under Listing Rule 11.1.2 or 11.2 will generally make it inappropriate to combine that resolution with any other resolution required in relation to the transaction under the Corporations Act.⁷¹

Supplemental or revised notices

As mentioned above, each of Listing Rules 11.1.2 and 11.2 empowers ASX to impose additional requirements in relation to the notice of meeting. ASX considers that this power can be exercised even after a notice of meeting has been dispatched by a listed entity to its security holders. Hence, if ASX becomes aware of material deficiencies in a notice of meeting (including any accompanying explanatory memorandum) that has already been dispatched to security holders under Listing Rule 11.1.2 or 11.2, it may require those deficiencies to be corrected in a supplemental notice to security holders or, in an extreme case, require a revised notice of meeting to be dispatched.

⁶⁸ Listing Rule 14.11.

⁶⁹ ASX may also require the voting exclusion statement to extend to other persons whose vote, in ASX's opinion, should be disregarded – see the final entry in the table that appears in Listing Rule 14.11.1.

⁷⁰ Listing Rule 14.9. If an entity has other securities on issue that might otherwise be entitled to vote on a resolution put to ordinary security holders at a general meeting, the notice of meeting should make it clear that, under the ASX Listing Rules, the holders of those other securities are not entitled to vote on the resolution under Listing Rule 11.1.2 or 11.2 (as the case may be) and that, if they do vote, their vote will be disregarded.

⁷¹ For example, a resolution under the Corporations Act approving a scheme of arrangement, reduction of capital or share buy-back, where there generally are no comparable voting exclusions.

Listing Rule 11.3: suspension of quotation

The policy objectives of Listing Rule 11.1.3

Listing Rule 11.1.3 empowers ASX to suspend the quotation of an entity's securities until the entity has satisfied the requirements of Listing Rules 11.1 or 11.2. It is a discretion that ASX can exercise to secure compliance with the requirements of Listing Rules 11.1 or 11.2 and to ensure that the market is supplied with sufficient information about a proposed significant change to the nature or scale of a listed entity's activities for trading in its securities to be taking place on a reasonably informed basis.

The circumstances in which ASX will exercise its discretion under Listing Rule 11.3

Generally, an announcement by a listed entity under Listing Rule 11.1 will be treated as a market sensitive announcement and its securities placed into a 10 minute trading halt under ASX Operating Rule 3301, to allow the market time to absorb and react to the information in the announcement.

If ASX is not satisfied with the information in the announcement, it may suggest that the entity request a formal trading halt under Listing Rule 17.1 to enable a further announcement to be made to the market or else exercise its discretion under Listing Rules 11.3 and 17.3.2 to suspend trading in the entity's securities until the situation has been rectified. This may arise in particular where ASX considers that the transaction is one where it is likely to exercise its discretion to require security holder approval under Listing Rule 11.1.2 and/or re-compliance with the admission requirements under Listing Rule 11.1.3 and the notice does not inform readers of the likelihood and consequences of that happening.

Where an entity is proposing to acquire a business soon after its admission to the official list and the transaction is not consistent with the business objectives of the entity stated in the prospectus or PDS it lodged in connection with its admission under Listing Rule 1.1 condition 3 and/or the commitments disclosed to ASX in connection with its admission under Listing Rule 1.3.2(b) and ASX exercises its discretions under Listing Rules 11.1.2 and 11.1.3 to require security holder approval and re-compliance with the admission requirements, ASX will also usually at the same time suspend trading in its securities under Listing Rule 11.3. The suspension will continue until the entity has met ASX's requirements.

Where an entity is proposing to be party to a transaction which, in ASX's opinion, is a back door listing or in any other case where ASX exercises its discretions under Listing Rules 11.1.2 and 11.1.3 to require both security holder approval and re-compliance with the admission requirements, ASX will, in the absence of any other reason to suspend the quotation of the entity's securities, usually continue the quotation of its securities during the period from the date of the announcement of the transaction up to the beginning of the trading day on which the meeting of security holders is due to be held to consider the resolution to approve the transaction. Thereafter, ASX will apply the following process:

- the entity should request a trading halt under Listing Rule 17.1 to apply from the start of trading on the date of the security holders' meeting. If it does not, ASX will suspend trading in the entity's securities under Listing Rule 11.3 before trading starts on that date.
- If security holders do not approve the transaction, the trading halt will end or the suspension will be lifted after the entity has made an announcement to the market confirming the result of the security holder vote and that it will not be proceeding with the transaction.
- If security holders approve the transaction, the entity should immediately request a voluntary suspension under Listing Rule 17.2 pending its re-compliance with the admission requirements. If it does not, ASX will suspend trading in the entity's securities under Listing Rule 11.3. In either case, the suspension will continue until those requirements have been satisfied and ASX confirms that fact in writing to the entity.

ASX will expect the entity promptly to make an announcement to the market under Listing Rule 3.1 confirming the result of the security holder vote, the remaining steps that need to be satisfied for the entity to re-comply with the admission requirements and the timetable for the completion of those steps.

Otherwise, ASX will not generally exercise its discretion to suspend trading in an entity's securities under Listing Rule 11.3⁷² unless it considers that:

- the security holders in the entity and the market generally have not received sufficient information about the proposed significant change to the nature or scale of its activities for trading in its securities to occur on a reasonably informed basis – in which case, ASX may impose a suspension until the entity rectifies the situation;
- the entity is in breach of Listing Rule 11.1 or 11.2 – in which case, ASX may impose a suspension until the entity remedies the breach; or
- the entity is taking an unreasonable time to comply with the requirements of Listing Rule 11.1 or 11.2 – in which ASX may impose a suspension until the entity completes all of the steps required to fully comply with the requirements of Listing Rules 11.1 and 11.2.

⁷² This is on the general principle applied by ASX that interruptions to trading should be kept to a minimum and only imposed or allowed where there are clear reasons for them (such as where the entity is in breach of the Listing Rules, where there is a material risk that trading in a particular security might occur while the market as a whole is not reasonably informed or where the interruption is required to avoid or correct an unfair or disorderly market).