

Listed@ASX Compliance Update no. 09/23

8 December 2023

1. Market Announcements Reporting Calendar 2024

The 2024 reporting calendar for listed entities is now available on the home page of ASX Online and on the [ASX website](#). Designed as a quick reference guide for listed entities with a 30 June or 31 December balance date, it outlines key reporting dates under the Listing Rules. It also indicates days on which ASX is closed.

If you require assistance to understand your entity's periodic reporting obligations, please contact your Listings Compliance Adviser.

2. Observations from the AGM season

Each year ASX Listings Compliance reviews hundreds of draft notices of meeting that are submitted for examination in accordance with Listing Rule 15.1. The majority of ASX-listed entities have a 30 June balance date, so most of these reviews take place in September and October.

ASX will use all reasonable endeavours to tell an entity within 5 business days whether ASX objects to documents that have been submitted for examination under Listing Rule 15.1 or if additional time is required to complete the review. If the entity needs to make changes to the documents after they have been submitted, that will reset the 5 business day period. ASX will still endeavour to meet the original timeframe, but that will not always be possible.

Below are a number of common issues that ASX encountered when reviewing notices of meeting this AGM season. Entities and their advisers are encouraged to address these issues before submitting draft documents to ASX for review, particularly if the entity is operating under tight timeframes.

Incomplete documentation

All documents to be sent to securityholders as part of the notice of meeting package should be provided to ASX for review at the same time and in the same email. ASX will not commence its review until all documents have been received. The notice of meeting package includes the proxy form which must accompany the notice (Listing Rule 14.2), as well as any document which must be sent to securityholders along with the notice (for example, an independent expert's report).

If an entity proposes to amend or replace its constitution, a draft of the amended or new constitution must be given to ASX for review (Listing Rule 15.1.1), and all changes should be marked-up so they are easy to identify. If the constitution does not contain the provisions of Appendix 15A or Appendix 15B (as applicable), ASX's constitution checklist (available [here](#)) should also be completed and provided to ASX with the constitution.

Voting exclusion statement

If a rule requires a notice of meeting to include a voting exclusion statement, the voting exclusion statement must be to the same effect as the statement set out in Listing Rule 14.11. If an entity uses a voting exclusion statement that does not match the wording in Listing Rule 14.11, the entity must be able to demonstrate to ASX's satisfaction that the exclusion statement is to the same effect.

Regardless of the wording of the voting exclusion statement, the entity must exclude all votes required to be excluded under the Listing Rules.

Issues of securities under an agreement

Listing Rule 14.1A states that a notice of meeting which contains a resolution seeking an approval under the Listing Rules must summarise the relevant rule and what will happen if securityholders give, or do not give, that approval.

ASX identified a number of instances where a notice of meeting containing a resolution to approve an agreement to issue securities included a statement that if the resolution was not approved, the issue would nevertheless proceed under the entity's then placement capacity.

ASX reminds entities that the time to determine whether an agreement to issue securities falls within an entity's placement capacity under Listing Rules 7.1 and 7.1A is the time the agreement is entered into. On the date of the agreement, the issue must either come within the entity's placement capacity (in which case the correct resolution would be a ratification of the agreement under Listing Rule 7.4), or the agreement must have been conditional on securityholder approval being obtained in accordance with exception 17 (in which case the entity must not issue the securities unless approval is first obtained). See section 4.16 of Guidance Note 21 for further details.

If approval is being sought for an issue of securities under an agreement, the notice of meeting must summarise the material terms of that agreement (see Listing Rules 7.3.7, 7.5.7, and 10.13.9). ASX identified a number of instances where the notice omitted details of the agreement or was silent on the existence of an agreement and the basis for the issue was not otherwise apparent. In cases where the notice is silent on the existence of an agreement, it would assist ASX if the entity instead expressly confirmed that the securities are not being issued under an agreement.

Listing Rule 7.1A mandate

Entities seeking securityholder approval for additional capacity under Listing Rule 7.1A must include the information required by Listing Rule 7.3A in the notice of meeting.

The rule requires disclosure of any issues of securities made under Listing Rule 7.1A in the preceding 12 months and the percentage they represent of the total number of equity securities on issue at the commencement of that 12 month period. A common error is the disclosure of all issues of equity securities in the prior year, rather than only those made under 7.1A. It is also common for entities to fail to include all of the information required by Listing Rule 7.3A.6 in relation to each issue made under Listing Rule 7.1A.

Circumstances where draft documents do not need to be submitted under Listing Rule 15.1

Listing Rule 15.1 specifies when draft documents need to be provided to ASX prior to their finalisation. This includes where there are proposed amendments to the constitution or where a notice of meeting contains a resolution seeking approval under the Listing Rules. Where the notice of meeting contains business solely concerned with the Corporations Act (e.g. receiving the financial statements and the election of directors), a draft is not required to be provided to ASX and the documents can simply be finalised and lodged through ASX Online.

Listing Rule 14.5 provides that an entity which has directors must hold an election of directors at each annual general meeting. For the avoidance of doubt, ASX confirms that listed entities are not required to submit a draft notice of meeting under Listing Rule 15.1 simply because the notice contains a resolution for the election or re-election of a director, as this is not a resolution seeking an approval under the Listing Rules.

3. ASX Online access audit- December 2023

ASX has commenced an access audit of all ASX Online users. Customers may recall previous clean-ups in both 2019 and 2021. This is to ensure that inactive and duplicate users are identified and removed as part of ASX's ongoing cyber security measures.

Any customers that have not logged into ASX Online in the last 12 months will be contacted during December and asked to login to their account within 30 days. If no action is taken by the account holder within that time, the account will be deactivated, thereby removing the account holder's ability to lodge market announcements via ASX Online without reactivating their account.

Please note that an account holder can reset their ASX Online password using the 'forgotten password' functionality at the login screen. Alternatively, login details can be reset by the designated ASX Online administrator within the account holder's organisation.

4. Listing Rule 6.23

Listing Rule 6.23 contains a number of sub-rules that relate to changes that affect options. ASX considers a performance right to be an 'option' for the purposes of these rules if the performance right can be settled by the delivery of a share (whether via a new issue or by transfer of existing shares).

Listing Rule 6.23.3

Listing Rule 6.23.3 provides that a change affecting an option cannot be made if it has the effect of reducing the exercise price, increasing the period for exercise or increasing the number of securities received on exercise of an option.

Changing these fundamental features affects the value of the option. A decision whether to buy, hold, sell, or exercise the option depends upon these features being known with certainty. These features also have the potential to affect the market in an entity's ordinary securities. Accordingly, changes to these features are prohibited under Listing Rule 6.23.3 in order to promote market integrity.

Any change to a performance hurdle or milestone that makes the hurdle or milestone easier to achieve is an increase in the period for exercising the option that is prohibited by Listing Rule 6.23.3. This is because the option might vest in circumstances where it otherwise would not have vested as a result of the change. ASX will generally assume that any change to a performance hurdle or milestone will make the hurdle or milestone easier to achieve.

For similar reasons, the exercise of a general discretion to waive a performance hurdle or milestone notwithstanding that the hurdle or milestone has not been achieved is generally considered by ASX to be an increase in the period for exercising the option that is prohibited by Listing Rule 6.23.3.

Waivers from Listing Rule 6.23.3

ASX is very unlikely to waive Listing Rule 6.23.3 in relation to quoted options. However, in limited circumstances, ASX may be prepared to grant a waiver to permit changes to unquoted options on condition that the change is approved by securityholders under Listing Rule 6.23.4.

An applicant for a waiver from Listing Rule 6.23.3 should have regard to Guidance Note 17 *Waivers and In-Principle Advice* when preparing its application. Amongst other things, the applicant should include the following information with its application:

- the number of options affected as a proportion of the entity's undiluted issued capital;
- whether the issue of the options has been approved by securityholders;
- the nature of the proposed change and the reasons for it;
- whether the securities were issued under an employee incentive scheme or as remuneration; and
- whether there will be any impact on the market for the entity's quoted ordinary securities and any reasoning or analysis to support that view.

While 'the rules are the rules' and an entity has no right or expectation to be granted a waiver, ASX is usually prepared to grant waivers permitting entities to seek securityholder approval to make a change that would otherwise be prohibited under Listing Rule 6.23.3 if:

- the options are not quoted and were issued under an employee incentive scheme or as remuneration;
- the options were issued in compliance with the Listing Rules;
- the options represent a relatively small proportion of the entity's undiluted issued capital (in the absence of other factors, ASX considers this to be less than 5% of the entity's undiluted issued capital); and
- granting the waiver will not undermine any prior securityholder approvals or ASX confirmations that have been given for the purposes of the Listing Rules.

In relation to the last bullet point above, ASX notes that disclosure in a notice of meeting of a general power to amend the terms of an option or of a broad discretion to waive the terms of an option does not permit an entity to make changes to an option that are prohibited by Listing Rule 6.23.3. ASX generally will not grant a waiver of Listing Rule 6.23.3 in relation to an option that was issued with securityholder approval under the Listing Rules if the possibility of the change and the circumstances in which the change might occur were not disclosed specifically and prominently in the original notice of meeting.

ASX is also unlikely to grant a waiver of Listing Rule 6.23.3 where the terms of the option have been disclosed in a prospectus or other disclosure document as a condition of a Listing Rule 6.1 confirmation.

Listing Rule 6.23.2

Under Listing Rule 6.23.2, a change which has the effect of cancelling an option for consideration can only be made if holders of ordinary securities approve the change. However, as stated in the note to listing rule 6.23.2, a change which has the effect of cancelling an option in consideration of the issue of a new option may also be a change which is prohibited by rule 6.23.3 where it has the effect of reducing the exercise price, increasing the period for exercise or increasing the number of securities received on exercise.

A change that has the effect of cancelling an option in consideration of the issue of a new option will generally only be permitted if:

- the cancellation of the original option is not conditional on the issue of the new option, and securityholder approval is obtained under Listing Rule 6.23.2. In that case, the nexus between the original option and the new option is broken and Listing Rule 6.23.3 is not enlivened; or
- the entity obtains a waiver from Listing Rule 6.23.3 (see comments above) and securityholders approve the change under Listing Rules 6.23.2 and 6.23.4.

If you missed any of our historical Compliance Updates, you can download past editions [here](#).
