



# ASX LISTING RULES

## Guidance Note 19

### PERFORMANCE SECURITIES

<p><b>The purpose of this Guidance Note</b></p>	<ul style="list-style-type: none"> <li>To assist listed entities <u>and entities wishing to apply for admission to the official list as an ASX Listing to understand how ASX applies the Listing Rules to performance securities</u></li> </ul>
<p><b>The main points it covers</b></p>	<ul style="list-style-type: none"> <li>What are “performance <u>securities</u>”?</li> <li>The Listing Rules applicable to performance <u>securities</u></li> <li><u>The types of performance securities covered by this Guidance Note</u></li> <li>Applying for in-principle advice about performance <u>securities</u></li> <li>Base requirements for performance <u>securities</u></li> <li>Appropriate <u>and equitable</u> numbers of performance <u>securities</u></li> <li>Appropriate and equitable performance milestones</li> <li>ASX’s requirements for security <u>holders to approve</u> the issue of performance <u>securities and</u> changes to their terms</li> <li><u>ASX’s requirement for an independent expert’s report in some cases</u></li> <li>Disclosure obligations in relation to performance <u>securities</u></li> </ul>
<p><b>Related materials you should read</b></p>	<ul style="list-style-type: none"> <li>Guidance Note <u>1 Applying for admission – ASX Listings</u></li> <li><u>Guidance Note 12 Significant Changes to Activities</u></li> <li><u>Guidance Note 17 Waivers and In-Principle Advice</u></li> <li>Guidance Note 21 <i>The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules</i></li> <li>Guidance Note 25 <i>Issues of Securities to Persons in a Position of Influence</i></li> <li>Guidance Note 30 <i>Notifying an Issue of Securities and Applying for their Quotation</i></li> <li>Guidance Note 35 <i>Security Holder Resolutions</i></li> </ul>

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**History:** Guidance Note 19 amended 28/08/20. Previous versions of this Guidance Note were issued in 04/14 and 12/19.

**Important notice:** ASX has published this Guidance Note to assist listed entities to understand and comply with their obligations under the Listing Rules. Nothing in this Guidance Note necessarily binds ASX in the application of the Listing Rules in a particular case. In issuing this Guidance Note, ASX is not providing legal advice and listed entities should obtain their own advice from a qualified professional person in respect of their obligations. ASX may withdraw or replace this Guidance Note at any time without further notice to any person.

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# ASX LISTING RULES

## Guidance Note 19

### Table of Contents

<a href="#">1. Introduction</a>	2
<a href="#">2. What are "performance securities"?</a>	3
<a href="#">3. The different types of performance securities</a>	3
<a href="#">4. The reasons for issuing performance securities</a>	4
<a href="#">5. The characterisation of performance securities under the Listing Rules</a>	5
<a href="#">6. The Listing Rules applicable to performance securities</a>	5
<a href="#">7. Performance securities covered by sections 8 to 15 of this Guidance Note</a>	7
<a href="#">8. Applying for in-principle advice about performance securities</a>	8
<a href="#">9. Base requirements for performance securities</a>	11
<a href="#">10. Appropriate and equitable numbers of performance securities</a>	12
<a href="#">11. Appropriate and equitable performance milestones</a>	13
<a href="#">12. ASX's requirement for security holder approval</a>	15
<a href="#">13. ASX's requirement for an independent expert's report in some cases</a>	16
<a href="#">14. Notice requirements</a>	17
<a href="#">15. Voting exclusions</a>	18

## 1. Introduction

ASX Limited ("ASX") recognises that appropriately structured performance securities can be useful and flexible instruments that benefit listed entities and their security holders and is prepared to allow listed entities to issue them, provided they comply with the Listing Rules. However, ASX is concerned about the increasing prevalence of performance securities, particularly (but not only) in new and re-compliance<sup>1</sup> listings, where it is not always apparent to ASX that entities and their boards have given careful consideration to the appropriateness and equity of the performance milestones attached to the performance securities.

This Guidance Note is published by ASX to assist listed entities and entities wishing to apply for admission to the ASX official list as an ASX Listing<sup>2</sup> to understand how ASX applies the Listing Rules to performance securities.

It should be noted that performance securities can raise issues under the Corporations Act 2001 (Cth),<sup>3</sup> as well as under the Listing Rules, including:

- whether their issue requires an amendment to the entity's constitution under section 136(2) (listed companies) or 601GC(1) (listed managed investment schemes);
- whether their issue requires security holder approval as a related party transaction under section 208(1)(a) (listed companies) or 601LC (listed managed investment schemes); and
- whether their conversion into ordinary shares requires shareholder approval under item 7 of section 611.<sup>4</sup>

<sup>1</sup> The term "re-compliance listing" refers to the situation where ASX exercises its discretion under Listing Rule 11.1.3 to require an entity proposing a significant change to the nature or scale of its activities to meet ASX's requirements for admission and quotation in Chapters 1 and 2 of the Listing Rules as if the entity were applying for admission to the official list. The application the entity is required to make in this regard for admission to the official list is referred to as an application for "re-admission" to the official list. See generally Guidance Note 12 *Significant Changes to Activities*.

<sup>2</sup> Most of the Listing Rules addressed in this Guidance Note do not apply to entities admitted to the official list as an ASX Debt Listing or as an ASX Foreign Exempt Listing (see Listing Rules 1.10 and 1.15.1). Unless otherwise indicated, references in this Guidance Note to a listed entity or entity mean an entity admitted, or applying to be admitted or re-admitted, to the ASX official list as an ASX Listing.

<sup>3</sup> Referred to in this Guidance Note as the "Corporations Act". Unless otherwise indicated, references in this Guidance Note to sections of an Act are to sections of the Corporations Act.

<sup>4</sup> So as to avoid breaching section 606(1), noting in particular the provisions in section 606(6)(a) that deem a person to acquire a relevant interest in voting shares in a company if securities in which a person already had a relevant interest become voting shares in the company. Listed entities should also have regard to the guidance provided by ASIC on such matters in Regulatory Guide 74 *Acquisitions approved by members*.

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# ASX LISTING RULES

## Guidance Note 19

This Guidance Note does not address Corporations Act issues and entities should ensure they obtain appropriate legal advice on the application of the Corporations Act to an issue of performance securities, as well as on the application of the Listing Rules.

### 2. What are “performance securities”?

The term “performance security” is a generic term referring to a security that converts into a given number of ordinary shares with all the usual rights attached if and when a nominated performance milestone is achieved, but has limited rights before then. The number of ordinary shares into which the performance security converts may be a fixed number (often it is one for one<sup>6</sup>) or it may be determined by reference to a particular formula.

Performance securities issued by a listed entity to the vendor of an asset are sometimes referred to as “contingent consideration securities” or “deferred consideration securities”, as they provide a mechanism for the vendor to receive additional ordinary shares as consideration for selling the asset to the entity, if and when the nominated performance milestone is achieved.

### 3. The different types of performance securities

Performance securities come in a number of different forms:

- “performance shares”<sup>7</sup> – that is, shares that convert into ordinary shares if a nominated performance milestone is achieved;
- “performance options” – that is, an option to subscribe for or purchase ordinary shares for a nominal amount or for free which has achieving a nominated performance milestone as a condition for its exercise, and;
- “performance rights” – that is, a contractual right to receive ordinary shares if a nominated performance milestone is achieved.

An agreement to issue ordinary shares in the future if a nominated performance milestone is achieved is, in substance and effect, a performance right for these purposes. Hence, an agreement to purchase an asset where the consideration includes an issue of ordinary shares at a future date if a nominated performance milestone is achieved will be treated by ASX as a performance right, and therefore a performance security, for the purposes of this Guidance Note.<sup>8</sup> This applies even though the parties to the agreement may choose to describe it as something else, such as a “contingent consideration agreement” or “deferred consideration agreement”.<sup>9</sup>

It should be noted that agreements structured in this way can raise issues under Listing Rules 7.1 and 7.3.4. If the entity does not have sufficient placement capacity under Listing Rule 7.1 to agree to issue the relevant ordinary securities under the agreement, it will need to obtain security holder approval to that issue under Listing Rule 7.1.<sup>11</sup> Listing Rule 7.3.4, in turn, will require the notice of meeting seeking that approval to set out the date on or by which the entity will issue the ordinary securities under the agreement and (relevantly) that this date must be no later than 3 months after the date of the meeting. Many agreements of this nature will involve a performance milestone that

<sup>6</sup> That is, one performance security converts into one ordinary share.

<sup>7</sup> In the case of a listed trust, references in this guidance note to “performance shares” should be read as references to performance units (that is, units that convert into a given number of ordinary units if and when a nominated performance milestone is achieved but have limited rights before then), and references to “ordinary shares” should be read as references to ordinary units.

<sup>8</sup> An agreement to make a cash payment in the future if a nominated performance milestone is achieved is not regarded as a performance right for the purposes of this Guidance Note. This applies even where the amount of the cash payment is tied to the market price of a given number of ordinary shares, in which case, the agreement is the economic equivalent of a cash-settled performance right. As noted in ‘7 Performance securities covered by sections 8 to 15 of this Guidance Note’ on page 7, this Guidance Note does not apply to cash-settled performance rights.

<sup>9</sup> It also applies despite the fact that the agreement might not be regarded as a traditional security. In this regard, paragraph (d) of the definition of “equity security” in the Listing Rules plainly captures any right (including one granted under an agreement) to an issued or unissued share or unit. See also note 14 below.

<sup>11</sup> See ‘6 The Listing Rules applicable to performance securities’ on page 5 and Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*.

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# ASX LISTING RULES

## Guidance Note 19

extends beyond this 3 month period and hence will require a waiver from ASX of Listing Rule 7.3.4. If the performance right conferred by the agreement is one that satisfies the requirements of this Guidance Note, ASX will generally grant such a waiver but the entity must go through the formalities of applying for it.<sup>12</sup> Conversely, if the performance right conferred by the agreement is not one that satisfies the requirements of this Guidance Note, ASX will not generally grant such a waiver.

### 4. The reasons for issuing performance securities

Performance securities are most typically issued by a listed entity to the vendor of an asset as a form of contingent or deferred consideration, often where the value of the asset being acquired by the entity is unclear or may vary materially, depending on whether the relevant performance milestone is achieved. For example, a listed entity buying a mining tenement that has been the subject of a preliminary drilling program with promising results but that requires an in-fill drilling program and other work to confirm the size and quality of the resource, may wish to protect itself in case the tenement does not live up to its initial promise. To do this, it may agree to issue a base level of ordinary shares to the vendor to acquire the tenement, plus performance securities that convert into further ordinary shares if an inferred, indicated or measured resource of a given size and quality is confirmed. If the milestone is not met, the performance securities will lapse worthless and the entity will only be "out of pocket" the base number of ordinary shares, helping to protect the entity and its investors from overpaying for the tenement. If the milestone is met, the vendor will receive an additional number of ordinary shares to reward it more fully for the latent value of the tenement.

Performance securities are sometimes issued to directors, senior executives, employees or contractors, either as part of their remuneration package or under an employee incentive scheme, as a means of incentivising them to achieve a particular performance milestone. They can be especially useful for cash-strapped start-up ventures that may have no other practical means of remunerating or incentivising key individuals for the substantial efforts that may be required to get the venture up and running profitably.

Performance securities are also sometimes issued to promoters of or advisers to, a new or re-compliance listing as a means of providing them with additional consideration if the listing performs particularly well.

Additionally, performance securities are sometimes issued to service providers to encourage and reward a given level of performance (such as to sales agents, licensees or other distributors of a listed entity's products to incentivise them to achieve a target level of sales).

Examples of performance milestones that have been attached to performance securities include:

- an entity achieving a particular financial target (eg a nominated level of profit or earnings per share);
- an entity achieving a particular measure of shareholder value (such as a nominated share price or total shareholder return);
- an entity obtaining a key governmental approval needed to commence operations;
- a biotech entity achieving a step in the regulatory approval process for the licensing of a new drug or medical device;
- a mining exploration entity achieving an inferred, indicated or measured resource of a given size and quality at a particular tenement; and
- a mining producing entity achieving a nominated level of production at a particular mining facility.

<sup>12</sup> See Guidance Note 17 Waivers and In-Principle Advice. Where a report from an independent expert is required under section 13 of this Guidance Note confirming that the issue of the performance securities is fair and reasonable to non-participating security holders, any waiver of Listing Rule 7.3.4 granted by ASX in these circumstances will be conditional on the notice of meeting including such a report.

**Deleted:** This Guidance Note relates specifically to performance shares and does not specifically address performance options or performance rights in any detail. However, many of the principles and policies outlined in this Guidance Note apply equally to performance options and rights. Accordingly, ASX may apply the guidance in this Guidance Note to performance options or performance rights, especially (but not only) if it considers that entities are attempting to use them to achieve an outcome that ASX would not consider appropriate and equitable in the case of performance shares.<sup>13</sup>

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# ASX LISTING RULES

## Guidance Note 19

### 5. The characterisation of performance securities under the Listing Rules

Performance shares, performance options, and performance rights that confer a right to receive ordinary shares ("deliverable performance rights"), are "equity securities"<sup>14</sup> and "convertible securities"<sup>15</sup> for the purposes of the Listing Rules. As equity securities, they must comply with the general requirements applicable to all equity securities in Chapter 6 of the Listing Rules, including the requirement in Listing Rule 6.1 that their terms must, in ASX's opinion, be appropriate and equitable.

Performance options must also meet the requirements applicable to options in Chapter 6 of the Listing Rules.

It should be noted that some instruments labelled as "performance rights", properly construed, confer an option over an issued or unissued share. Where that is the case, not only must the performance rights meet the general requirements applicable to equity securities in Chapter 6 of the Listing Rules, they must also meet the specific requirements applicable to options in that Chapter.

Performance rights that only confer a right to a payment of the cash value of a given number of ordinary shares if a nominated performance milestone is achieved and that do not confer any right to receive an issued or unissued share or shares ("cash-settled performance rights"), are neither "equity securities" nor "convertible securities" for the purposes of the Listing Rules.

### 6. The Listing Rules applicable to performance securities

Listing Rule 1.1 condition 1 requires an entity seeking admission to the official list as an ASX Listing to have a structure that is appropriate for a listed entity.

Listing Rule 12.5 also imposes an ongoing obligation on a listed entity to have a structure that is appropriate for a listed entity.

ASX takes the view that for an entity to have a structure appropriate for a listed entity, among other things, the terms of its securities must comply with Chapter 6 of the Listing Rules. This applies both to its quoted<sup>16</sup> and its unquoted securities.

In this regard, Listing Rule 6.1 expressly provides that the terms that apply to each class of equity securities of a listed entity must, in ASX's opinion, be appropriate and equitable.<sup>17</sup> Again, this applies both to its quoted and its unquoted securities.<sup>19</sup> It also applies regardless of whether the issue of securities has been approved by security holders.<sup>20</sup>

In assessing whether Listing Rules 1.1 condition 1 or 6.1 and 12.5 (as applicable) are met, ASX has regard to the principles on which the Listing Rules are based, as set out in the introduction to the Listing Rules. One of these

<sup>14</sup> See the definition of "equity security" in Listing Rule 19.12. Shares fall within paragraph (a) of that definition. Options over issued or unissued shares fall within paragraph (c) of that definition. Rights to an issued or unissued share fall within paragraph (d) of that definition. Thus, a performance share, a performance option, and a performance right that confers a contractual entitlement to receive ordinary shares if a nominated performance milestone is achieved, are all equity securities for the purposes of the Listing Rules.

<sup>15</sup> See the definition of "convertible security" in Listing Rule 19.12.

<sup>16</sup> Listing Rules 2.1 condition 1 and 2.5 condition 1 also make it a condition of quotation of all equity securities that the terms of the securities comply with Listing Rule 6.1.

<sup>17</sup> Note also Listing Rule 6.2, which precludes a listed entity from having more than one class of ordinary security unless ASX approves the terms of the additional class or the additional class is of partly paid securities which, if fully paid, would be in the same class as the ordinary securities.

<sup>19</sup> See the explanatory note at the commencement of Chapter 6 of the Listing Rules, which states that the requirements of that Chapter "apply to both quoted and unquoted securities unless otherwise stated". Performance securities typically are not quoted by ASX (see "9. Base requirements for performance securities" on page 11).

<sup>20</sup> For example under Listing Rule 7.1 or 10.11 or under item 7 of section 611 of the Corporations Act. The fact that the terms applying to performance securities have been, or are proposed to be, approved by security holders is a factor to which ASX will have regard in determining whether those terms are appropriate and equitable but ASX may still form the opinion that those terms are not appropriate and equitable having regard to other factors.

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# ASX LISTING RULES

## Guidance Note 19

principles is that securities “should be issued in circumstances, and have rights and obligations attaching to them, that are fair to new and existing security holders”.

Suffice to say, if an entity undertaking a new or re-compliance listing has, or proposes to have, performance securities on issue that do not comply with this Guidance Note, ASX will likely find that the entity does not comply with Listing Rule 7.1 condition 1 and therefore deny its application for admission or re-admission to the official list. Similarly, if an existing listed entity issues performance securities that do not comply with this Guidance Note, ASX will likely find that the entity is in breach of Listing Rule 12.5 and suspend its securities from trading until that breach is rectified.<sup>22</sup>

Listing Rule 7.1, which broadly speaking requires security holder approval for issues of equity securities over a 12 month period in excess of 15% of an entity’s ordinary capital, may apply to an issue of performance securities.<sup>23</sup> Whether it applies will depend on the number of performance securities to be issued, the number of ordinary shares into which they convert,<sup>24</sup> and the number of other equity securities that the entity has issued, agreed to issue, or cancelled, over the preceding 12 months.<sup>25</sup> It will also depend on whether the issue falls within one of the permitted exceptions to Listing Rule 7.1 in Listing Rule 7.2.<sup>26</sup>

Listing Rule 10.11, which broadly speaking requires security holder approval for an issue of equity securities to related and other closely connected parties, may also apply to an issue of performance securities, depending on the person to whom they are to be issued.<sup>27</sup> It will also depend on whether the issue falls within one of the permitted exceptions to Listing Rule 10.11 in Listing Rule 10.12.<sup>28</sup>

Alternatively, if the performance securities are being issued under an employee incentive scheme to a director or someone closely connected to a director, their issue may require security holder approval under Listing Rule 10.14.<sup>29</sup>

Having said this, ASX will generally require the issue of performance securities to be approved by security holders under this Guidance Note<sup>30</sup> in any event and so any approval required under Listing Rules 7.1, 10.11 or 10.14 can easily be incorporated into the same notice of meeting as the resolution approving the issue under this Guidance Note.

Performance securities can also attract various disclosure requirements under the Listing Rules. For example, a listed entity is required to notify ASX:

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<sup>22</sup> This only applies to performance securities issued after 28 August 2020, the date of release of the updated version of this Guidance Note containing this particular guidance. It does not apply retrospectively to performance securities issued before that date.

<sup>23</sup> See generally Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*.

<sup>24</sup> As mentioned in the text accompanying note 15 above, performance securities are “convertible securities” for the purposes of the Listing Rules. Hence, in applying the formula in Listing Rule 7.1, ASX will count each performance security as being equivalent to the number of ordinary shares (or if that number is variable, the maximum number of ordinary shares) that may be issued to the holder if the relevant performance milestone is achieved (see Listing Rule 7.1B.1(e) and section 5 of Guidance Note 21 *The Restrictions on Issuing Equity Securities in Chapter 7 of the Listing Rules*).

<sup>25</sup> Even where an entity has sufficient placement capacity under Listing Rule 7.1 to issue performance securities without security holder approval, it will typically seek security holder approval to the issue under Listing Rule 7.1 so that the performance securities do not use up any of its 15% placement capacity under that rule. ASX generally requires security holder approval to an issue of performance securities under Listing Rule 6.1 in any event (see “12. ASX’s requirement for security holder approval” on page 15) and so there is no material added burden for the entity in seeking a resolution of security holders approving the issue under Listing Rule 7.1 as well.

<sup>26</sup> Note that performance securities issued under an employee incentive scheme may be exempt from the requirement for security holder approval under Listing Rule 7.1 if they fall within Listing Rule 7.2 exception 13, 14 or 15.

<sup>27</sup> See generally, Guidance Note 25 *Issues of Securities to Persons in a Position of Influence*.

<sup>28</sup> Note that performance securities issued under an employee incentive scheme may be exempt from the requirement for security holder approval under Listing Rule 10.11 if they fall within Listing Rule 10.12 exception 8 or 9.

<sup>29</sup> Note that some performance securities issued under an employee incentive scheme may be exempt from the requirement for security holder approval under Listing Rule 10.14 if they fall within Listing Rule 10.16.

<sup>30</sup> See “12. ASX’s requirement for security holder approval” on page 15.

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- under Listing Rule 3.10.3 of a proposed issue of performance securities (other than an issue proposed to be made under an employee incentive scheme), immediately it proposes to issue them, using an Appendix 3B; or
- under Listing Rule 3.10.3A of an issue of performance securities under an employee incentive scheme, within 5 business days of the date of issue, using an Appendix 3G.

In each case above, this applies regardless of the size or purpose of the proposed issue and whether or not information about the proposed issue is "market sensitive".<sup>32</sup>

In due course, if and when the applicable performance milestone is met and the performance securities are converted into ordinary shares, the entity must notify ASX of their conversion and apply for the quotation of the resulting ordinary shares using an Appendix 2A Application for Quotation of Securities within 10 business days of their conversion.<sup>33</sup>

ASX expects an entity that has a material number of performance securities on issue to make a market announcement immediately:

- upon satisfaction of the milestone that triggers their conversion into ordinary shares, indicating that the milestone has been achieved and stating the amount of ordinary shares to be issued as a consequence;<sup>34</sup> and
- if the milestone is not satisfied by the expiry date, stating that fact and what will happen to the performance securities as a consequence.<sup>35</sup>

An entity that has performance securities on issue should disclose in the notes to the statement of financial position in its annual report, preliminary final report (Appendix 4E) and half-year report:

- the number of performance securities on issue at the balance date of the report;
- a brief summary of the terms of the performance securities, including in particular the performance milestone that has to be satisfied in order for the performance securities to be converted into ordinary shares and the number of ordinary shares into which they may be converted; and
- whether any performance securities were converted or cancelled during the financial period covered by the report.

## **7. Performance securities covered by sections 8 to 15 of this Guidance Note**

Sections 8 to 15 of this Guidance Note do not apply to:

- cash-settled performance rights<sup>36</sup> – as noted above, cash-settled performance rights are not "equity securities" for the purposes of the Listing Rules;

<sup>32</sup> Information about a proposed issue of securities is "market sensitive" if a reasonable person would expect the information to have a material effect on the price or value of the entity's securities: see generally Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1 – 3.1B*.

<sup>33</sup> Listing Rules 2.7, 2.8.3 and 3.10.3B.

<sup>34</sup> ASX will usually impose this as a condition to any in-principle advice it gives that the performance securities are appropriate and equitable for the purposes of Listing Rule 6.1. Even if it does not impose such a condition, this information should be disclosed under Listing Rule 3.1 and/or 3.10.3B.

<sup>35</sup> ASX will usually impose this as a condition to any in-principle advice it gives that the performance securities are appropriate and equitable for the purposes of Listing Rule 6.1. Even if it does not impose such a condition, this information should be disclosed under Listing Rule 3.1.

<sup>36</sup> It should be noted that the fact that this Guidance Note does not apply to cash-settled performance rights does not mean that they can be issued without any consequences under the Listing Rules. For example, if they are issued on unusual terms or in unusual amounts, they can raise issues under Listing Rule 1.1 condition 1 or Listing Rule 12.5 (see 6. The Listing Rules applicable to performance securities' on page 5).



# ASX LISTING RULES

## Guidance Note 19

- an issue of performance shares, performance options or deliverable performance rights pursuant to a takeover bid under Chapter 6, or a merger by way of scheme of arrangement under Part 5.1, of the Corporations Act – these are overseen by ASIC, the Takeovers Panel and the Court and ASX does not see a need to regulate them further under the Listing Rules; or
- an issue of performance shares, performance options or deliverable performance rights by an entity under an employee incentive scheme or as part of the remuneration package of a director or employee, where the issue has been made in the ordinary course of business of the entity and not in connection with a new or re-compliance listing,<sup>37</sup> and has been approved:
  - if Listing Rule 10.11 applies, by security holders under Listing Rule 10.11;
  - if Listing Rule 10.14 applies, by security holders under Listing Rule 10.14; or
  - if Listing Rules 10.11 and 10.14 do not apply, by the board or a remuneration committee of the board.

(together referred to in this Guidance Note as “ordinary course of business remuneration securities”). Ordinary course of business remuneration securities tend to raise far fewer concerns under the Listing Rules than other types of performance securities. A determination as to whether the terms that apply to ordinary course of business remuneration securities are appropriate and equitable is properly a matter for the board of the listed entity and, where Listing Rule 10.11 or 10.14 applies, its security holders, rather than ASX.

Otherwise, sections 8 to 15 of this Guidance Note apply to all other securities that are in substance performance securities (as defined in section 2 and described in section 3 above), regardless of whether they are called performance securities or something else. This specifically includes performance shares, performance options or deliverable performance rights that are issued under an employee incentive scheme or as part of the remuneration package of a director or employee in connection with a new or re-compliance listing and therefore are not “ordinary course of business remuneration securities”.

### 8. Applying for in-principle advice about performance securities

ASX strongly recommends that an entity undertaking a new or re-compliance listing that has issued, or is proposing to issue, performance securities covered by sections 8 to 15 of this Guidance Note apply to ASX for in-principle advice that the terms of the performance securities will satisfy Listing Rule 1.1 condition 1.

ASX also strongly recommends that an existing listed entity proposing to issue any performance securities covered by sections 8 to 15 of this Guidance Note other than in connection with a re-compliance listing, apply to ASX for in-principle advice that the terms of the performance securities will satisfy Listing Rules 6.1 and 12.5 before it makes any announcement about its intention to issue the performance securities and certainly before it issues the securities or enters into a legally binding agreement to do so. In the former case, this may help to avoid the embarrassment of having to retract or correct the announcement if ASX forms the view that the issue of the performance securities will breach the Listing Rules and therefore cannot proceed. In the latter case, it may help to avoid the legal and practical complications that will arise if ASX forms the view that the terms of the performance securities breach the Listing Rules and consequently requires the entity to take action to avoid or correct that breach.<sup>38</sup>

An application for in-principle advice that the terms of performance securities will satisfy Listing Rules 1.1 condition 1 or 6.1 and 12.5 (as applicable) must be in writing and submitted by the applicant or a professional adviser or representative acting on behalf of the applicant. It should be addressed to ASX Listings Compliance:

- in the case of a listed entity, at the entity's home branch, or

<sup>37</sup> Performance securities issued in connection with a new or re-compliance listing to remunerate or incentivise a director or employee are not regarded as “ordinary course of business remuneration securities” for the purposes of this Guidance Note. This is because the terms of those securities are generally heavily influenced by the promoters of, or advisers to, the new or re-compliance listing rather than independently determined by the board or security holders of the listed entity.

<sup>38</sup> Pursuant to ASX's powers in that regard under Listing Rule 18.8.

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- in the case of an entity applying for admission to the official list, at the ASX branch where the entity has lodged, or intends to lodge, its application for admission.

The application for in-principle advice should include the following information:

- (a) the party or parties to whom the performance securities are to be issued and the number of performance securities to be issued to them or each of them (as the case may be);
- (b) any relationship the recipient of the performance securities or an associate of the recipient has with the entity (eg as a promoter, director, employee or security holder of, or adviser to, the entity);
- (c) if the performance securities are being issued in connection with an acquisition by the entity of another entity or undertaking:<sup>39</sup>
- a statement to that effect;
  - an explanation why the performance securities are being issued in connection with the acquisition, including the commercial goals the entity is trying to achieve, and the risks it is trying to manage, by imposing the relevant performance milestone;
  - details of the entity or undertaking being acquired;
  - details of the vendor(s) from whom the entity is acquiring the entity or undertaking and their respective ownership interests in that entity or undertaking;
  - details of how the entity determined the number of performance securities to be issued to the vendor(s) and why it considers that number to be appropriate and equitable; and
  - if any of the performance securities are being issued to someone who does not have an ownership interest in the entity or undertaking being acquired, or if the performance securities are being issued disproportionately to the ownership interests of the vendors, an explanation why that is the case and how that is considered appropriate and equitable;
- (d) if the performance securities are being issued in connection with a new or re-compliance listing to remunerate or incentivise a director or employee and are not ordinary course of business remuneration securities:<sup>40</sup>
- a statement to that effect;
  - details of the role (if any) the director or employee will play in meeting the performance milestone;
  - details of the existing total remuneration package of the director or employee;
  - if the director or employee or any of their associates hold securities in the entity, details of those securities and the consideration they paid or provided for those securities;
  - in light of the above, an explanation why it is considered necessary or appropriate to further remunerate or incentivise the director or employee to achieve the applicable performance milestone; and
  - details of how the entity determined the number of performance securities to be issued to the director or employee and why it considers that number to be appropriate and equitable;
- (e) if the performance securities are being issued to reward a promoter of, or adviser to, a new or re-compliance listing if the listing performs particularly well:

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<sup>39</sup> As might occur as a precursor to the entity being involved in a new or re-compliance listing.

<sup>40</sup> Noting that performance securities issued in connection with a new or re-compliance listing to remunerate or incentivise a director or employee are not "ordinary course of business remuneration securities" for the purposes of this Guidance Note: see note 37 above.

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# ASX LISTING RULES

## Guidance Note 19

- [a statement to that effect;](#)
  - [details of all fees and other consideration \(including securities\) the promoter/adviser or an associate may receive for services provided in connection with the listing;](#)
  - [details of all fees or other consideration \(including securities\) the promoter/adviser or an associate may receive under any other ongoing mandate they may have with the entity;](#)
  - [if the promoter/adviser or any of its associates hold securities in the entity, details of those securities and the consideration they paid or provided for those securities;](#)
  - [in light of the above, an explanation why it is considered necessary or appropriate to further reward the promoter/adviser with an issue of performance securities; and](#)
  - [details of how the entity determined the number of performance securities to be issued to the promoter/adviser and why it considers that number to be appropriate and equitable;](#)
- (f) [if the performance securities are being issued to a service provider to encourage and reward a given level of performance:](#)
- [a statement to that effect;](#)
  - [details of the services being provided;](#)
  - [details of all fees and other consideration \(including securities\) the service provider may receive for those services;](#)
  - [if the service provider or any of its associates hold securities in the entity, details of those securities and the consideration they paid or provided for those securities;](#)
  - [in light of the above, an explanation why it is considered necessary or appropriate to further reward the service provider with an issue of performance securities; and](#)
  - [details of how the entity determined the number of performance securities to be issued to the service provider and why it considers that number to be appropriate and equitable;](#)
- (g) the full terms of the performance securities;<sup>41</sup>
- (h) the number of ordinary shares that the performance securities will convert into if the applicable performance milestone is met and the impact that will have on the entity's capital structure;
- (i) if the performance securities convert into ordinary shares on the basis of a formula, the impact on the entity's capital structure for different scenarios that indicate a reasonable low, mid and high case for the number of ordinary shares that might be issued based on the formula;
- (j) [confirmation that the terms of the performance securities are consistent with the base requirements for performance securities set out in section 9 and an analysis of their compliance with sections 10 and 11 of this Guidance Note;](#)
- (k) [if applicable, confirmation that the entity intends to seek security holder approval for the issue of the performance securities in accordance with section 12 of this Guidance Note and an indicative timetable for doing so; and](#)
- (l) [if a report from an independent expert is required under section 13 of this Guidance Note opining on whether the issue of the performance securities is fair and reasonable to non-participating security holders:](#)

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<sup>41</sup> This includes full details of the applicable performance milestones. In this regard, ASX will not accept statements that the performance milestones are confidential or commercially sensitive information.

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- [details of the expert appointed or proposed to be appointed in that regard and how they meet the requirements in ASIC Regulatory Guide 112 \*Independence of experts to be considered independent\*;](#)
- [if the expert has already provided their report, a copy of that report; and](#)
- [if the expert has not yet provided their report, an indicative timetable for the production of that report.](#)

The onus is on the applicant for in-principle advice to satisfy ASX that the terms of the performance [securities](#) are appropriate and equitable and therefore should be acceptable to ASX.

Further guidance on applications for in-principle advice can be found in Guidance Note 17 *Waivers and In-Principle Advice*.

[For the avoidance of doubt, ASX does not expect entities proposing to issue performance securities that are not covered by sections 8 to 15 of this Guidance Note to apply to ASX for in-principle advice that the terms of the performance securities will satisfy Listing Rules 1.1 condition 1, 6.1 or 12.5, although they are free to do so if they wish.](#)

### 9. Base requirements for performance [securities](#)

The essence of a performance [security](#) is that it has [\(or should have\) limited rights and limited value](#) unless and until the applicable performance milestone is achieved. [The terms of issue of a performance security covered by sections 8 to 15 of this Guidance Note must therefore specifically provide that the security:](#)

- [is not](#) transferrable (and, consequently, will not be quoted on ASX or any other exchange);
- [does not](#) confer any right to vote, except as otherwise required by law;
- [does not](#) confer any entitlement to a dividend, whether fixed or at the discretion of the directors;
- [does not](#) confer any right to a return of capital, whether in a winding up, upon a reduction of capital or otherwise;
- [does not](#) confer any right to participate in the surplus profit or assets of the entity upon a winding up; [and](#)
- [does not](#) confer any right to participate in new issues of securities such as bonus issues or entitlement issues,

unless and until the applicable performance milestone is achieved and the performance [security](#) converts into ordinary shares,

It is acceptable for performance [securities](#) to have a “change of control” provision allowing the holder [or the entity](#) to convert [them](#) into ordinary shares if there is a change in control of the entity, notwithstanding that the applicable performance milestone has not been achieved, but only if [the change of control is triggered by a person who does not control the entity at the time the performance securities are issued achieving control of more than 50% of the ordinary voting securities in the entity – change of control provisions that trigger at a lower level of “control” are not acceptable.](#)

It is also acceptable for performance [securities](#) to have [normal](#) anti-dilution provisions that adjust the number of ordinary shares into which the performance [securities](#) convert if the entity splits or consolidates its ordinary shares or undertakes a bonus issue, entitlement issue or other capital reconstruction, [so as to preserve the proportionate value of the performance securities vis-à-vis the ordinary shares.](#)

[Any performance security covered by sections 8 to 15 of this Guidance Note that does not meet these base requirements is likely to be regarded by ASX as not complying with Listing Rules 1.1 condition 1 or 6.1 and 12.5 \(as applicable\).](#)

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## 10. Appropriate and equitable numbers of performance securities

For performance securities covered by sections 8 to 15 of this Guidance Note to comply with Listing Rule 6.1, the number of performance securities issued, and the number of ordinary shares into which they will convert if the relevant milestone is achieved, must, in ASX's opinion, be appropriate and equitable.

ASX considers that this requires that the number of ordinary shares into which the performance security will convert if the relevant milestone is achieved must be:

- (1) fixed or calculated by reference to a formula that delivers a fixed outcome so that investors and analysts can readily understand, and have reasonable certainty as to, the impact on the entity's capital structure if the milestone is achieved;<sup>42</sup> and
- (2) objectively fair and reasonable, both in absolute terms and in relative terms compared to the additional value delivered if the milestone is met.

An example of conversion terms that ASX is likely to consider inappropriate for failing to meet requirement (1) above is a performance security where the number of ordinary shares into which it converts is determined by reference to the market price of the ordinary shares at a future date or over a future period and there is no floor on the conversion price. This is especially so if the entity has a relatively low market capitalisation and its securities have a history of significant price volatility or of periods where they have suffered a sustained fall in market price. It also applies if the entity is undertaking a new or re-compliance listing and will have a relatively low market capitalisation at listing. In either case, there is a very real risk that the conversion of the performance securities could be highly dilutive to existing ordinary shareholders if the market price of the entity's ordinary shares falls substantially between the issue of the performance securities and their conversion.

Examples of conversion terms that ASX is likely to consider inappropriate for failing to meet requirement (2) above include performance securities that convert into a material number of ordinary shares, where conversion is triggered by:

- introducing a given number of new investors without any meaningful thresholds around the amount of funds invested by them;
- winning a given number of new customers without any meaningful thresholds around the amount of sales generated from them;
- launching a new product or service without any meaningful thresholds around the level of sales generated by the new product or service;
- launching a new sales outlet or channel without any meaningful thresholds around the level of sales generated by the new outlet or channel; and
- signing-up/registering a given number of new website users without any meaningful thresholds around their level of usage of the website (including counting users who are on a free trial or discounted introductory offer).

Under no circumstances will ASX permit a listed entity to issue performance securities if the number of ordinary shares into which the performance securities will convert if the applicable milestone is achieved is greater than the number of ordinary shares in the entity on the date of issue of the performance securities. Otherwise, the

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<sup>42</sup> As indicated above, this requirement does not preclude normal anti-dilution provisions that adjust the number of ordinary shares into which the performance securities convert if the entity splits or consolidates its ordinary shares or undertakes a bonus issue, entitlement issue or other capital reconstruction.

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performance securities effectively become the main class of security of the entity and ASX does not regard that as an acceptable capital structure for the purposes of Listing Rule 12.5.<sup>43</sup>

Similarly, where a listed entity has options or other convertible securities on issue, ASX will not permit it to issue performance securities if the total number of ordinary shares that will be issued if the options are all exercised, the convertible securities are all converted and the applicable milestone is achieved is greater than the number of ordinary shares in the entity on the date of issue of the performance securities. Again, ASX does not regard this as an acceptable capital structure for the purposes of Listing Rule 12.5.<sup>44</sup>

Likewise, ASX will reject an application for admission to the official list if the applicant has or proposes to have performance securities on issue at the date of its listing and the number of ordinary shares into which the performance securities will convert if the applicable milestone is achieved is greater than the number of ordinary shares the entity proposes to have on issue at the date of its listing.<sup>45</sup> It will also reject an application if the applicant has or proposes to have options or other convertible securities, as well as performance securities, on issue at the date of its listing and the total number of ordinary shares that will be issued if the options are all exercised, the convertible securities are all converted and the applicable milestone is achieved is greater than the number of ordinary shares the entity proposes to have on issue as at the date of its listing. Again, ASX does not regard these as acceptable capital structures for the purposes of Listing Rule 1.1 condition 1.

### 11. Appropriate and equitable performance milestones

For performance securities covered by sections 8 to 15 of this Guidance Note to comply with Listing Rule 6.1, the performance milestone attached to a performance security must, in ASX's opinion, be appropriate and equitable.<sup>46</sup> ASX considers that this requires the following:

- (1) there must be an appropriate and demonstrable nexus between the performance milestone and the transaction or purpose for which the performance security is being issued;
- (2) the performance milestone must be clearly articulated by reference to objective criteria so that investors and analysts can readily understand, and have reasonable certainty as to, the circumstances in which the performance milestone will be taken to have been met; and
- (3) the performance security must have an expiry date by which the relevant milestone is to be achieved and, if the milestone is not achieved by that date, either the performance security must be cancelled or bought back for no or nominal consideration only or else the total number of performance securities on issue must convert into a nominal number of ordinary shares only.

Examples of performance securities and milestones that ASX is likely to consider inappropriate under requirement (1) above, and therefore not allow, include:

- performance securities issued to a vendor by an entity where the performance milestone is tied to the market price of the ordinary shares of the entity or to the financial performance of the entity as a whole rather than to some demonstrable measure of the value of the particular assets acquired from the vendor;<sup>49</sup>

<sup>43</sup> ASX regards this as inconsistent with the policy underlying Listing Rule 6.2, which precludes a listed entity from having more than one class of ordinary security without ASX approval (see note 17 above), and Listing Rule 7.16, which provides that a listed entity cannot have more options on issue than underlying securities.

<sup>44</sup> ASX regards this as inconsistent with the policy underlying Listing Rule 7.16, which provides that a listed entity cannot have more options on issue than underlying securities.

<sup>45</sup> Taking into account any ordinary shares that the entity may be issuing in connection with its listing.

<sup>46</sup> Again, in assessing this issue, ASX has regard to the principle set out in the introduction to the Listing Rules that securities "should be issued in circumstances, and have rights and obligations attaching to them, that are fair to new and existing security holders".

<sup>49</sup> ASX is likely to object to performance securities issued in these circumstances with this type of performance hurdle because they potentially reward the vendor for performance that has nothing to do with the assets acquired from the vendor. For example, if at the time of acquiring the assets from the vendor, the entity has another asset or business, the reason the milestone is achieved could be because of

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# ASX LISTING RULES

## Guidance Note 19

- performance securities issued to a director or other officer who is otherwise being reasonably remunerated for their services where the milestone to be achieved is merely that the director or officer hold office until a nominated date;<sup>50</sup>
- performance securities issued to a director or other officer which convert into ordinary shares if the director or officer is removed from office before a nominated date;<sup>51</sup>
- performance securities issued by an entity proposing to list to non-promoter seed capitalists who have limited or no ongoing involvement in managing the entity where the performance milestone is tied to the post-listing market price of the ordinary shares of the entity or the post-listing financial performance of the entity;<sup>53</sup> and
- performance securities issued by an entity proposing to list to a lead manager or other adviser where the performance milestone is tied to the post-listing market price of the ordinary shares of the entity or the post-listing financial performance of the entity as a whole.<sup>54</sup>

Examples of performance milestones that ASX is likely to consider inappropriate under requirement (2) above, and therefore not allow, include:

- performance milestones tied to revenue or profit for a particular period that do not expressly exclude or disregard:
  - one-off or extraordinary revenue items;
  - revenue received in the form of government grants, allowances, rebates or other hand-outs; or
  - revenue or profit that has been "manufactured" to achieve the performance milestone;<sup>56</sup>
- performance milestones tied to a projected financial measure for a particular period rather than an actual financial measure for that period;<sup>57</sup>

the performance of that other asset or business rather than the assets acquired from the vendor. The same could also apply if, subsequent to the acquisition of the assets from the vendor, the entity acquires another asset or business.

However, ASX will not generally object to the issue of performance securities to a vendor by an entity with a primary and appropriate performance milestone tied to the performance of the assets acquired from the vendor and a secondary or supplementary performance milestone tied to the market price of the entity's ordinary shares or the financial performance of the entity as a whole.

ASX may also be prepared to allow the issue of performance securities with a performance milestone tied to the market price of the entity's ordinary shares or the financial performance of the entity as a whole to vendors in a "roll-up" listing, where the individual businesses being acquired are not material to the overall value of the entity.

<sup>50</sup> ASX is likely to object to performance securities issued in these circumstances with this type of performance hurdle because they potentially reward the director or other officer for doing nothing more than not resigning their office. The case may be different, however, if the director or other officer is not otherwise being reasonably remunerated for their services and the performance securities are effectively being issued in lieu of director's fees.

<sup>51</sup> ASX is likely to object to performance securities issued in these circumstances with this type of performance hurdle because they have the potential to act as a deterrent to security holders exercising their right to remove the director from office, or to directors exercising their power to dismiss the officer, and therefore potentially reward the director or officer for bad performance.

<sup>53</sup> ASX is likely to object to performance securities issued in these circumstances with this type of performance hurdle because they potentially reward seed capitalists for share price or financial performance post-listing that may have nothing to do with their original contribution of seed capital.

<sup>54</sup> ASX is likely to object to performance securities issued in these circumstances with this type of performance hurdle because they potentially reward the lead manager or other adviser for share price or financial performance post-listing that may have nothing to do with the work they did for the entity pre-listing.

<sup>56</sup> An example would be a listed entity that has issued performance securities with a revenue-based milestone entering into customer contracts with large fees attached and then subcontracting most of its obligations under those contracts to third parties who charge the entity not dissimilar fees, thereby generating large amounts of revenue for no real effort by, and no real return to, the entity.

<sup>57</sup> An example would be a performance hurdle tied to an "annualised" financial measure (ie a financial measure for a period less than a full year, such as a month, quarter, half-year or other part year, which is projected out to a full year on a straight-line basis). ASX is likely to object to performance securities with this type of performance hurdle because they reward the holder for assumed or projected financial performance rather than actual financial performance. ASX is also concerned about the incentive these types of performance securities may

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# ASX LISTING RULES

## Guidance Note 19

- performance milestones involving a financial measure that is not audited by the entity's external auditor or some other quantitative or qualitative measure that is not signed off by another suitable expert;<sup>58</sup>
- performance milestones that are vague, uncertain, ambiguous or not transparent;<sup>59</sup> and
- performance milestones that are subjective or otherwise based on opinion.

In relation to requirement (3) above, ASX will not permit performance securities with an expiry date longer than 5 years<sup>60</sup> from their date of issue. It may also object to performance securities with a shorter expiry date than 5 years from their date of issue if ASX considers that the applicable performance milestone ought reasonably be capable of being met within a shorter timeframe.

If the applicable performance milestone is not met by the nominated expiry date, ASX will not generally permit the entity to issue replacement performance securities extending the date by which the performance milestone must be met. To allow this would run counter to the policy of having a nominated expiry date for performance securities in the first place.<sup>62</sup>

In those cases where it is not objectionable to have a performance milestone tied to the market price of an entity's securities,<sup>63</sup> particular care needs to be taken in framing the milestone so that it is appropriate and equitable, noting that:

- security prices can be affected by macroeconomic factors, market sentiment and other matters unrelated to the performance of the entity;
- security prices can fluctuate significantly over a short period and achieving a nominated hurdle briefly before the price falls back below that hurdle may not be a fair measure of sustainable performance; and
- security prices may be susceptible to manipulation, especially in the case of thinly traded securities or if measured at a single point in time (for example, at the close of trading on a particular day).

For these reasons, ASX recommends that a security price hurdle attached to a performance security should be based on volume weighted average market price over a reasonable period (for example, over 20 consecutive trading days on which the entity's securities have actually traded), rather than the market price at a particular date or for a shorter period.

## 12. ASX's requirement for security holder approval

Subject to the one exception mentioned below, ASX will generally consider it appropriate and equitable, and therefore impose a condition,<sup>64</sup> that a listed entity obtain the approval of the holders of its ordinary shares to the

create to recognise financial performance in a particular period and therefore to manipulate the financial measure to achieve the performance hurdle.

<sup>58</sup> For example, in the case of a performance milestone tied to the declaration of a certain level of mineral resources or reserves, an independent geologist.

<sup>59</sup> An example of a performance milestone that would not be allowed due to lack of transparency would be one that is not disclosed because it is claimed to be commercially sensitive (eg a milestone tied to achieving a confidential sales target) or that has not yet been determined (eg a milestone to be set by the board or a committee of the board in the future).

<sup>60</sup> In ASX's opinion, performance securities that have an expiry date of longer than 5 years create too much uncertainty around the value of the entity's ordinary securities.

<sup>62</sup> This applies even where the entity is proposing to obtain security holder approval to the issue of the replacement performance securities. This position is consistent with the underlying principle of Listing Rule 6.23.2, which prohibits a change to the terms of an option increasing the period for its exercise, even where the change is proposed to be made with security holder approval.

<sup>63</sup> See notes 49 and 54 above and accompanying text.

<sup>64</sup> This condition is imposed under Listing Rule 18.8 as a requirement to ensure compliance with Listing Rule 6.1. The entity must comply with the condition (Listing Rule 18.5A). Outside of the one exception mentioned in the text where ASX does not require security holder approval to the terms of performance securities, any in-principle advice ASX gives that the terms of performance securities comply with Listing Rules 6.1 and/or 12.5 will invariably be subject to a condition that security holders approve the terms of the performance securities in accordance with this Guidance Note.

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# ASX LISTING RULES

## Guidance Note 19

issue of the performance [securities covered by sections 8 to 15 of this Guidance Note](#), and that a voting exclusion statement<sup>65</sup> apply in relation to any person who may participate in the issue.

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A resolution to the following effect will suffice:

“That the issue of performance [securities](#) described in the notice of meeting is approved under and for the purposes of the ASX Listing Rules.”

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The one exception that ASX allows to its requirement for security holder approval to an issue of performance [securities covered by sections 8 to 15 of this Guidance Note](#) is where:

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- the intention to undertake the issue was clearly disclosed in the entity’s listing prospectus or PDS;<sup>66</sup>
- [if required under section 13 below, the prospectus or PDS included a copy of an independent expert’s report opining on whether the issue of the performance securities is fair and reasonable to non-participating security holders;](#)
- the disclosure in the prospectus or PDS included the same details as mentioned [in section 14 below](#) for a notice of meeting to approve an issue of performance [securities](#);
- the issue takes place within a reasonable period of the entity being admitted to the official list; and
- ASX otherwise considers the terms applicable to the performance [security are](#) appropriate and equitable.

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This exception recognises that the fact that investors have subscribed for securities in the entity based on such a disclosure effectively evidences their approval to the terms of the performance [securities](#).

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In all cases,<sup>67</sup> ASX will also generally consider it appropriate and equitable, and therefore impose a condition,<sup>68</sup> that the terms of the performance [securities](#), including (without limitation) the applicable milestone that has to be satisfied before the performance [securities](#) may be converted into ordinary shares, must not be changed without the prior approval of the holders of the entity’s ordinary shares and that a voting exclusion statement apply in relation to any holder of the performance [securities](#).<sup>69</sup>

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### 13. ASX’s requirement for an independent expert’s report in some cases

[In the circumstances mentioned below, ASX will generally consider it appropriate and equitable, and therefore impose a condition,<sup>70</sup> that the entity obtain a report from an independent expert acceptable to ASX<sup>71</sup> that complies with the requirements in ASIC Regulatory Guide 111 \*Content of expert reports\* and that opines on whether the issue of the performance securities in question is fair and reasonable to non-participating security holders.](#)

[In expressing this opinion, ASX would expect the independent expert to assume that the relevant performance milestone\(s\) have been met, assess the impact that would have on the value of the entity, and then determine](#)

<sup>65</sup> See ‘15\_ Voting exclusions’ on page 18.

<sup>66</sup> That is, the prospectus or PDS lodged with ASX by an applicant for listing in accordance with Listing Rule 1.1 condition 3.

<sup>67</sup> Including those that fall within the exception mentioned above to ASX’s requirement for security holder approval to an issue of performance [securities](#).

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<sup>68</sup> Again, in the case of a listed entity, this condition is imposed under Listing Rule 18.8 as a requirement to ensure compliance with Listing Rule 6.1. In the case of an applicant for listing, this condition is imposed under Listing Rule 1.19. In either case, the entity must comply with the condition (Listing Rule 18.5A).

<sup>69</sup> See ‘15\_ Voting exclusions’ on page 18.

<sup>70</sup> [This condition is imposed under Listing Rule 18.8 as a requirement to ensure compliance with Listing Rule 6.1. The entity must comply with the condition \(Listing Rule 18.5A\). Where the 10% thresholds in the text are met, any in-principle advice ASX gives that the terms of performance securities comply with Listing Rule 6.1 will invariably be subject to a condition that the entity obtain a report from an independent expert acceptable to ASX that complies with the requirements in ASIC Regulatory Guide 111 \*Content of expert reports\* and that confirms the issue of the performance securities is fair and reasonable to non-participating security holders in accordance with this Guidance Note.](#)

<sup>71</sup> [To be acceptable to ASX, the expert must satisfy the requirements in ASIC Regulatory Guide 112 \*Independence of experts to be considered independent\*.](#)

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# ASX LISTING RULES

## Guidance Note 19

[whether the resulting number of ordinary shares to be issued by the entity to the holder of the performance shares is fair and reasonable in the circumstances.](#)

The requirement for an independent expert's report will apply in the following two situations:

- [the entity is already listed, it is proposing to issue performance securities covered by sections 8 to 15 of this Guidance Note<sup>72</sup> and the number of ordinary shares into which those performance securities will convert in aggregate if the applicable milestone is achieved is greater than 10% of the number of ordinary shares the entity proposes to have on issue at the date the performance securities are proposed to be issued \(taking into account any ordinary shares that the entity may be issuing in connection with the same transaction\); or](#)
- [the entity is applying to be listed, it has or proposes to have performance securities covered by sections 8 to 15 of this Guidance Note on issue at the date of its admission to quotation<sup>73</sup> and the number of ordinary shares into which those performance securities will convert in aggregate if the applicable milestone is achieved is greater than 10% of the number of ordinary shares the entity proposes to have on issue at the date of its admission to quotation \(taking into account any ordinary shares that the entity may be issuing in connection with its listing\).<sup>74</sup>](#)

[In the former case, the report must be included in or accompany the notice of meeting seeking security holder approval to the terms of the performance securities. If the report opines that the terms of the performance securities are "fair but not reasonable", "reasonable but not fair", or "neither fair nor reasonable", ASX will expect that fact to be prominently disclosed in the notice of meeting.](#)

[In the latter case, the report must be included in the entity's listing prospectus, PDS or information memorandum.<sup>75</sup> Again, if the report opines that the terms of performance securities are "fair but not reasonable", "reasonable but not fair", or "neither fair nor reasonable", ASX will expect that fact to be prominently disclosed in the entity's listing prospectus, PDS or information memorandum \(including in the investment overview section of that document\).](#)

[ASX would have no objection to an independent expert expressing a broader view on an issue of performance securities, for example, a statement that while the expert is not able to conclude that the issue is fair or reasonable \(as applicable\), they regard it as being in the interests of the entity and non-participating security holders to proceed with the issue.](#)

[For the avoidance of doubt, the fact that an independent expert has opined that an issue of performance securities is, in their opinion, fair and reasonable to, or otherwise in the interests of, non-participating security holders does not prevent ASX from reaching a view that the terms of the performance securities are not appropriate and equitable, if they otherwise infringe the requirements set out in this Guidance Note.](#)

### 14. Notice requirements

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 those matters.<sup>76</sup>

Where a notice of meeting proposes a resolution of security holders approving an issue of performance [securities covered by sections 8 to 15 of this Guidance Note](#), ASX will expect the notice to include the following information:

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<sup>72</sup> [For these purposes, separate issues of performance securities covered by sections 8 to 15 of this Guidance Note proposed to undertaken at or around the same time will be aggregated for the purposes of determining whether the 10% threshold mentioned in the text is being exceeded. This applies even if they are proposed to be issued to different parties and on different terms.](#)

<sup>73</sup> [Again, this includes all performance securities covered by sections 8 to 15 of this Guidance Note on issue at the date of the entity's admission to quotation even where they are held by different parties and on different terms.](#)

<sup>74</sup> [.](#)

<sup>75</sup> [That is the prospectus, PDS or information memorandum the entity lodges with ASX to satisfy Listing Rule 1.1 condition 3.](#)

<sup>76</sup> See *Bullfin v Bebarfalds Ltd* (1938) 38 SR (NSW) 423 and *Chequepoint Securities Ltd v Claremont Petroleum NL* (1986) 11 ACLR 94.

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- the reason why the approval is being sought and what will happen if the approval is given or not given<sup>77</sup> – a summary along the following lines will suffice for these purposes:

"[Name of entity] is proposing to [insert a description of the proposed issue of performance securities, defining them as the "Performance Shares", "Performance Options" or "Performance Rights" (as appropriate)].

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As is its usual practice, ASX has imposed a requirement under Listing Rule 6.1 and Guidance Note 19 Performance Securities, that [name of entity] obtain shareholder approval to the issue of the Performance [Shares/Options/Rights].

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Resolution [n<sup>o</sup>] seeks the required shareholder approval to the issue of the Performance [Shares/Options/Rights] under and for the purposes of the Listing Rules.

If resolution [n<sup>o</sup>] is passed, [name of entity] will be able to proceed with the issue of the Performance [Shares/Options/Rights] and [outline the consequences that will follow].

If resolution [n<sup>o</sup>] is not passed, [name of entity] will not be able to proceed with the issue of the Performance [Shares/Options/Rights] and [outline the consequences that will follow]."

- [all of the information set out in paragraphs \(a\) – \(i\) of section 8 above;](#)
- [if a report from an independent expert is required under section 13 of this Guidance Note opining on whether the issue of the performance securities is fair and reasonable to non-participating security holders, a copy of that report; and](#)
- if ASX imposes a voting exclusion (as it typically will), a voting exclusion statement.

Deleted: <#>the party or parties to whom the performance shares are to be issued and the number of performance shares to be issued to them or each of them (as the case may be);¶  
<#>any relationship between a recipient of the performance shares and the entity (eg vendor, promoter, director, employee etc);¶  
<#>if the performance shares are being issued in connection with a particular transaction, an explanation of the transaction;¶  
<#>if the performance shares are not being issued in connection with a particular transaction, an explanation of the purpose the entity is seeking to achieve by issuing them;¶  
<#>the full terms of the performance shares;¶  
<#>the number of ordinary shares that the performance shares will convert into if the applicable performance milestone is met and the impact that will have on the entity's capital structure;¶  
<#>if the performance shares convert into ordinary shares on the basis of a formula, the impact on the entity's capital structure for different scenarios that indicate a reasonable low, mid and high case for the number of ordinary shares that might be issued based on the formula; and¶

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This information may be given in the notice itself or in an accompanying explanatory memorandum to security holders.<sup>78</sup>

Before a listed entity sends out a notice of meeting that includes a resolution by security holders approving the issue of performance securities, it must give ASX a copy of the draft notice for review. It must not finalise the notice until ASX tells it that ASX does not object to it.<sup>79</sup>

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

## 15. Voting exclusions

As mentioned in section 12 above, ASX will generally impose a voting exclusion preventing any person who may participate in an issue of performance securities covered by sections 8 to 15 of this Guidance Note, or their associates, from voting in favour of the resolution approving their issue.<sup>80</sup>

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A voting exclusion is effected in this instance by including a statement in the notice of meeting proposing the resolution to the effect that the entity will disregard any votes cast in favour of the resolution by or on behalf of any person who may participate in the issue of the performance securities or their associates,<sup>81</sup> save where it is cast by:

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<sup>77</sup> Listing Rule 14.1A.

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<sup>78</sup> Listing Rule 14.1.

<sup>79</sup> Listing Rules 15.1 and 15.1.4. The draft notice should be sent by way of email to the entity's ASX listings adviser (Listing Rule 15.2.2) and clearly marked "not for public release" (Listing Rule 15.6). ASX generally tries to review and notify the entity whether it objects to a draft notice of meeting within 5 business days of receipt. ASX will tell an entity within 5 business days if it needs more time to examine a draft notice of meeting.

<sup>80</sup> Pursuant to its powers in that regard under the last row in the table in Listing Rule 14.11.1.

<sup>81</sup> Guidance Note 35 Security Holder Resolutions has guidance on who is an associate of a person who may participate in the issue of the performance securities for these purposes.

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# ASX LISTING RULES

## Guidance Note 19

- a person as proxy or attorney for another person who is entitled to vote on the resolution, in accordance with directions given to the proxy or attorney to vote on the resolution in that way;
- the chair of the meeting as proxy or attorney for a person who is entitled to vote on the resolution, in accordance with a direction given to the chair to vote on the resolution as the chair decides; or
- a holder acting solely in a nominee, trustee, custodial or other fiduciary capacity on behalf of a beneficiary provided the following conditions are met:
  - the beneficiary provides written confirmation to the holder that they are not excluded from voting, and are not an associate of a person excluded from voting, on the resolution; and
  - the holder votes on the resolution in accordance with directions given by the beneficiary to the holder to vote in that way.

Guidance Note 35 *Security Holder Resolutions* has further guidance on voting exclusions and the procedures that should be followed at a meeting of security holders where a resolution to approve an issue of performance [securities](#) is being considered.

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Disclosures about performance shares¶**

An entity that has performance shares on issue should make an announcement immediately upon satisfaction of the milestone that triggers their conversion into ordinary shares, indicating that the milestone has been achieved and stating the amount of ordinary shares to be issued as a consequence.<sup>82</sup> It should also make an announcement immediately if the milestone is not satisfied by the expiry date, stating that fact and what will happen to the performance shares as a consequence.<sup>83</sup>¶

An entity that has performance shares on issue should disclose in the notes to the statement of financial position in its annual report, preliminary final report (Appendix 4E) and half-year report it may give to ASX:¶  
the number of performance shares on issue at the balance date of the report;¶  
a brief summary of the terms of the performance shares, including in particular the performance milestone that has to be satisfied in order for the performance shares to be converted into ordinary shares and the number of ordinary shares into which they may be converted; and¶  
whether any performance shares were converted or cancelled during the financial period covered by the report.

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