

CO-OPERATIVES AND MUTUALS LISTING ON ASX

<p>The purpose of this Guidance Note</p>	<ul style="list-style-type: none"> • To assist co-operatives and mutuals considering a listing on ASX to understand the options available to them.
<p>The main points it covers</p>	<ul style="list-style-type: none"> • Why a co-operative or mutual might want to list on ASX • The preliminary steps a co-operative or mutual will usually need to take before listing on ASX • ASX's flexible approach to listing co-operatives and mutuals • Examples of that flexible approach
<p>Related materials you should read</p>	<ul style="list-style-type: none"> • Guidance Note 1 <i>Applying for Admission – ASX Listings</i> • Guidance Note 4 <i>Foreign Entities Listing on ASX</i> • Guidance Note 17 <i>Waivers and In-Principle Advice</i>

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Important notice: ASX has published this Guidance Note to assist co-operatives and mutuals considering a listing on ASX to understand the options available to them. 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 co-operatives and mutual business 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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1. Introduction

This Guidance Note is published by ASX Limited (ASX) to assist co-operatives and mutuals considering a listing on ASX to understand the options available to them.¹

The term “co-operative” refers to an association whose members join together and co-operate to achieve some economic, social or cultural benefit. Some familiar examples include producer co-operatives,² consumer co-operatives, worker co-operatives, student co-operatives and housing co-operatives.

The term “mutual” refers to an organisation founded on the principle of mutuality – ie, one that provides services to its members and whose members and customers are therefore one and the same. Some familiar examples include building societies, credit unions, mutual insurance companies and motorist associations.

The distinguishing feature of most co-operatives and mutuals is that they exist primarily to benefit members as members rather than as equity owners. Many are not-for-profit organisations that exist chiefly to provide goods, services or other benefits to their members at a lower cost than they might be able to obtain them elsewhere. Even those that run ‘for-profit’ businesses often distribute their profits to members as rebates or bonuses based on the amount of business they do with the organisation rather than as dividends based on the amount of capital they have contributed to the organisation.

2. Why a co-operative or mutual might want to list on ASX

Many successful co-operatives and mutuals grow to have substantial commercial operations. However, their structure ultimately constrains their capacity to grow. The fact that they exist primarily to benefit members as members rather than as equity owners makes it difficult for them to attract capital from outside investors and they are therefore generally reliant on their members for any capital they need to sustain or grow their operations. Yet they often find it difficult to raise substantial amounts of additional capital from members, for the very reason that they are not structured to pay equity-type returns to the providers of capital.

Many successful co-operatives and mutuals also have considerable latent value locked up within the organisation that members are not able to realise. Again, the fact that they are structured to benefit members as members rather

¹ General guidance on the admission process can be found in Guidance Note 1 *Applying for Admission – ASX Listings*. Further guidance relevant to entities established outside Australia can be found in Guidance Note 4 *Foreign Entities Listing on ASX*.

² Sometimes also referred to as agricultural co-operatives, grower co-operatives or farmer co-operatives.

than as equity owners means that the value of the organisation is often not fully reflected in the value of its equity interests.

It is therefore not uncommon for a co-operative or mutual with successful commercial operations to reach a turning point in its evolution where it wishes to consider a listing. This may be because it wants to access public equity markets for additional capital to grow its operations. Or it may be because it wants to unlock value for its members.

ASX has a long and successful history of bringing co-operatives and mutuals to market and it would encourage any co-operative or mutual considering a listing to do so on the ASX market. An ASX listing brings with it significant benefits. These include access to:

- one of the world's largest investment pools underpinned by Australia's mandatory superannuation system;
- price discovery in a deep and liquid market worth well over a trillion dollars;
- the world class trading platform and clearing and settlement infrastructure of ASX,

and the status that comes from being listed on one of the world's top 10 exchanges.

References in this Guidance Note to a co-operative or mutual listing on ASX are intended to capture all of the different ways in which a co-operative or mutual may come to market.³ For example, they include:

- a co-operative or mutual that has transformed itself to a company by de-registering under its governing legislation and re-registering under the Corporations Act 2001 (Cth)⁴ or that has undergone some other form of reconstruction or demutualisation in anticipation of listing;⁵ and
- an entity to which the co-operative or mutual may have transferred its business in anticipation of that entity being listed.

3. Preliminary steps a co-operative or mutual will usually need to take before listing on ASX

It is fundamental to an entity being able to list on any equity market and to attract capital from investors that it have operations designed to generate investment returns and a structure that facilitates the distribution of those returns to investors based on the level of their investment.

As mentioned previously, many co-operatives and mutuals have operations designed to generate member benefits rather than investment returns, or have structures that lead to any returns being distributed to members on a basis other than the level of their investment. They therefore do not meet the fundamental requirement for listing on ASX that they have a structure and operations appropriate for a listed entity.⁶ Consequently, most co-operatives or mutuals seeking to list on ASX will first need to undertake some form of reconstruction or demutualisation before they can do so.⁷

Many co-operatives and mutuals also have constitutional provisions that do not comply with the Listing Rules. Some, for example, have constitutional provisions that:

³ Referring to a co-operative or mutual listing on ASX is convenient shorthand even though often the entity that is being listed is not technically a co-operative or mutual but rather some form of successor entity.

⁴ Referred to in this Guidance Note as the "Corporations Act".

⁵ Co-operatives and mutuals incorporated under specific governing legislation will often have to de-register under that legislation and re-register as a company under the Corporations Act in order to free themselves from restrictions in their governing legislation that are incompatible with them being a listed entity.

⁶ Listing Rule 1.1 condition 1.

⁷ Not all co-operatives or mutuals will need to undertake a reconstruction or demutualisation before listing on ASX. For example, Namoi Cotton Co-operative Limited, which was incorporated under the Co-operation Act 1923 (NSW) and registered under the Co-operatives Act 1992 (NSW), listed on ASX in 1998 while still retaining its co-operative status.

- only allow certain categories of people to become or remain as members;⁸
- restrict the maximum number of shares that a single member and their associates can hold;⁹
- only allow certain categories of members to vote;
- provide that each member has one vote only, regardless of the number of shares they hold, or impose a cap on the number of votes that a single member and their associates can exercise;
- restrict the right to transfer shares to transferees who meet certain criteria;
- require the approval of the board to any share transfer; or
- provide that members can only dispose of their shares via a company-operated market or redemption facility.

These features not only conflict with the general requirement that an applicant for listing have a structure that is appropriate for a listed entity, they also potentially conflict with the ‘one share one vote’ requirement in Listing Rule 6.9, the prohibition against interfering with a transfer of securities in Listing Rule 8.10 and, to the extent that any of these constitutional provisions are enforced via divestiture powers, the anti-divestiture provisions in Listing Rules 6.10 and 6.12.

Consequently, many co-operatives or mutuals seeking to list on ASX will also need to amend their constitution before they can do so.

For many co-operatives and mutuals, undertaking a reconstruction or demutualisation and amending their constitution to facilitate a listing can be a tricky process. Typically it will require the approval of members, usually by way of a super-majority resolution. A substantial body of the members therefore will have to be convinced to change the fundamental basis on which their organisation was founded, to cede a level of ownership and control to the providers of equity capital and sometimes also to relinquish some of their membership benefits.

For some co-operatives and mutuals, going from their current form to a conventional listed structure in one fell swoop can be a bridge too far for their members. As a practical matter, they will need to undertake this process in stages to garner the necessary member support. ASX understands this point and is prepared to adopt a flexible approach to the application of the Listing Rules in order to allow these entities to make the transition to a listed entity.

4. ASX’s flexible approach to listing co-operatives and mutuals

In an appropriate case, ASX is prepared to admit to the official list a co-operative or mutual with a structure or operations that it would not allow for other listed entities. It is also prepared to grant waivers of the Listing Rules to permit the entity to preserve some of its co-operative or mutual features for a period of time. Some examples of ASX’s flexibility in this regard are mentioned in section 7 below.

ASX does so in recognition of the practical reality mentioned previously that without these special accommodations, some co-operatives and mutuals will not garner the member support necessary to convert to a listed entity. ASX also does so confident in the knowledge that once they are listed, ordinary market forces will usually drive these entities to “normalise” their structure and operations in the fullness of time.

In seeking to take advantage of this flexibility, co-operatives and mutuals must bear in mind that their proposed structure and operations post-listing will need to attract investor support, as well as member support, or else they will not secure the full benefits of a listing. They therefore need to strike an appropriate balance between the

⁸ For example, section 67 of the Victorian Co-operatives Act 1996 stipulates that a person is not qualified to be admitted to membership of a co-operative unless there are reasonable grounds to believe that the person will be an active member of the co-operative. To be ‘active’ means to utilise or support an activity of, or maintain a relationship or an arrangement with, the co-operative, in connection with the carrying on of a primary activity of the co-operative. Similarly, it is not uncommon for producer co-operatives to have constitutional provisions limiting membership to current or former producers.

⁹ As was the case in *Shears v The Phosphate Co-operative Company of Australia Limited* (1989) 7 ACLC 812.

interests of members and the interests of investors at the point of listing. They also need to consider the impact of their proposed structure and operations over the longer term on their attractiveness to the providers of capital and, in that regard, consider the timeline over which they might phase out any particular non-standard elements of their structure and operations.¹⁰

5. General considerations ASX takes into account

In deciding whether or not to grant to a co-operative or mutual the special accommodations referred to in this Guidance Note, ASX assesses each case on its merits, having regard to the following general considerations:

- the history and circumstances of the entity in question;
- the steps it proposes to take to convert to a listed entity, including any reconstruction, demutualisation or constitutional amendments involved;
- the member approvals it requires for these purposes;
- the entity's views as to the likelihood of these approvals being obtained without ASX granting a particular accommodation referred to in this Guidance Note;
- the reasons articulated by the entity as to why such accommodation is appropriate in the circumstances;
- the period of time for which the entity seeks such accommodation;
- any undertaking the applicant may be prepared to give in terms of when and how it will seek to normalise its structure and operations;
- whether the entity is proposing a substantial capital raising from outside investors which, if successful, will indicate that there is a level of investor support for the entity, notwithstanding that its structure and operations may not conform to the usual model for a listed entity; and
- the overwhelming imperative to preserve the reputation and integrity of the ASX market.

On the third last point, ASX acknowledges, as a practical matter, that a co-operative or mutual may not be in a position to give an undertaking to remove any non-standard elements from its structure and operations for the simple reason that its creation of these non-standard elements will often be crucial to garnering the member support necessary for its listing. However, ASX expects co-operatives and mutuals that are admitted to the official list with a particular non-standard element in their structure or operations to acknowledge the special nature of the accommodations they have been granted by ASX and to consider moving to a more normal listed entity structure and operations as their circumstances permit.

To that end, ASX will generally impose as a condition of listing¹¹ that a co-operative or mutual that has been admitted to the official list with a particular non-standard element in its structure or operations disclose periodically (usually in its sixth annual report after listing and in every third annual report thereafter):

- whether it has considered removing that non-standard element from its structure and operations; and
- if it has not decided to remove that non-standard element for the time being, its reasons for this.

More detailed examples of the form of the condition ASX is likely to impose are included in sections 7.1 – 7.5 below.

¹⁰ In saying this, ASX acknowledges (as mentioned in section 5 below) that a co-operative or mutual may not be able, at the time of listing, to commit to a particular timeline over which it will consider phasing out any particular non-standard elements of its structure or operations.

¹¹ ASX has a general power under Listing Rule 1.19 to admit an entity to the official list on any conditions it thinks appropriate.

ASX also expects a co-operative or mutual applying for admission to the official list that has a particular non-standard feature in its structure or operations to include a clear, concise and effective¹² summary of that feature in its listing prospectus, product disclosure statement (PDS) or information memorandum.¹³

In the case of a prospectus or PDS that has an investment overview section, that summary should also appear in the investment overview section.¹⁴

ASX would emphasise that whether it will admit a co-operative or mutual with a particular non-standard element in its structure or operations and grant any necessary consequential waiver of the Listing Rules is always considered on a case-by-case basis. The fact that the ASX may in the past have listed a co-operative or mutual with a particular structure or operations, or granted it particular waivers from the Listing Rules, does not necessarily mean that it will do likewise for another co-operative or mutual in the future.

6. Initial discussions in advance of listing application

As each case is assessed on its merits, ASX recommends that any co-operative or mutual considering an ASX listing first discuss the matter with ASX Listings Compliance at the earliest opportunity. Those discussions are generally best held with the branch office where the entity intends to lodge its application for admission to the ASX official list. Typically, this will be the ASX branch office where the applicant wishes to have its home branch if its application for admission is successful.¹⁵

ASX Listings Compliance will be able to provide general advice on the listing process and a preliminary view on:

- whether the applicant's structure and operations are likely to meet the requirement in Listing Rule 1.1 condition 1 that they are appropriate for a listed entity;
- whether any securities that have non-standard terms are likely to meet the requirement in Listing Rule 6.1 that, in ASX's opinion, their terms are appropriate and equitable;
- any waivers from, or rulings in respect of, the Listing Rules that the applicant may be proposing to request in conjunction with its application and the likelihood of those waivers or rulings being given; and
- the expected timeframe for listing, given the nature and complexity of the application and the current workloads within ASX Listings Compliance.

ASX Listings Compliance may suggest that the co-operative or mutual seek 'in-principle' advice from ASX that ASX is prepared to admit it with a particular structure or operations and/or to grant particular waivers from the Listing Rules so that it can go about the task of seeking the necessary member approvals with a reasonable level of surety that it will be admitted to the official list at the conclusion of that process.

¹² Sections 715A and 1013C(3) of the Corporations Act require prospectuses and PDSs to be worded and presented in a clear, concise and effective manner.

¹³ Listing Rule 1.1 condition 3 requires an entity applying for admission to the official list to have lodged a prospectus or PDS with ASIC or, if ASX agrees, an information memorandum instead of a prospectus or PDS. A prospectus for securities must set out all the information that investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus, to make an informed assessment of the rights and liabilities attaching to the securities and of the issuer's assets and liabilities, financial position and performance, profits and losses and prospects (section 710 of the Corporations Act). A PDS for other financial products must include all information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product (section 1013E of the Corporations Act). An information memorandum must include the same information as a prospectus or PDS (Listing Rules 1.4.1 and 1.4.2).

In ASX's view, information about non-standard features in the structure or operations of an entity of the type referred to in this Guidance Note will be material information for investors and therefore required to be included in an entity's prospectus, PDS or information memorandum.

¹⁴ For guidance on the recommended contents of an investment overview section in a prospectus, see section C of ASIC Regulatory Guide 228: *Prospectuses: Effective disclosure for retail investors*.

¹⁵ The ASX home branch for an entity looks after day-to-day matters relating to the entity's listing and makes decisions about the Listing Rules that affect it. ASX has home branches in Sydney, Perth and Melbourne.

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

In some cases, the process of listing on ASX may require a co-operative or mutual to engage with or seek approval from the Australian Securities and Investment Commission (ASIC).¹⁶ Where that is the case, ASX would strongly encourage a co-operative or mutual to commence its discussions with ASIC at the earliest opportunity.

7. Specific examples of ASX's approach to co-operatives

7.1. Foundation securities

In an appropriate case,¹⁷ ASX may permit a co-operative or mutual to list with a single security – often referred to as a “foundation security” or sometimes as a “golden security” – which is held for the benefit of members and which confers special control rights on the holder. This allows members and investors to hold a single class of ordinary securities but members to exercise special control rights through the foundation security.

There are many different permutations of this type of structure but one example is where the foundation security confers the right to veto a special resolution (either directly or because the holder can exercise a disproportionate number of votes on such a resolution) and/or the right to elect a given number or percentage of directors.

When designing a foundation security, co-operatives and mutuals need to consider the impact the security may have on their attractiveness to the providers of capital, both at the point of listing and over the longer term.

In addition to the general considerations referred to in section 5 above, in determining whether to allow a foundation security, ASX will have regard to:

- the terms proposed for the foundation security and whether, in ASX's opinion, they are appropriate and equitable;¹⁸
- who will hold the foundation security;
- the mechanisms that the entity proposes to ensure the foundation security continues to be held, and its rights exercised, only for the benefit of persons who would have qualified to be members of the co-operative or mutual had it continued in its pre-listed form, and cannot be used by a potential acquirer to purchase control without compensating investors;
- the period for which the foundation security will confer the special rights on its holder and what will happen to the foundation security at the end of that period (for example, will it convert to an ordinary security or will it be bought back or cancelled);
- if it is proposed that the foundation security will confer special rights for a period longer than 5 years, whether it is proposed to have mechanisms to review the continued operation of those special rights over that period, for example, by requiring security holders to approve their continued applicability at the end of 5 years and each year thereafter and, if so, which security holders have to give the approval and by what percentage; and
- whether the entity's constitution contains any mechanism for the foundation security to be redeemed or bought back or otherwise to lose its rights if the entity's business at the time of listing ceases to be its main undertaking.¹⁹

¹⁶ For example, if the entity is proposing to implement a reconstruction or demutualisation in advance of listing via a scheme of arrangement under the Corporations Act that requires a statement in writing from ASIC that it has no objection to the scheme under section 411(17), or is proposing to adopt a bifurcated structure with a listed trust that requires relief from particular provisions of Chapter 5C.

¹⁷ Some examples where ASX allowed a foundation security include Wesfarmers Limited, which listed in 1984 with a 'Founder's Share' held by Westralian Farmers Co-Operative Limited, and Graincorp Limited, which listed in 1998 with a 'PWA Foundation Share' held by the Prime Wheat Association Limited, being the grower representative body in industry matters.

¹⁸ As required by Listing Rule 6.1.

¹⁹ The rationale for suggesting such a provision is that the special accommodations afforded to a co-operative or mutual in accordance with this Guidance Note are there to protect the special interest of its members in its undertaking for a period of time so as to secure their

A co-operative or mutual seeking to list on ASX with a foundation security should include with its application for listing a cover letter addressing the general considerations mentioned in section 5 and the specific considerations mentioned above.

If ASX agrees to list a co-operative or mutual with a foundation security, for greater transparency, ASX will generally require as a condition of listing²⁰ that, for as long as the foundation security remains in place, the entity include:

- in a reasonably prominent location on its website and in its annual report each year a description of the foundation security and the rights attached to it; and
- an agreed form of wording highlighting the existence of the foundation security as a note in:
 - each continuous disclosure announcement the entity lodges on MAP under Listing Rule 3.1; and
 - each CHESS and issuer-sponsored holding statement issued in relation to the entity's securities.

The entity should include in the cover letter accompanying its application for listing a suggested form of wording for the note above.²¹

As indicated in section 5 above, ASX will also generally impose as a condition of listing that the entity disclose periodically (usually in its sixth annual report after listing and in every third annual report thereafter):

- whether it has considered removing the foundation security from its structure; and
- if it has decided not to remove the foundation security for the time being, its reasons for this.

7.2. Security holding limits

In an appropriate case,²² ASX may allow a co-operative or mutual which had a restriction on the number of securities a member could hold prior to listing, to continue that restriction for a period after listing. This may help to allay member concerns that a power shift towards new investors might occur too quickly or that a takeover or other change of control might occur before the entity has had an opportunity to consolidate its transition to a listed entity.

To ensure a security holding limit is effective, ASX will generally allow it to capture not only securities that a person holds but also securities in which a person or any "associate"²³ has a "relevant interest".²⁴ If the entity is not incorporated under the Corporations Act and not covered by provisions comparable to Parts 6C.1 and 6C.2 of that Act,²⁵ ASX will also generally allow the entity to have equivalent provisions in its constitution requiring a member to disclose substantial holdings and to respond to tracing notices issued by the entity.

support for it to convert from a member-based organisation to a listed entity. If the main undertaking of the listed entity changes (for example, through merger or acquisition) and the members no longer have the same special interest in its undertaking, then the need to protect those interests no longer exists and should therefore fall away.

For ASX's interpretation of the meaning of "main undertaking", see section 1.3 of Guidance Note 12 *Significant Changes to Activities*.

²⁰ See note 11 above.

²¹ The suggested form of wording for this note should be clear and concise. It is acceptable for it to refer the reader to the entity's website for further information.

Entities should be cognisant that the notes field in CHESS holding statements is limited to two lines each of 90 characters, including punctuation and spaces. Entities should check with their registries any limitations they may have on the length of any note in issuer-sponsored holding statements before proposing their suggested wording for this note.

²² Some examples where ASX allowed security holding limits include AWB Limited, which listed in 2001 with a 10% limit on the number of 'Class B' shares that could be held by investors, IOOF Holdings Limited, which listed in 2003 with a 10% limit on the number of ordinary shares that could be held by any person in the 5 years following listing, and Warrnambool Cheese and Butter Factory Company Holdings Limited, which listed in 2004 with a 5% limit on the number of ordinary shares that could be held by any person in the 5 years following listing.

²³ As defined in section 12 of the Corporations Act.

²⁴ As defined in sections 608 and 609 of the Corporations Act.

²⁵ These Parts respectively require a substantial holder in a listed entity to disclose their holdings of securities to the entity and allow a listed entity to issue tracing notices to uncover the ultimate beneficial owner or controller of securities in the entity.

ASX will generally permit a security holding limit to be enforced through appropriate and equitable divestiture powers in the entity's constitution that allow the entity to dispose of any securities held in excess of the limit and, pending the disposal, to suspend all voting, dividend and other rights in relation to the excess.²⁶

When designing a security holding limit, co-operatives and mutuals need to consider the impact the limit may have on their attractiveness to the providers of capital, both at the point of listing and over the longer term.

In addition to the general considerations referred to in section 5 above, in determining whether to allow a security holding limit, ASX will have regard to:

- the size of the limit proposed (in this regard, a limit of less than 10% is unlikely to be acceptable to ASX²⁷);
- the period for which the limit will apply (in this regard, a period of longer than 10 years after listing is unlikely to be acceptable to ASX);
- whether it is proposed to phase out the limit over that period, for example, by providing for periodic increases to the limit over time before it eventually falls away altogether;
- if it is proposed that the limit will apply for a period longer than 5 years, whether it is proposed to have mechanisms to review the limit over that period, for example, by requiring security holders to approve the continued application of the limit at the end of 5 years and each year thereafter and, if so, which security holders have to give the approval and by what percentage;
- the terms in which the limit is expressed and whether, in ASX's opinion, they are clear and unambiguous;
- whether the mechanisms for enforcing the limit (including any divestment or disenfranchisement provisions) are, in ASX's opinion, appropriate and equitable;²⁸ and
- whether the entity's constitution contains a mechanism for the limit to fall away if its business at the time of listing ceases to be its main undertaking.²⁹

A co-operative or mutual seeking to list on ASX with a security holding limit should include with its application for listing a cover letter addressing the general considerations mentioned in section 5 and the specific considerations mentioned above.

Generally speaking, ASX is more likely to approve larger security holding limits for shorter periods than smaller security holding limits for longer periods.

ASX will not allow a co-operative or mutual that did not have a security holding limit in its governing legislation or constitution pre-listing to have one post-listing, nor to have a lower security holding limit post-listing than the one that applied pre-listing.

ASX also will not allow a limit that, in its opinion, is capable of being used in an arbitrary or discriminatory manner to divest or disenfranchise security holders.

Again, if ASX agrees to list a co-operative or mutual with a security holding limit, for greater transparency, ASX will generally require as a condition of listing³⁰ that, for as long as the limit remains in place, the entity include:

- in a reasonably prominent location on its website and in its annual report each year a description of the security holding limit then in force; and

²⁶ As permitted under Listing Rules 6.10.5 and 6.12.3.

²⁷ In certain exceptional cases, ASX has permitted 5% holding limits: for example, Warrnambool Cheese and Butter Factory Company Holdings Limited (note 22) and Bega Cheese Limited, which listed in 2011 also with a 5% limit.

²⁸ As required by Listing Rules 6.10.5 and 6.12.3.

²⁹ See note 19 above

³⁰ See note 11 above.

- an agreed form of wording highlighting the existence of the security holding limit as a note in:
 - each continuous disclosure announcement the entity lodges on MAP under Listing Rule 3.1; and
 - each CHESS and issuer-sponsored holding statement issued in relation to the entity's securities.

The entity should include in the cover letter accompanying its application for listing a suggested form of wording for the note above.³¹

As indicated in section 5 above, ASX will also generally impose as a condition of listing that the entity disclose periodically (usually in its sixth annual report after listing and in every third annual report thereafter):

- whether it has considered removing the security holding limit from its constitution; and
- if it has decided not to remove the security holding limit for the time being, its reasons for this.

7.3. Mandatory director representation

In an appropriate case,³² ASX may allow a co-operative or mutual to list with a constitutional provision requiring a given number or percentage of directors to meet certain qualifications designed to ensure that its core constituency continues to be represented on the board. For example, in the case of a farmers co-operative, ASX may allow a constitutional provision requiring that a certain number or percentage of directors must be active farmers.

Any such constitutional provision must not operate in a manner that would entrench an individual as a director or that would otherwise conflict with the director rotation requirements in Listing Rule 14.4.³³ It should also be clearly understood that, regardless of the constituency from which the director is drawn, the director owes his or her duties to the entity and its security holders as a whole and must act in its and their best interests.

When designing a constitution provision requiring mandatory director representation, co-operatives and mutuals need to consider the impact that requirement may have on their attractiveness to the providers of capital, both at the point of listing and over the longer term.

In addition to the general considerations referred to in section 5 above, in determining whether to allow a constitutional provision requiring mandatory director representation, ASX will have regard to:

- the period for which the requirement will apply;
- whether it is proposed to phase out the requirement over that period, for example, by providing for periodic decreases in the number or percentage of directors required to meet the particular qualification before it eventually falls away altogether;
- if it is proposed that the requirement will apply for a period longer than 5 years, whether it is proposed to have mechanisms to review the requirement over that period, for example, by requiring security holders to approve the continued operation of the requirement at the end of 5 years and each year thereafter and, if so, which security holders have to give the approval and by what percentage;
- the terms in which the requirement is expressed and whether, in ASX's opinion, they are clear and unambiguous;

³¹ The suggested form of wording for this note should be clear and concise: see note 21 above.

³² For instance, at the time of their respective listings, the board of AWB Limited (note 22) comprised a managing director, seven Class A Directors (elected by Class A shareholders in various regions) and two Class B directors; the board of Graincorp Limited (note 17) was able to be controlled by its major shareholder, PWA, through its holding of the foundation share; and under Namoi Cotton Co-operative Limited's constitution, not more than three of the mandated board size of 7 directors were permitted to be non-growers.

³³ In other words, all directors have to face election or re-election in accordance with Listing Rule 14.4. If a director with the requisite qualification fails to be elected or re-elected by security holders, the entity would have to find another director with the requisite qualification.

- whether the entity's constitution adequately addresses what will happen if a director who has been appointed or elected pursuant to that requirement dies, resigns or otherwise ceases to hold office (it cannot be the case that the board is inquorate or otherwise unable to function in this scenario); and
- whether the entity's constitution provides for the requirement to fall away if its business at the time of listing ceases to be its main undertaking.³⁴

A co-operative or mutual seeking to list on ASX with mandatory director representation provisions should include with its application for listing a cover letter addressing the general considerations mentioned in section 5 and the specific considerations mentioned above.

Again, if ASX agrees to list a co-operative or mutual with mandatory director representation provisions, for greater transparency, ASX will generally require as a condition of listing³⁵ that, for as long as the provisions remain, the entity include:

- in a reasonably prominent location³⁶ on its website and in its annual report each year a description of the mandatory director representation provisions then in force; and
- an agreed form of wording highlighting the existence of the mandatory director representation provisions as a note in:
 - each continuous disclosure announcement the entity lodges on MAP under Listing Rule 3.1; and
 - each CHESS and issuer-sponsored holding statement issued in relation to the entity's securities.

The entity should include in the cover letter accompanying its application for listing a suggested form of wording for the note above.³⁷

As indicated in section 5 above, ASX will also generally impose as a condition of listing that the entity disclose periodically (usually in its sixth annual report after listing and in every third annual report thereafter):

- whether it has considered removing the mandatory director representation provisions from its constitution; and
- if it has decided not to remove the mandatory director representation provisions for the time being, its reasons for this.

7.4. Dual classes of securities

In an appropriate case,³⁸ ASX may permit a co-operative or mutual to list with dual classes of securities – one intended to be held exclusively by or for the benefit of the members of the co-operative or mutual (in their capacity as members) and the other intended to be held by investors (including members in their capacity as investors).

There are many different permutations of this type of structure but one example is where the member class confers particular control rights (for example, the right to elect a given number or percentage of directors) but no dividend rights, while the investor class confers lesser control rights (for example, the right to elect the remaining directors) but full dividend rights. Typically, in this permutation, the investor class would be quoted on ASX but the member class would not be quoted or transferable and, if the member class is held by members personally rather than by a vehicle on their behalf, the entity would have constitutional provisions ensuring that the member class can only be held by persons who would have qualified to be members of the co-operative or mutual had it continued in its pre-

³⁴ See note 19 above

³⁵ See note 11 above.

³⁶ This would generally best appear in the sections of the website and annual report dealing with the composition of the entity's board.

³⁷ The suggested form of wording for this note should be clear and concise: see note 21 above.

³⁸ An example where ASX allowed a dual class structure was AWB Limited (note 22), which listed in 2001 with 'Class A' shares held by growers and 'Class B' shares held by investors. The Class A shares were non-transferable and not quoted on ASX. They carried no dividend rights but could elect a majority of the directors. The Class B shares were quoted on ASX and carried dividend rights. ABB Grain Limited, which listed in 2002, also had a capital structure with Class A shares held by growers and Class B shares held by investors.

listed form. Typically those constitutional provisions would include a power for the entity to redeem, buy back or otherwise divest a member security if the holder ceases to meet the qualifications to be a member holder.

When designing dual classes of securities, co-operatives and mutuals need to consider the impact the dual class structure may have on their attractiveness to the providers of capital, both at the point of listing and over the longer term.

In addition to the general considerations referred to in section 5 above, in determining whether to allow dual classes of securities, ASX will have regard to:

- the terms proposed for each class of securities and whether, in ASX's opinion, they are appropriate and equitable;³⁹
- the mechanisms that the entity proposes to ensure the member class continues to be held only by or for the benefit of persons who would have qualified to be members of the co-operative or mutual had it continued in its pre-listed form, and cannot be used by a potential acquirer to purchase control without compensating investors; and
- whether the entity's constitution contains any mechanism for the dual class structure to be unwound or fall away⁴⁰ if its business at the time of listing ceases to be its main undertaking.⁴¹

A co-operative or mutual seeking to list on ASX with a dual class structure should include with its application for listing a cover letter addressing the general considerations mentioned in section 5 and the specific considerations mentioned above.

Again, if ASX agrees to list a co-operative or mutual with a dual class structure, for greater transparency, ASX will generally require as a condition of listing⁴² that the entity include:

- in a reasonably prominent location on its website and in its annual report each year a description of the dual class structure and an explanation of the different rights attaching to each class; and
- an agreed form of wording highlighting the existence of the dual class structure as a note in:
 - each continuous disclosure announcement the entity lodges on MAP under Listing Rule 3.1; and
 - each CHESS and issuer-sponsored holding statement issued in relation to the entity's securities.

The entity should include in the cover letter accompanying its application for listing a suggested form of wording for the note above.⁴³

If the investor class has significantly different voting rights to the member class, for greater transparency, ASX may also require the investor class to have an ASX trading code that will signify to investors the fact that they are not holding ordinary securities with normal voting rights. For example, instead of having the usual 3 character trading code for equity securities, ASX may require the investor class to have a 5 character code with the letters "LV" or "NV" at the end, signifying that the class has limited voting rights or no voting rights.

As indicated in section 5 above, ASX will also generally impose as a condition of listing that the entity disclose periodically (usually in its sixth annual report after listing and in every third annual report thereafter):

³⁹ As required by Listing Rule 6.1.

⁴⁰ For example, by having the member class and the investor class each automatically convert into ordinary securities or by having the member class redeemed and the rights of the investor class automatically augmented or normalised so that they effectively become ordinary securities.

⁴¹ See note 19 above

⁴² See note 11 above.

⁴³ The suggested form of wording for this note should be clear and concise: see note 21 above.

- whether it has considered replacing its dual class structure with a single class of ordinary securities; and
- if it has decided not to replace the dual class structure for the time being, its reasons for this.

7.5. Bifurcated structures

In an appropriate case,⁴⁴ ASX may allow a co-operative or mutual to list with a bifurcated structure, where investors hold securities in a listed holding company or trust that in turn holds a particular type of security or securities in the co-operative or mutual. In this type of structure, the co-operative or mutual would typically not be listed. It would continue operating as a co-operative or mutual and its members would continue to hold shares in it in the usual course. The security or securities held by the listed holding company or trust in the co-operative or mutual would typically have rights attached that would give investors in the holding company or trust an economic return equivalent to what they might otherwise have received if they held shares directly in the co-operative or mutual.

This structure allows members to retain their ownership and control of the co-operative or mutual but allows outside investors to gain an economic exposure to its performance via their interest in the listed holding company or trust.

When designing a bifurcated structure, co-operatives and mutuals need to consider the impact of the structure on their attractiveness to the providers of capital, both at the point of listing and over the longer term. In this regard, bifurcated structures can be complex, which in and of itself may deter investors. They can introduce complications into the capital raising process (for example, will future capital raisings require separate capital raisings at the co-operative/mutual level and at the listed entity level and what happens if one or other raising is unsuccessful?). They can also be very difficult to unwind should the entity reach a point in its evolution when it wants to “normalise” its structure and operations in order to make itself more attractive to the providers of capital.

In addition to the general considerations referred to in section 5 above, in determining whether to allow a bifurcated structure, ASX will have regard to:

- the name proposed to be given to the listed entity that will hold securities in the co-operative or mutual and its proposed code – in this regard, the name of the entity and the code must clearly differentiate it from the co-operative or mutual and not convey any impression that it has any rights or entitlements in relation to the co-operative or mutual greater than it in fact has;
- whether the rights attaching to the securities held by the listed entity in the co-operative or mutual are appropriate and equitable, especially in terms of what happens if the co-operative or mutual undertakes a capital raising, buy back or return of capital, is wound up, or is subject to a takeover, merger or other control event;⁴⁵
- the mechanisms that the entity proposes to ensure that the economic entitlements attaching to the securities held by the listed entity in the co-operative or mutual are protected and cannot be diluted without the consent of the investors in the listed entity;
- the mechanisms that the entity proposes to ensure that the voting and other rights attaching to the securities held by the listed entity in the co-operative or mutual are protected and cannot be altered without the consent of the investors in the listed entity; and
- the mechanisms that the entity proposes to ensure that the listed entity can comply with its continuous and periodic disclosure obligations under the Listing Rules and to ensure that investors in the listed entity receive timely disclosure of information that may affect the price or value of their securities in the listed entity.

On this last point, it should be noted that bifurcated structures can raise particular concerns for both ASIC and ASX around the ability of the listed entity to comply with its disclosure obligations. The design of the bifurcated structure must ensure that the listed entity receives from the co-operative or mutual in a timely manner all of the information

⁴⁴ An example where ASX allowed a bifurcated structure was the Fonterra Shareholders' Fund, which listed on ASX in 2012 and which holds interests in the New Zealand dairy co-operative Fonterra Co-operative Group Limited.

⁴⁵ If they are not, then that will bear on whether the listed holding company or trust has a structure and operations appropriate for a listed entity, as required by Listing Rule 1.1 condition 1.

it needs to comply with both its continuous and periodic disclosure obligations and to ensure that investors in the listed entity receive timely disclosure of information that may affect the price or value of their securities in the listed entity in the same manner and at the same time as they would have if they held securities directly in the cooperative or mutual and it was listed on ASX. This may be achieved, for example, by:

- having constitutional provisions requiring there to be common directors on the board of directors of the co-operative/mutual and the board of directors of the listed entity (or, where the listed entity is a trust, on the board of directors of the responsible entity of the trust) and acknowledging that such directors can disclose to the listed entity any information acquired in their capacity as a director of the co-operative/mutual, even where it might otherwise be considered confidential or proprietary to the co-operative/mutual; and
- having a legally enforceable agreement between the co-operative/mutual and the listed entity (or, where the listed entity is a trust, the responsible entity of the trust) requiring the co-operative/mutual to give to the listed entity in a timely manner any information it may reasonably require for the purposes of complying with its continuous and periodic disclosure obligations.

A co-operative or mutual seeking to list on ASX with a bifurcated structure should include with its application for listing a cover letter addressing the general considerations mentioned in section 5 and the specific considerations mentioned above.

Again, if ASX agrees to list a co-operative or mutual with a bifurcated structure, for greater transparency, ASX will generally require as a condition of listing⁴⁶ that the entity include:

- in a reasonably prominent location on its website and in its annual report each year a description of the structure by which the listed entity holds its interest in the co-operative or mutual, the rights attaching to the securities held by listed entity in the co-operative or mutual, and the rights attached to the securities held by other members of the co-operative or mutual; and
- an agreed form of wording highlighting the existence of the bifurcated structure as a note in:
 - each continuous disclosure announcement the entity lodges on MAP under Listing Rule 3.1; and
 - each CHESS and issuer-sponsored holding statement issued in relation to the entity's securities.

The entity should include in the cover letter accompanying its application for listing a suggested form of wording for the note above.⁴⁷

As indicated in section 5 above, ASX will also generally impose as a condition of listing that the entity disclose periodically (usually in its sixth annual report after listing and in every third annual report thereafter):

- whether it has considered collapsing the bifurcated structure and giving investors in the listed entity a direct stake in co-operative or mutual; and
- if it has decided to not collapse the bifurcated structure for the time being, its reasons for this.

ASX will also generally require as a condition of listing that the agreements and arrangements that have been put in place to ensure that the listed entity can comply with its continuous and periodic disclosure obligations under the Listing Rules and to ensure that investors in the listed entity receive timely disclosure of information that may affect the price or value of their securities in the listed entity are not revoked or amended without ASX's prior consent.

⁴⁶ See note 11 above.

⁴⁷ The suggested form of wording for this note should be clear and concise: see note 21 above.

7.6. Co-operative capital units and mutual capital instruments

Australian law permits co-operative companies⁴⁸ to issue “co-operative capital units” (“CCUs”)⁴⁹ and mutual companies⁵⁰ to issue “mutual capital instruments” (“MCIs”).⁵¹ In each case, these typically take the form of a hybrid equity instrument that has some equity-like features and some debt-like features.

Where a CCU or MCI has debt-like features, ASX will be favourably disposed to declaring the CCU or MCI to be a debt security⁵² for the purposes of the Listing Rules and admitting the issuer as an ASX Debt Listing⁵³ rather than an ASX Listing.

7.7. Agreements with related parties

In an appropriate case,⁵⁴ ASX may grant a co-operative or mutual a waiver from Listing Rule 10.1 to allow it to enter into certain standard-form agreements with persons who would ordinarily be covered by that rule⁵⁵ without having to obtain the approval of security holders or an independent expert's report on the fairness and reasonableness of the transaction. For example, in the case of a producers co-operative that enters into standard-form supply agreements on the same terms and conditions with all of its suppliers, ASX would typically grant a waiver from Listing Rule 10.1 to allow the entity to enter into such an agreement with a supplier who also happened to be a director or substantial holder of the entity.

ASX must be satisfied that the agreement in question is a standard-form agreement and that there is no prospect of a person in a position of influence gaining any advantage from the agreement that is not available to other parties who enter into the same type of agreement.

For transparency, ASX will usually require the entity to disclose to the market that it has received the waiver.

Guidance on applications for waivers can be found in Guidance Note 17: *Waivers and In Principle Advice*.

7.8. Dual listed entities

In an appropriate case,⁵⁶ where a co-operative or mutual is formed under the laws of a foreign jurisdiction and has a primary listing on an overseas exchange, ASX may recognise compliance by the entity with a particular obligation

⁴⁸ Co-operatives are generally registered under specific state or territory laws governing co-operative companies (although they can also be registered as ordinary companies under the Corporations Act with their co-operative features achieved by appropriate provisions in their constitution). Under the Australian Uniform Co-operative Laws Agreement between the Australian states and territories, each state and territory has agreed either to adopt, or to enact legislation that is consistent with, template legislation enacted in New South Wales called the Co-operatives National Law.

⁴⁹ See Division 2 of Part 3.4 of the Co-operatives National Law. A CCU is an interest issued by a co-operative conferring an interest in the capital (but not the share capital) of the co-operative (section 345(1) of the Co-operatives National Law). The holder of a CCU is not entitled to the rights of a member of the co-operative (section 349(c) of the Co-operatives National Law).

⁵⁰ A “mutual entity” is defined in sections 9 and 51M of the Corporations Act as a company registered under the Corporations Act whose constitution provides that “a person has no more than one vote at a general meeting of the company for each capacity in which the person is a member of the company”. To issue MCIs, the mutual entity must be a public company which does not have voting shares (other than MCIs) quoted on a prescribed financial market and which is not a registered entity within the meaning of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). The mutual entity's constitution must also state the entity is intended to be an “MCI mutual entity” for the purposes of the Corporations Act (section 167AC).

⁵¹ See Part 2B.8 of the Corporations Act. This Part requires that MCIs may only be issued as fully paid shares; dividends in respect of MCIs must be non-cumulative; the issuer's constitution must set out the rights attached to the MCI with respect to participation in surplus assets and profits; and the rights attached to an MCI may only be varied or cancelled by special resolution of members and either by special resolution passed at a meeting of the MCI holders or with the written consent of members with at least 75% of the MCIs (sections 167AC and 167AF).

⁵² Exercising its power in that regard under paragraph (b) of the definition of “debt security”, and paragraph (h) of the definition of “equity security”, in Listing Rule 19.12.

⁵³ See Listing Rules 1.8 – 1.10 and Guidance Note 29 *Applying for Admission – ASX Debt Listings*.

⁵⁴ As an example, Farm Pride Foods Limited, which listed in 1997, was granted an ongoing waiver by ASX from Listing Rule 10.1 enabling it to enter into supply agreements with producers who were also directors on conditions which included that the contract terms did not differ materially from those entered into with producers who were not related parties.

⁵⁵ That is to say, related parties, substantial holders and persons who are associates of a related party or substantial holder.

⁵⁶ A case where such waivers were granted was the Fonterra Shareholders' Fund (note 44), which was established in New Zealand and had a dual listing on ASX and NZX.

imposed by its home exchange as constituting, in principle, sufficient reason to justify the granting of a waiver from a comparable, but inconsistent, obligation under the ASX Listing Rules.

Again, for transparency, ASX will usually require the entity to disclose to the market that it has received any such waiver.

Further guidance on these types of waivers can be found in section 3.4 of Guidance Note 4 *Foreign Entities Listing on ASX*.