

*Listing a  
company on  
the Australian  
Securities  
Exchange*



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# *Introduction*

Listing is the process of taking a privately-owned organisation and making the transition to a publicly-owned entity whose shares can be traded on a stock exchange.

For many companies, having their securities listed on an internationally recognised stock exchange signifies a new era of growth, raised profile and market significance.

This guide provides an overview of what is required to list a company on the Australian Securities Exchange (ASX).



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# 1 *Benefits of listing on ASX*

There are many advantages in listing a company on the ASX, listing will:

- allow the company to raise capital from a wider market in order to, among other things:
  - expand existing business
  - acquire or establish new businesses
  - fund acquisitions.
- enable existing shareholders to realise the value of their holdings and trade their holdings in the market, allowing greater liquidity and for the broadening of the shareholder base
- potentially provide an exit strategy for founders of the company, early stage investors and other existing shareholders
- provide a means of increasing the number and diversity of security holders
- provide de facto third party valuation of the company by the market
- potentially improve the company's public recognition and commercial standing, improving the company's investor profile
- enable management and staff to more easily realise value from participation in employee share/option schemes
- raise the profile of a company to institutional and professional investors
- enable companies to be listed on one of the top 10 equity markets in the world (measured by market capitalisation) with a reputation for integrity and attracting international investors.

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## 2 *ASX requirements*

### **Admission categories**

A company wishing to list on the ASX must come within one of the following categories:

- general admission
- foreign exempt
- debt issuer.

**General admission** – known as “ASX Listing”, a company seeking admission under this category must satisfy a number of conditions including either the “assets test” or the “profit test”.

**Foreign exempt** – a company seeking admission under this category must be, among other things, a foreign entity listed on an overseas exchange which is a member of the World Federation of Exchanges.

**Debt issuer** – known as “ASX Debt Listing”, a company seeking admission under this category will be seeking to quote debt securities only and in subject to various other requirements, including corporate form and minimum net tangible asset requirements.

The main category of admission is “general admission” which is discussed in further detail on the following page.

For simplicity’s sake, this booklet only deals with “ASX Listing” admissions. While other entities (including managed funds registered with ASIC and stapled structures) can list on ASX, such entities are beyond the scope of this booklet. If you require information on the admission categories of “foreign exempt” and “debt issuer”, or the listing of entities other than companies, please contact us.



## 3 General admission

For an Australian registered company to be admitted to the official list, the ASX must be satisfied that its requirements in respect of the following conditions are met:

- profit/asset test
- shareholder spread
- certain constitutional and corporate governance requirements
- prospectus
- for the capital raising, a minimum issue price of \$0.20.

### *Profit/Asset test*

A company seeking admission to the official list must satisfy either the “Profit test” or the “Asset test”.

#### *The ‘Profit Test’*

The ASX Listing Rules provide that to satisfy the “Profit Test”, a company must satisfy criteria in respect of each of the following:

- being a going concern
- its business activity
- its audited financial statements
- its three years’ profits
- its last year’s profits
- providing a directors’ statement.

#### *A going concern*

The company must be a going concern (which is also satisfied if the company is the successor of a going concern).

#### *Business activity*

The company’s main business activity at the date it is admitted must be the same as it was during the last three full financial years.

### *Audited financial statements*

The company must provide the ASX with:

- audited financial statements and reports in accordance with its normal reporting cycle for the last three full financial years
- audited or reviewed financial statements for the last half year where the last full financial year for which financial statements must be given was more than eight months before applying for admission
- a pro forma balance sheet reviewed by a registered auditor or independent accountant, together with the review.

### *Three years profit*

The company’s aggregated gross profit from continuing operations for the last three full financial years must have been at least \$1 million.

### *Last year’s profit*

The company’s consolidated gross profit from continuing operations for the last 12 months (to a date no more than two months before the company applies for admission) must be more than \$400,000.

### *Director’s statement*

The company must provide the ASX with a statement from all directors confirming that they have made enquiries and nothing has come to their attention to suggest that the economic entity is not continuing to earn profit from continuing operations up to the date of the application.

### *The ‘Asset Test’*

The ASX Listing Rules provide that to satisfy the “Asset Test”, a company must satisfy criteria in respect of each of the following:

- net tangible assets/market capitalisation
- liquid assets
- working capital
- financial statements and audit report.

### *Net tangible assets/market capitalisation*

The company must have either:

- net tangible assets at the time of admission of at least \$2 million, after deducting the costs of fund raising
- a market capitalisation post-IPO of at least \$10 million (normally based on the issue or sale price under the prospectus).

If the company is an investment entity, it must have net tangible assets of \$15 million after deducting the costs of fundraising.

### *Liquid assets*

In respect of liquid assets, the criteria applied is that either:

- less than half of the company's total tangible assets (after raising any funds) must be cash or in a form readily convertible to cash
- half or more of the company's total tangible assets (after raising any funds) are cash or in a form readily convertible to cash and the company has commitments consistent with its business objectives to spend at least half of its cash and assets in a form readily convertible to cash. The business objectives must be clearly stated and include an expenditure program.

### *Working capital*

The company must have working capital of:

- at least \$1.5 million
- an amount that would be \$1.5 million if the company's budgeted revenue for the first full financial year, that ends after listing, was included in the working capital.

A statement that the company has enough working capital to carry out its stated objectives must be contained in the company's prospectus or be provided to the ASX from an independent expert. Special provisions are made for mining exploration entities.

### *Financial statements and audit report*

The company must provide to the ASX:

- financial statements and an audit report or review for the last three full financial years

- financial statements for the last half year where the last full financial year for which financial statements must be given was more than eight months before applying for admission
- a pro forma balance sheet reviewed by a registered auditor or independent accountant.

### *Shareholder spread*

The ASX requires a satisfactory spread of shareholders to be achieved. The company will meet this requirement if it has at least:

- 500 shareholders who each hold shares with a value (based on the issue price) of at least A\$2,000
- 400 shareholders who each hold shares with a value (based on the issue price) of at least A\$2,000 provided that at least 25% of the company's shares are held by unrelated entities.

Restricted securities, being shares that are required to be subject to "escrow" by the ASX, will not count towards satisfying the shareholder spread requirements referred to above.

Further, the ASX will not include shares to obtain shareholder spread if this is done through artificial means such as giving away shares, offering non-recourse loans to prospective shareholders to acquire shares, or using a combination of nominee and company names.

### *Constitution and corporate governance*

To be listed, a company must have constitution which is consistent with the ASX Listing Rules or contain wording prescribed by ASX to a similar effect.

ASX Corporate Governance Council has made recommendations regarding corporate governance which, while voluntary, must be followed on an "if not, why not" basis. For further details, see section on "Corporate Governance" on page 32.

To facilitate continuous and other disclosure to the market, the company must also appoint an ASX communications officer and establish facilities to allow electronic lodgment.

## ***Prospectus***

A company seeking to list on the ASX will need to issue a prospectus to raise funds. This will require the company to:

- prepare a prospectus
- lodge the prospectus with the Australian Securities and Investments Commission (ASIC)
- issue the prospectus to the public.

However, if the company:

- does not need to raise funds in conjunction with its application to list on the ASX
- has not raised funds in the three months prior to its application to the ASX
- will not raise funds in the three months after its application to the ASX.

an information memorandum may be acceptable to the ASX. The ASX will generally require the entity to send the information memorandum to all security holders. Such memoranda are rarely used as most companies seeking to list wish to also raise capital by way of an initial public offering (IPO).

# 4 Prospectus information/ disclosure requirements

## **Disclosure requirements**

For the majority of fundraising activities, the *Corporations Act 2001 (Cth)* (Corporations Act) requires the company seeking to raise funds through the issue of securities to issue a disclosure document.

The Corporations Act provides for various types of disclosure documents that can be used for an offer of securities.

The type of document utilised will depend upon:

- the size of the fundraising
- the type of likely investor
- any previous fundraising completed by the company.

The ASX Listing Rules require that for a company to be admitted to the official list a prospectus must be issued and lodged with ASIC. In the absence of a capital raising as part of the IPO, the ASX may also agree that an information memorandum that complies with the requirements in Appendix 1A of the Listing Rules will be sufficient instead of a prospectus.

## **Full prospectus**

### **General information requirements**

A full prospectus must contain all the information about the company that investors and their advisers would reasonably require to make an informed assessment of the:

- assets and liabilities, financial position and performance, profits and losses, and prospects of the company
- rights and liabilities attaching to the securities to be offered.

In deciding what information must be included in the prospectus, regard must also be had to the:

- nature of the securities and of the company

- matters likely investors may reasonably be expected to know
- fact that certain matters may reasonably be expected to be known to the likely investors' professional advisers.

A person who has relevant knowledge must disclose the information required in the prospectus. Their knowledge will be relevant if they actually know the information or, in the circumstances, they ought reasonably to have obtained the information by making enquiries. A person's knowledge is relevant only if they are:

- the person offering the securities
- a director or proposed director of a body offering securities
- an underwriter of the issue or sale of securities
- a financial services licensee involved in the issue or sale of the securities
- a person named in the prospectus with their consent as having made a statement included in the prospectus or on which the prospectus is based
- a person named in a prospectus with their consent as having performed a particular professional or advisory function.

The confidentiality of information is irrelevant.

### **Specific information requirements**

In addition to the above general information, each prospectus is required to contain the following specific information:

- the terms and conditions of the offer
- details of the admission of the securities on a stock exchange or, if not already quoted, that an application will be made for quotation within 7 days of the date of quotation
- the expiry date after which no further securities will be issued, being a date not later than 13 months after the date of the prospectus

- that a copy of the prospectus has been lodged with ASIC and ASIC takes no responsibility for the prospectus
- any other information required by the regulations to the Corporations Act.

For any:

- directors or proposed directors
- person named as performing a function in a professional capacity
- promoter of the body
- underwriter to the issue or sale
- financial services licensee named in the prospectus as being involved.

the prospectus must also set out the:

- nature and extent of the interests each person holds or has held at any time in the last 2 years in:
  - the formation or promotion of the body
  - property acquired or proposed to be acquired
  - the offer of securities.
- amount anyone has paid or agreed to pay, or the nature and benefit anyone has given or agreed to give:
  - to induce someone to become a director
  - for services provided to the formation or promotion of the body
  - for the offer of securities.

The Corporations Act also has certain formal requirements, such as that a prospectus:

- must contain information worded and presented in a clear, concise and effective manner
- ought to be dated with the date on which it is lodged with ASIC
- in which third party information is used, must have been consented to by the third party in relation to that information (subject to certain public information exemptions).

## ***Short form prospectuses***

Short form prospectuses are intended to reduce the length and complexity of prospectuses for retail investors, so that information may be presented to retail investors in a manner best suited to their needs. The means of achieving this objective is to expand the circumstances in which information may be incorporated into a prospectus by reference.

The Corporations Act provides that:

- any document may be incorporated by reference into the prospectus, whether the document was required to be lodged or not, provided it is in fact lodged and investors are able to obtain a copy of it
- the document must be identified in the prospectus
- where the information is primarily of interest to professional analysts or advisers and to investors with similar specialist information needs, the reference must also describe the contents of the document and say that the information in it is primarily of interest to those people
- where the information is not of any particular interest to either retail investors or professional analysts or advisers, then sufficient information about the contents of the document must be provided so as to allow the person to whom the offer is made to decide if they wish to obtain a copy of the document
- the person making the offer must provide a copy of the document, free of charge, to any person requesting it during the application period of the prospectus.

## ***Materiality guidelines for a prospectus***

The prospectus ought to be focused on what is material to investors for the purpose of making an informed decision about whether or not to invest in the company.

Accordingly, guidelines ought to be set which “filter-out” non-material issues. This will ensure efficient time and resource use in the drafting of the disclosure document by concentrating only on material issues.

Typically, materiality thresholds for prospectuses are set at 5 – 10% of representative profit and loss and

balance sheet measures. However, even if a matter falls below this threshold, the committee needs to consider whether it is qualitatively material (eg the information could impact the company's reputation significantly).

The Corporations Act states that a reasonable person would be taken to expect information to have a material effect on the price or value of a company's securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for the company's securities.

### ***Prospective financial information***

In producing a prospectus, prospective financial information perhaps ought to receive the greatest attention as it can provide the greatest area of risk. If the prospectus contains a statement about a future matter and there are no "reasonable grounds" for making the statement, the statement may be regarded as "misleading" and may give rise to legal action.

ASIC has expressed the view that what constitutes "reasonable grounds" ought to be determined objectively in light of all of the circumstances of the statement, so that reasonable persons would view the grounds, on which the statement was made, as reasonable. A forecast beyond a 2 year period is presumed to be misleading.

The general test for whether an earnings forecast, for example, must be disclosed is whether it is:

- relevant to its audience
- reliable – there must be a reasonable basis for it.

Prospective financial information may take various forms, including:

- financial forecasts
- prospects.

**Financial forecasts** – these are based on best-estimate assumptions about future events that management expects to take place, and actions management expects to take as of the date the information is prepared.

**Prospects** – the prospects of the company may be included by way of a simple narrative. Significant benefits about a product or service and the way in which the benefits will or may be provided must be disclosed.

ASIC considers that prospective financial information ought to be accompanied closely and prominently by:

- full details of the assumptions used to prepare the information including a sensitivity analysis
- the time period and specific factors affecting that period covered by the information
- warnings that the information might not be achieved
- an independent expert's sign off on the information and relevant assumptions
- an explanation of how the information was calculated and the reasons for any departures from accounting or industry standards investors might expect to be followed.

It may be a commercial impediment to the company to successfully complete its fundraising if its prospectus does not include at least some form of financial forecast or projection. Conversely, however, if the company is in a volatile industry where the future is uncertain, providing forecasted or projected figures may be misleading, unless appropriate explanation is provided.

### ***The final prospectus***

A process of verification is undertaken prior to the finalisation of any prospectus. In essence, this involves checking each material statement of fact or opinion to ensure that it is accurate and not incomplete.

Once the verification process is finalised and the due diligence committee and the board of directors have approved the prospectus, the prospectus is complete and ready for lodgement.

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# 5 *The due diligence process*

## *The need for due diligence*

Due diligence is a process by which stakeholders involved in the listing of a company find out and confirm information they need to know in relation to the company, its business, assets and liabilities.

If a prospectus is being prepared, the Corporations Act effectively requires the company to make all reasonable enquiries in relation to the offer. Due diligence is necessary in order to ensure that information which is known, or could reasonably be found out by making enquiries, is included in the prospectus and those involved have a potential defence from liability.

## *The due diligence committee*

Generally speaking, due diligence is coordinated and carried out by a due diligence committee.

The committee usually consists of one or more representatives of each of the listing team members. The committee ought to be relatively small and focused so that the effective day to day management of the company's business is maintained.

A typical due diligence committee consists of the following members:

- a chairperson (often the lawyer but also could be the chairman of the company or an independent director)
- one or more representatives of the company to be listed, such as company directors or senior management
- the company's lawyers
- an independent investigating accountant
- the underwriter (if any) on the listing
- any other experts commissioned to help in the listing process.

## *Potential liability*

If the company's disclosure document is found to contravene the Corporations Act, substantial criminal

and/or civil liability penalties may apply to those involved in preparing the prospectus, including the company, its directors, the underwriters and a person who consented to have a statement in the prospectus attributed to them.

A properly coordinated and effective due diligence process will not only identify the material issues for inclusion in a prospectus, but in general terms will afford the stakeholders with a defence to their potential liability for a defective prospectus.

## *Responsibilities*

Committee members should be assigned responsibility for various areas in the due diligence process in accordance with their expertise. The allocation of responsibilities to each member and the planning process which is proposed to be undertaken is ordinarily set out in a due diligence memorandum which is prepared by the lawyers involved in the due diligence.

A legal due diligence report is compiled by the lawyers and presented to the due diligence committee after gathering and analysing the relevant and necessary company legal information. An opinion letter is normally also drafted by the lawyers with respect to the extent to which the prospectus meets applicable disclosure requirements and the adequacy of the due diligence process undertaken by the company.

The independent accountant is normally responsible for carrying out an accounting and tax due diligence, while company representatives prepare a commercial due diligence.

Each of these reports is used as a basis for the drafting of the disclosure document.

## ***Board approval***

Once the verification of the final draft of the prospectus has been completed, the due diligence committee will report to the board of directors and confirm that the prospectus complies with all legal requirements. The board of directors then gives their approval for the issue of the prospectus. This reinforces the need for the committee to ensure the accuracy of every statement in the prospectus by reference to a reliable external source or a person with the expertise or knowledge to make such statements.

## ***Continuous disclosure/supplementary document***

Importantly, the due diligence process does not end once the prospectus has been finalised and lodged.

Those involved in preparing the prospectus must inform the offeror if they become aware that the prospectus is (or has become) defective.

A corporation has an obligation to lodge a supplementary or replacement prospectus if, after the original prospectus was lodged and while it remains current, the corporation becomes aware of any new information that is materially adverse to investors.

Supplementary and replacement prospectus are alternatives which serve the same purposes. They either correct a deficiency in the original prospectus, or provide particulars about something that has occurred since the original prospectus was prepared.

A materially adverse defect in a prospectus may give IPO applicants a right to a refund of their application moneys and may compromise underwriting arrangements.

Supplementary prospectuses can also be used voluntarily to update a prospectus with information that is relevant to investors (eg better than expected results from a particular transaction).



# 6 Who is involved in the listing process?

The listing process will involve assembling an expert fundraising team with clearly identified and separate roles. This team would normally include:

- a corporate adviser
- an underwriter
- accountants
- lawyers
- a share registrar
- various other experts depending on the nature of the company being listed (eg foreign lawyers for any offshore share offer).

## *The corporate adviser*

The corporate adviser ought to provide objective advice on a range of commercial, financial and float issues, including:

- the optimal quantum and timing of capital required
- whether the float ought to be underwritten or whether a book build ought to be used
- which broker(s) will provide the:
  - best credentials in the company’s sector and for the size of float
  - highest and most supportable valuation
  - most secure and acceptable underwriting contract
  - best institutional and retail investor base
  - best aftermarket research and trading support.
- the “right” valuation/sale/listing price for the company
- specialist project management of the overall float process through to listing including:
  - float timetable and budget development, monitoring and management
  - co-ordination of, and interfacing between, management and its float advisers and suppliers

- co-ordination of prospectus drafting and assisting the lawyers with verification and lodgement
- participation in the due diligence committee
- liaison with regulatory bodies such as the ASX and ASIC
- general issues management and resolution.

It ought to be noted that sometimes the company chooses to have the underwriter/stockbroker fulfil some or all of the functions normally performed by the corporate adviser. Companies ought to be aware of the inherent conflict an underwriter/stockbroker has in providing objective advice in relation to a number of the key “threshold” float issues listed above.

## *The underwriter*

In an IPO, an underwriter is a subscriber to the issue of shares, who offers to take shares not taken up by the public in consideration for certain fees disclosed in the prospectus.

Early in the listing process the company will have to make a decision as to whether or not the fundraising will be underwritten. Many IPOs on ASX are underwritten.

Generally, underwriting the fundraising has the following advantages for the company:

- ensuring the success and assuming the market risk of the fundraising by agreeing to provide applications for any shares not taken up by investors
- adding endorsement to the fundraising
- allowing the fundraising to be aggressively priced as the company will be certain that all shares will be taken up.

Following the appointment of an underwriter, an underwriting agreement will need to be entered into between the company and the underwriter. The most

## Who is involved in the listing process?

important parts of this agreement for the company will be the events which give rise to termination and the fees associated with the underwriting (which as a rough guide will be between 2.5% to 5% of the proceeds of an IPO fundraising, sometimes also comprising a management and/or handling fee).

### ***The lawyers***

The lawyers will be responsible for:

- conducting the legal due diligence on the company
- the preparation of the “additional information” section of the prospectus
- organising verification of the prospectus
- negotiating with the underwriter on behalf of the company
- sign off the content of the prospectus and whether due diligence defences are available.

In addition to the above, the lawyers may be required to draft other documents such as voluntary escrow agreements, the company's revised constitution and new employee share or option plans.

### ***Accountants***

Generally the company's existing accountants will be appointed for the fundraising. The accountants may provide the following services:

- assist in setting materiality thresholds for the due diligence generally

- conduct the accounting and tax due diligence on the company
- prepare the disclosed financial accounts
- advise generally on any accounting and/or tax issues
- review of forecasts made in the disclosure document
- advise on the type of investment vehicle to use.

### ***Share registrar***

A share registrar can assist by, among other things, performing the following functions:

- handle the receipt and processing of applications
- maintain the company's share register after the fundraising
- allot and transfer shares during and after the fund raising
- despatch investor communications and other documentation to shareholders on an ongoing basis (eg notices of general meeting).

### ***Other experts***

Other experts may be engaged to advise the company or to produce special reports for the prospectus, depending on the type of company. For example, it is common to engage a financial expert to provide an opinion in relation to the company's forecasted financial performance or the value of a particular asset.

## 7 *Time considerations*

### *Listing is more like a marathon than a sprint*

Listings are done best when they are seen as part of the beginning of a much longer process. Many formerly private companies are surprised by the market's scrutiny after listing, and cultural changes are often needed to properly prepare for the unswerving gaze of markets. This includes learning the language of markets and knowing which questions can be answered and which questions must not.

Listing takes a significant amount of energy, effort and time and can prove to be very demanding on the management of the company. There must still be time to manage the usual affairs of the company, and this should be a factor in setting the timetable for listing.

In addition, the company needs to prepare for post-listing requirements, many of which require additional disclosure and systems that are often not present in companies prior to listing.

### *Time to list*

The length of time it will take to list a company on the ASX depends upon the complexity and scale of the capital raising. As a general rule, from initial instructions, the listing of a company can be expected

to take approximately five months. However, the time taken may range anywhere from three months to two years.

### *When to list*

In deciding when to list, the company ought to give consideration to a number of factors which may influence its success. Professional advisers are often used to assist in resolving some of these issues. The issues that need thorough consideration include:

- **market value** – market factors such as the general value of shares and the specific value of shares in the company's industry will have a large bearing on the price realised upon listing by the company
- **competition** – precautions ought to be taken to avoid listing when there are other major listings occurring which are likely to attract the majority of investment funds
- **seasonal factors** – it is generally advised that the traditionally quiet Christmas period ought to be avoided as a time for listing a company
- **capital requirements** – the capital requirements of the company must be balanced against the above mentioned timing considerations which may affect the success of the listing.

## ***Listing timetable***

The timetable below sets out the steps involved and provides a guide as to when certain events are expected to occur. The timetable is based on a five month listing period.

<b>Task</b>	<b>Activity</b>	<b>Due rate</b>	<b>Responsibility</b>
1	1st due diligence meeting	Week 1	Due diligence committee
2	Circulate draft documents including: <ul style="list-style-type: none"> <li>• due diligence planning memo/checklists</li> <li>• materiality guidelines</li> <li>• outline draft prospectus.</li> </ul>	Week 1 Week 1 Week 1	Lawyers Accountants Lawyers
3	1st draft prospectus	Week 2	Company/Corporate Advisers/Lawyers
4	2nd due diligence meeting	Week 2	Due diligence committee
5	Draft accountants reports including: <ul style="list-style-type: none"> <li>• independent accountant's report</li> <li>• forecasts/projections.</li> </ul>	Week 3 Week 3	Accountant/Company/Corporate Advisers Accountant/Company/Corporate Advisers
6	Draft material contracts	Week 3	Lawyers
7	3rd due diligence meeting	Week 4	Due diligence committee
8	3rd draft prospectus	Week 4	Company/Corporate Advisers/Lawyers
9	4th due diligence meeting	Week 5	Due diligence committee
10	Final drafts: <ul style="list-style-type: none"> <li>• accountants reports</li> <li>• material contracts.</li> </ul>	Week 5 Week 5	Accountants Lawyers
11	4th draft prospectus	Week 5	Company/Corporate Advisers/Lawyers
12	Pre-marketing	Week 5	Company/Corporate Advisers
13	ASX/ASIC waivers declarations escrow	Week 5	Lawyers/Company/Corporate Advisers
14	5th due diligence meeting	Week 6	Due diligence committee
15	6th due diligence meeting	Week 7	Due diligence committee
16	Appointment of share registrar	Week 9	Company/Corporate Advisers
17	7th due diligence meeting	Week 9	Due diligence committee
18	Prospectus verification and final draft accountants report	Week 11	Lawyers/Company/Corporate Advisers/Accountants
19	8th due diligence meeting	Week 11	Due diligence committee
20	Execute all contracts/plans/schemes	Week 11	All parties
21	Consents	Week 11	All parties
22	Prospectus sign-off	Week 11	All parties
23	Lodge prospectus with ASIC/ASX	Week 11	Lawyers

## Time considerations

Task	Activity	Due rate	Responsibility
24	End of period for non-issue	Week 12	
25	Printing and dispatch of prospectus	Week 13	Company/Corporate Advisers
26	Prospectus to be put on web	Week 14	Company
27	Printing and dispatch of reports	Week 14	Company/Corporate Advisers
28	Issue opens	Week 14	
29	Media release	Week 14	Company/Corporate Advisers
30	Retail investor roadshows	Week 14-16	Company/Corporate Advisers
31	9th due diligence meeting	Week 18	Due diligence committee
32	Issue closes	Week 18	
33	Allotment of shares	Week 19	Share Registrar
34	Approval for admission to official list and quotation of shares	Week 20	ASX
35	Announcement and press release	Week 20	Company/Corporate Advisers
36	Start trading in shares	Week 20	

Note: A person must not accept an application for, or issue or transfer, non-quoted securities under a prospectus until the period of seven days after lodgement of the prospectus has ended. ASIC may extend this period to 14 days.

## 8 *The cost of listing*

The cost for a company of listing on the ASX can be substantial, both in monetary and non-monetary terms. However, these costs may be kept to a minimum by:

- proper planning and coordination of the process
- focused due diligence activity
- early identification of potential difficulties.

It is important to note, however, that the cost of listing a company will be influenced by various factors such as the:

- complexity of the fundraising
- size of the fundraising
- number of advisers involved
- degree of marketing.

The monetary costs include the appointment of advisers and experts such as lawyers, corporate advisers, underwriters and accountants. As a general guide, the underwriting fee and broking fees for listing range from approximately 2% to 8% of the amount raised. Other fees, such as ASX, legal, accounting, experts, registry and printing fees, normally range from approximately \$300,000 to \$800,000 in total, depending on the size of the company and its business and the extent of pre-flight restructuring work required. Larger flights can involve other fees in excess of \$1 million.

The non-monetary costs involved in listing a company on the ASX include, among other things:

- devotion of senior management to the process
- presenting investor roadshows
- assisting with the disclosure document.

In addition to the above mentioned monetary and non-monetary fees the ASX charges various fees for general admission entries, including:

- in-principle decision fee
- initial listing fee
- other administrative and related fees.

The details of the above fees (exclusive of GST) have been extracted from the ASX website and are set out below. These fees are subject to change.

### ***‘In-principle’ decision fee***

If there is an aspect of the application upon which the company requests the formal advice of the ASX before submitting the application (such as an unusual structure or requirement for significant waivers), a minimum fee of \$7,500 must be paid to the ASX.

**Note:** This amount is generally offset against the initial listing fee that is charged.

## Initial listing fee

This fee is payable when the company gives the ASX its application. The fee is based on the value of securities for which quotation is sought. Below is a table setting out initial listing fees payable by general admission entries:

Value of equity securities for which quotation is sought	Fee payable on application for admission
Up to \$3 million	\$25,000
\$3,000,001 to \$10 million	\$25,000 + 0.2671429% on excess over \$3 million
\$10,000,001 to \$50 million	\$43,700 + 0.07975% on excess over \$10 million
\$50,000,001 to \$100 million	\$75,600 + 0.04004% on excess over \$50 million
\$100,000,001 to \$500 million	\$95,620 + 0.03% on excess over \$100 million
\$500,000,001 to \$1 billion	\$215,620 + 0.025% on excess over \$500 million
Over \$1 billion	\$340,620 + 0.018% on excess over \$1 billion

Note: Generally, the value of equity securities for this purpose is the highest of the issue price, the sale price, and 20 cents.

## Other administrative and related fees

Assuming the company lists successfully, the ASX fees payable are outlined below:

**Annual listing fee** – annual fees are payable in advance for each year, and are pro-rated from the date of listing. The minimum annual listing fee is \$9,990.

**Subsequent listing fees** – if the company issues further securities after listing, subsequent fees are payable for their quotation. The minimum subsequent listing fee is \$1,500, although certain quotations are fee – exempt.

**Additional fees** – are charged for such things as the review of documents, applications for waivers from the listing rules, and for other matters. A fee of \$13,310 to review the prospectus will be charged as part of the initial listing fee. General fees, however, are levied at \$300 per hour. There is no fee payable for most additional work that takes less than ten hours for the ASX to process.

**CHES fees** – these fees are payable monthly for transactions processed by the Clearing House Electronic Sub register System (CHES), including the production of CHES holding statements. An annual CHES operating fee equal to 10% of an entity's annual listing fee is also payable by the company (minimum \$1,500).

# 9 Company composition

## **Company composition – An introduction**

To be listed, companies must have a structure and operations that ASX regard as appropriate for a listed entity. From a commercial perspective, however, this is also important as companies that are structurally ready to proceed to listing are much more likely to find the listing process easily manageable and, by showing a degree of corporate maturity, may be regarded as a more attractive investment.

In order to ensure the best chance of a successful listing, companies ought to consider the following:

- corporate structure
- board of directors
- corporate governance procedures
- board committees
- underlying business
- service contracts and employee incentives
- securities policies
- relationship with shareholders
- ‘materiality’ thresholds.

## **Corporate structure**

The company needs to be structured as or converted to a public company prior to listing. In addition, it ought to adopt a:

- board of directors
- share structure
- constitution that complies with the Corporations Act and the ASX Listing Rules.

Converting a company to a public company may take between 1-2 months, due to mandated meetings and special resolutions.

## **Board of directors**

The market will generally want to see a good level and mix of experience on the Board. Companies preparing

for listing ought to have independent, non-executive directors with appropriate expertise. As a guide, the market generally expects to see more independent directors than executive directors. Consistent with the Council, the market also expects that the Chief Executive Officer will not be the Chairman.

## **Corporate governance procedures**

There are appropriate corporate governance procedures for a listed company that will need to be implemented and disclosed by the company in its annual report subsequent to listing. The nature and extent of such procedures will depend on the type of business being operated. As best practice, the Board will establish and adopt a formal Board Charter, which ought to include specific delegation of authority to the executive and details of powers that may only be exercised by the Board. The Board Charter ought to also contain a review process including a review timetable, for regular review.

Usually the Board will retain sole authority of the following areas:

- oversight of accounting and control systems
- appointment and removal of executives, including the Chief Executive Officer
- review of executive performance
- approving corporate strategy and performance objectives, usually in conjunction with the executive
- risk management, including procedures and review
- resource allocation
- tracking capital expenditure, acquisitions, divestitures and share price performance
- financial reporting
- establishment and review of Board performance criteria
- establishment and review of a corporate Code of Conduct



## Company composition

- other reporting (including on corporate social responsibility).

As part of admission, ASX will require a statement disclosing the extent to which the company will follow the recommendations set by the ASX Corporate Governance Council. For more details see the “Corporate Governance” section on page 32 below.

### **Board committees**

The Board ought to also give proper consideration to empowering and establishing various committees including the following, which have their own formal charters:

- nomination committee
- conduct committee
- audit committee
- remuneration committee.

The company should establish the means for complying with the ASX Listing Rules prior to listing. This is usually done through formal policies, disclosure of those policies and through designing executive and employee positions’ job descriptions accordingly.

### **The underlying business**

The underlying business model and plan of the company ought to be analysed and assessed to determine key issues and put the company in a position to show evidence to the market that the company:

- has a business with sound fundamentals
- has contracts, customers and growth to support its revenue projections
- has developed a comprehensive and achievable business plan
- has appropriate means to protect its intellectual property and confidential information and that its intellectual property strategy is solid
- understands the risks to itself and has appropriate plans to manage those risks
- has a system of identification, assessment and management of risk
- can identify material changes in risk

- has, where relevant or required, secured its confidential information.

### **Service contracts/employee incentives**

It will be necessary to have the company enter service contracts with key service providers and senior managers. It is also important to secure the involvement of key employees or non-executive directors, and that is often done through incentives such as the issue of shares or options to those persons.

The company ought to ensure that all its executives and key personnel have formal employment contracts that are clear and contain full details of the basis of employment and cessation of employment including, for senior officers, a job description and letter of appointment setting out their terms of office, rights and responsibilities, including on termination.

### **Securities policies**

The company ought to also have and disclose its policy in relation to:

- trading of securities by directors, executives and employees
- share option schemes.

In April 2010, ASX announced that it intends to make company trading policies the subject of a new listing role and guidance note and, together with the Federal Government, is considering further regulation in this area.

### **Relationship with shareholders**

After listing, the company’s relationship with its shareholders will often be conducted differently. In order to manage relations with its shareholders the company ought to consider preparing a formal shareholder engagement policy and use the policy in communications and meetings with shareholders. The policy will need to balance the needs of the company and the shareholders and be designed to facilitate good communication between them.

## ***Materiality thresholds***

Materiality is an important concept for the company to grasp particularly with respect to independence and risk issues. Determining what is 'material' is a matter for the Board, and will involve both qualitative and quantitative thresholds. Where these thresholds are set will depend on the nature of the company and its business, but applicable accounting standards will be useful in setting these measures.

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# 10 Valuations

The valuation of the company and the setting of an appropriate share price is performed in conjunction with the underwriter or corporate adviser. ASX Listing Rules prohibit the offering of shares at less than 20 cents each, except in special circumstances such as restricted shares.

## *Share offer alternatives*

The company may use a variety of methods in issuing new shares. Two frequently used methods include “open” and “fixed” price offers.

### *Open price offer*

The open price offer method is generally used for very large listings in Australia. The offer is split into two periods, namely the:

- 1 retail offer period
- 2 institutional offer period.

The retail offer period:

- generally runs for three weeks
- the issue price is fixed for retail applications (eg \$1.00).

The institutional offer period:

- generally runs for one week
- the issue price for institutions is either completely “open” or set within a range (eg \$0.70 to \$1.30).

During this period, institutions provide an indication of the number of shares they are likely to take up and the price they are prepared to pay. On the final day of the offer period, the institutions submit final (and legally binding) bids and the price is set.

### *Fixed price offer*

In Australia, the fixed price offer is the most commonly used method of issuing shares. This approach is generally underwritten with the issue price for the shares fixed in the company’s prospectus.

To assist the underwriter and the company to determine the final appropriate issue price, the final draft prospectus will sometimes be distributed to institutions without including a price. This procedure enables the company to ascertain an approximate issue price that the market is likely to pay for the shares.

### *Setting the final issue price*

The underwriter/corporate adviser will generally undertake market research to determine the appropriate final issue price for the industry in which the company being listed operates. The final issue price will commonly be set at a discount to the price at which the shares of listed companies in the same industry are trading. As a benchmark, this discount is usually 10% to 15%.

# 11 Marketing and publicity

## *Marketing the listing*

The underwriter and corporate adviser are normally responsible for marketing the issue of the company's shares. This is usually a two step process:

- firstly, to institutions both before and after the prospectus is lodged
- secondly, by brokers to private clients once the prospectus is lodged.

The Corporations Act places some restrictions on pre-prospectus advertising; however, once the disclosure document is lodged, these restrictions largely fall away.

## *Pre-lodgement publicity restrictions*

Prior to lodgement, publicity of the listing is restricted to the following means:

- roadshow presentations
- market research
- independent reports
- 'tombstone' statement
- 'pathfinder' prospectuses.

## *Roadshow presentations*

Presentations of information about the company and the listing may be made to Australian financial services licensees and their representatives.

The main purpose of these presentations is to raise awareness and interest in the company being listed. They also help underwriters to evaluate and determine their agreement with the company by providing them with a measure of institutional interest.

## *Market research*

The issuer of the securities or a bona fide market research organisation (engaged by the issuing body) may conduct market research of the disclosure document to determine the number of hard copy

prospectuses required; to whom the offer should be marketed; and how to market the offer.

Market research activities may use any number of surveys, but they must not survey more than 5000 people. Survey questions may refer to the proposed document only to the extent necessary to enable the researcher to conduct the research and for respondents to understand the questions asked.

## *Independent reports*

A report about the securities of a body or proposed body published by an independent party, does not contravene the pre-prospectus advertising prohibitions contained in the Corporations Act.

## *'Tombstone' statement*

Before lodgement, advertising and other statements must include a 'tombstone' statement which:

- identifies the offeror
- identifies the securities
- states that a prospectus will be made available when the securities are offered
- states that anyone who wants to acquire the securities will need to complete the application form in or accompanying the prospectus
- (optional) states how to arrange to receive a copy of the prospectus.

Care needs to be taken to avoid undisclaimed "image" advertising that the regulator could regard as indirect publicity for the offer.

## *'Pathfinder' prospectuses*

A pathfinder prospectus may only be circulated to prospective underwriters, brokers and exempt offerees (such as persons defined by the Corporations Act as 'sophisticated investors' and 'professional investors'). A pathfinder prospectus does not seek subscriptions, but is used to facilitate pricing of shares proposed to be offered or for settling the contents of the prospectus.

### ***Post-lodgement publicity***

After the disclosure document is lodged with ASIC the marketing campaign to retail investors may begin. For large listings this may include such methods as television commercials, newspaper and magazine advertisements and brochures whereas the marketing of smaller listings will be primarily through brokers to their retail clients.

The advertisement must however include the following:

- the issuer (and if applicable, seller) of the securities

- a statement that the offer of the securities is made by, or is accompanied by, a copy of the prospectus
- where the prospectus can be obtained
- a statement to the effect that:
  - in deciding whether to acquire securities, a person should consider the prospectus
  - anyone wishing to acquire securities will need to complete the application form in or with the prospectus.

Certain unsolicited meetings and telephone calls remain prohibited.

# 12 *The final steps*

## ***Lodgement***

When the prospectus is finalised, it must be lodged with ASIC before it can be issued to members of the public.

## ***Exposure period***

After lodgement, the prospectus is subject to an “exposure period” of a minimum seven days (ASIC may, and often does, extend the period to 14 days). During this time, the prospectus must be made generally available to potential investors but the company may not process any applications received from investors. The prospectus may need to be made widely available in printed and electronic form depending upon the size of the offer. The company may accept and process applications after the exposure period has expired.

## ***Offer period***

The offer period:

- begins when the exposure period ends
- is generally three to four weeks
- is usually able to be extended by the directors.

Providing the company is in compliance with the ASX Listing Rules, the ASX will generally grant the company conditional listing by the end of the offer period. In order to establish compliance, the company will be required to provide documentary proof of compliance.

## ***ASIC powers***

ASIC has the ability to exercise the following powers:

- audit
- stop orders.

## ***Audit***

ASIC may audit the prospectus once it is lodged in order to confirm that the legal requirements have been met.

## ***Stop orders***

If ASIC is not satisfied with the integrity of the prospectus or considers it to be problematic, it may issue a “stop order”, on the company’s share offering. Alternatively and more commonly, ASIC may issue an interim “stop order” effectively requiring the company to issue a supplementary disclosure document.

## ***Shortfall in minimum subscription***

If at the end of the offer period the listing is only partially subscribed, the company will issue a “shortfall notice” to the underwriter who must then provide funds to the listing for the shares not taken up by investors. Once the listing is fully subscribed, the shares are issued to investors and the listing proceeds are released to the company.

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## ***13 Restricted securities and escrow periods***

Often where a company seeks its initial listing on the ASX, the existing shareholders wish to sell some of their shares under the disclosure document. This is permitted provided that the existing shareholders only receive the same amount per share that the company receives for new shares.

The ASX may restrict the transfer of shares (known as “escrow”) issued before the listing so that they cannot be sold for a period of up to two years after listing. This is more common where the company gained admission to the ASX official list under the “assets test”, or where transactions with related parties are involved.

The ASX will also usually seek to restrict shares issued shortly prior to the listing held by seed capitalists, certain vendors (if the IPO is partially or wholly

achieved by a “sell down”), promoters, the professionals and consultants advising on the listing and employees receiving shares under an employee incentive scheme.

If the company achieves admission to the official list by way of the “profits test”, then there is no escrow for its shares unless the ASX decides otherwise.

If an escrow applies, the ASX will require signed original agreements from each of the restricted shareholders prior to listing. The share registrar will be required to impose a holding lock on the restricted shares until the escrow period has expired.

After consulting with the offer’s underwriters, founding shareholders may also voluntarily escrow their shares in the interests of a more marketable offer.

# 14 Post listing requirements and considerations

When the company has gained official listing status, it becomes subject to a much higher level of scrutiny and accountability imposed under the ASX Listing Rules and the Corporations Act. The primary requirements and issues for consideration for an ASX listed company are discussed below. Companies will need to implement appropriate arrangements to ensure compliance with these requirements.

## **Continuous disclosure**

The ASX Listing Rules contain continuous disclosure requirements that a company admitted by way of ASX Listing must satisfy. Continuous disclosure is the timely advising of information to keep the market informed of events and developments as they occur. The ASX Listing Rules are very clear that timing is extremely important and notification must be prompt, not as a matter of convenience. Information for release to the market must be given to the ASX's company announcements office. Failing to meet the disclosure obligations may result in civil and criminal penalties for the company and, in some cases, the company officers.

The primary and general rule for continuous disclosure is that once an entity is or becomes aware of any information concerning it that a 'reasonable person' would expect to have a 'material' effect on the price or value of the entity's securities, the entity must immediately inform the ASX of that information.

By way of a non-comprehensive list of examples, the company must provide notice to the ASX if the company:

- makes a takeover bid
- conducts a share buy-back
- signs a material contract
- changes its officers
- directors or other officeholders buy or sell shares

- grants options or rights to receive options to any officers (such as performance-based performance contractual rights)
- declares a dividend
- revises its financial forecasts
- makes an agreement with any of its directors or a directors' related entity
- proposes to change auditor.

The disclosure requirement referred to does not apply if all of the circumstances set out below are satisfied:

- a reasonable person would not expect the information to be disclosed
- the information is confidential and the ASX has not formed the view that the information has ceased to be confidential
- one or more of the following applies:
  - it would be a breach of the law to disclose the information
  - the information concerns an incomplete proposal or negotiation
  - the information comprises matters of supposition or is insufficiently definite to warrant disclosure
  - the information is generated for internal management purposes of the entity
  - the information is a trade secret.

ASX may also require disclosure of information by the company if ASX considers there could be a false market in the company's securities.

## **Notice of specific information**

Certain matters require specific disclosure to ASX, such as:

- reorganisations of capital
- issue of shares (including changes to proposed issue of shares)
- release of securities from escrow



## Post listing requirements and considerations

- holding a general meeting (including annual meetings)
- changes to officer or auditor
- notices to shareholders and results of voting at general meetings
- declarations of, and changes to, a dividend.

A copy of any prospectus or other disclosure document must be lodged with ASX as well as ASIC.

### *Periodic disclosure*

The ASX has various periodic disclosure requirements. Periodic disclosure generally involves:

- half year disclosure
- annual disclosure
- quarterly disclosure.

The ASX also requires monthly net tangible asset disclosure from certain investment entities.

Annual and half year financial reports generally must be provided within 60 days of the relevant reporting period ending.

### *Half year disclosure*

Following the end of the half year of the company, it must provide the ASX with the half yearly financial report lodged with ASIC (or equivalent) and, unless the company is a mining exploration company, other information in the prescribed form given by the ASX.

### *Annual disclosure*

The ASX requires an annual report to be sent to holders of ordinary securities and preference securities in a publicly listed company. The accounts, upon which the annual disclosure is based, must be audited. The report must contain certain and extensive information as required by the Corporations Act, the ASX Listing Rules and the ASX Corporate Governance Principles.

### *Quarterly disclosure*

The ASX only requires quarterly financial disclosure in certain circumstances. For example, where the company is a mining company, or has been listed under the “assets test” requirement that half or more

of its total tangible assets are cash or in a form readily convertible to cash. (It ought to be noted this is only one requirement of the “Asset test” and there are other standards to be met). Companies involved or with an interest in the mining industry are required to make additional quarterly disclosures in relation to production and exploration activities and reserve estimates.

## *Meetings*

Under the Corporations Act, an Australian public company is required to hold an annual general meeting within 18 months of its registration and then in each calendar year within five months after the end of its financial year.

The ASX Listing Rules set out various circumstances where shareholder approval is required to be obtained at a general meeting of the company. The following is a non-exhaustive list of events which require approval at a shareholder’s meeting:

- issue of securities exceeding 15% of the company’s capital in any rolling 12 month period
- acquisition or disposal of substantial assets from or to subsidiaries, related parties (including directors) or a current or recent holder of relevant interests in shares with 10% or more of the voting rights
- increase of payment to directors fees (not including the executive director’s salary)
- issues during a takeover, acquisition and disposal of substantial assets
- transactions involving a related party or subsidiary
- issues of securities to a related party of the company (such as directors).

## *ASX communications officer*

A company listed on the ASX is required to appoint a person who is responsible for communication with the ASX in relation to Listing Rule matters such as company announcements dealing with price sensitive information.

# 15 Corporate governance

## *Recommendations*

In applying to list and for each reporting period, the ASX requires a company to provide a statement disclosing the extent to which the company has followed the recommendations set by the ASX Corporate Governance Council (the Council). These are contained in the Council's *Principles of Good Corporate Governance and Recommendations*.

These recommendations are not prescriptive, nor do they require a "one size fits all" approach to corporate governance. Instead, the recommendations state aspirations of best practice for optimising corporate performance and accountability in the interests of shareholders and the broader economy. However, if a company considers that a recommendation is inappropriate to its particular circumstances and does not adopt it, the company must explain why.

## *Board*

In determining the composition of the company's board of directors, the recommendations make the following recommendations:

- a majority of the board of directors ought to be independent directors
- the chairperson ought to be an independent director
- the roles of chairperson and chief executive officer ought not be exercised by the same individual
- the board of directors ought to establish a nomination committee.

As a matter of best practice, the board ought to appoint an audit committee, remuneration committee and a nomination committee.

## *The audit committee*

This committee is usually responsible for the nomination of external auditors and for reviewing the adequacy of existing external audit arrangements, particularly the scope and quality of the audit. It is recommended that an audit committee comprise at least three members and a majority of non-executive

directors, preferably independent directors, including an independent chair.

A company which is included in the S&P/ASX All Ordinaries Index at the beginning of its financial year must have an audit committee during that year. If the company will be in the top 300 of that Index at the beginning of its financial year, the composition, operation and responsibility of the audit committee must also comply with the recommendations set out by the Council.

For all other companies, the recommendations released by the Council recommend that the board of directors establish an audit committee. The ASX requires a company that has not established an audit committee to explain why it has not done so. An explanation commonly provided by smaller entities is that a committee cannot be justified on the basis of a cost-benefit analysis; however, thought should be given as to how this may be perceived by the market.

## *The remuneration committee*

This committee is usually responsible for recommending and reviewing the remuneration hiring, retention and termination policies affecting the chief executive officer and other senior executive officers. Like the audit committee, it is recommended that the committee operates under a formal charter and consists of a minimum of three members, the majority being independent directors, and that the committee is chaired by an independent director.

## *The nomination committee*

A nomination committee is intended to examine the company's selection and appointment processes, including identifying the necessary and desirable competencies of directors and developing a process for evaluating Board performance. Like other Board committees, the Council recommends it operates under a formal charter. The recommended composition of the Board is structurally the same as for the remuneration committee. The Council recognizes, however, that a committee separate from the Board may not be appropriate for smaller companies.

### *Draft documents*

A company listed on the ASX is required to provide drafts of certain documents for examination by the ASX prior to their finalisation, such as:

- any proposed amended constitution
- a notice of meeting containing a resolution for an issue of securities
- document to be sent to holders of securities in connection with seeking an approval under the listing rules.

### *New changes*

The Council has recently released changes to its best practice principles in relation to:

- gender diversity (eg review and report on participation by women at all levels of the company and adopt nomination strategies)
- increasing new directors' awareness of a company and its culture
- analyst briefings (eg make them widely accessible and record topics of discussions)
- executive remuneration (eg limit participation by executive directors in the remuneration committee generally and prohibit involvement in discussing own remuneration).

These changes will commence operation 1 January 2011.

### *Lodgements with the Australian Securities and Investments Commission (ASIC)*

Under the Corporations Act, a company is required to make a wide variety of filings, particularly around corporate actions and corporate governance matters (such as Board changes). Among other things, a listed company is, in each calendar year, required to lodge the following accounting documents with ASIC:

- a statement of financial position (formerly called a balance sheet)
- a statement of financial performance (formerly called a profit and loss statement)
- a statement of cash flows
- notes to financial statements
- a director's declaration

- a director's report
- an auditor's report.

All documents lodged with ASIC under the relevant provisions of the Corporations Act must also be given to the ASX no later than the time they are lodged with ASIC.

### *The Board*

The Corporations Act requires that directors of a public company be appointed or have their appointment confirmed by resolution passed at a general meeting of the company.

An Australian company listed on the ASX is required to have a minimum of three directors, at least two of whom are ordinarily resident in Australia.

The company is required to obtain the written consent of each individual who agrees to be a director or secretary of the company, before their appointment. The original consent documents are to be retained by the company secretariat for safekeeping.

### *Directors' interests*

Under section 205G of the Corporations Act, the directors of a public listed company are required to disclose various interests to ASIC, including:

- relevant interests in securities of the company
- contracts to which the director is a party or under which the director is entitled to a benefit
- contracts that confer a right to call for or deliver shares in, or debentures of, or interests in a collective investment scheme made available by the company or a related body corporate.

ASX Listing Rules 3.19A and 3.19B, which are complimentary to section 205G, place the burden on the company, rather than the director, to inform the ASX of the notifiable interests of a director including additional information, such as the value of the transaction as well as a change in the notifiable interest of a director (Listing Rule 3.19A). The company must make the relevant disclosure within five business days of receipt of the director's notification under section 205G.

Listing Rule 3.19B places a requirement on the company to make necessary arrangements with a director to ensure that the director discloses information that the company is required to disclose to the ASX.

### ***Directors' and officers' insurance***

It is prudent for a company to have a personal deed of indemnity for its directors and officers. The Corporations Act allows a company to indemnify its directors and officers in the following circumstances:

- the liability to a third party (not the company or a related body corporate) unless that liability arises out of conduct which is fraudulent or involves a lack of good faith
- legal expenses incurred by a director or officer in successfully defending (or applying for relief from liability from) civil or criminal proceedings.

It is prudent for a company to obtain and maintain a directors and officers insurance policy. A directors and officers insurance policy will generally cover claims in relation to or arising out of a “wrongful act” committed, attempted or allegedly committed by a director/officer in their capacity as director/officer.

A company intending to list should also consider taking out IPO insurance to deal with liabilities arising from the IPO which traditional directors' and officers' insurance may not cover.

# 16 Tax considerations

## Overview

When undertaking an IPO, there are three primary parties for whom the tax consequences of listing should be considered: The company to be listed (directly or indirectly), the vendors (which may include existing management) and the purchasers. Each of these parties are considered in turn below, followed by a brief outline of alternative IPO structures.

## The company

### Historical tax issues

When undertaking an IPO, the Company will be subject to a due diligence (“DD”) exercise. Within this process, the tax history of the company will be examined in order to identify any potential material tax risks.

In readiness for this process, the Company should consider undertaking a review to determine areas where work is required to achieve an efficient DD.

Some key areas to be examined include:

- any issues identified during any prior due diligence
- the impact and outcomes of any past audits by relevant tax authorities (for example, the Australian Tax Office (“ATO”)), tax reviews or risk assessments
- whether or not any taxation advice received has been followed and whether or not any recommendations within that advice have been implemented
- international transactions or operations and associated tax matters
- whether issues identified in transmittal letters accompanying the corporate income tax returns have been adequately addressed.

It is important that adequate documentation can be provided which supports the material positions taken by the company (for example, copies of tax advice received).

## Tax attributes

An examination of any carried forward losses and any franking credits should be undertaken.

Once the IPO takes place the Continuity of Ownership Test is typically failed. To the extent that the company has tax losses, analysis of the Same Business Test will be required in order for the company to utilise losses in the future.

Tax consolidation impacts may also need to be addressed (including the transfer of losses and any limits imposed on the rate of loss utilisation).

In order to consider the projected franked dividends available after listing, the franking account should be reviewed (including any major franking account adjustments and limitations impacting franking credits due to predominant foreign ownership in the past).

## Pre-sale restructure

There may be a number of reasons why pre-sale restructuring is required in advance of an IPO. Examples include:

- Where certain assets held within an existing corporate group are not expected to be part of the listed group
- The current debt and/or equity structure may not be appropriate for a listed group
- The distribution of excess cash prior to listing may be desirable
- It may be simpler to introduce a new holding entity, with a revised Board and relevant corporate constitution in place, at the outset.

It is important to note that pre-sale restructuring steps may be complex, and that the underlying accounting implications will need to be reflected in the pro-forma balance sheet and forecast statutory profit and loss (and cash flows) contained within the prospectus.

Tax consolidation implications are also expected to be relevant.

## ***The vendor***

### ***Tax impacts of exit – Disposal of shares***

Broadly, Australian resident taxpayers will be taxable at their marginal rates on all gains (whether sourced in Australia or not). In the case of gains on capital account, there is a capital gains tax (“CGT”) discount available where the shares have been held for 12 months or more (relevant to individuals, trusts and complying superannuation funds).

It may be the case that some vendors/management maintain a shareholding in the listed entity, in which case the availability of rollover relief will be relevant to defer tax liabilities.

Broadly, non-resident taxpayers should only be taxable on capital gains where the gain is derived from Taxable Australian Property.

However, where shares are characterised as being held on revenue account (and Tax Treaty relief is not applicable), non-residents should be taxed on Australian sourced gains only. Whether shares are held on revenue account is ultimately a question of fact.

Non-resident vendors should be aware of the ATO’s recent guidance outlining when Australian Tax may be imposed for an IPO exit (refer recent draft Tax Determinations 2009/D17 and 2009/D18). The draft determinations are expected to be finalised towards the end of May 2010.

Other international tax matters may be relevant to the Australian tax implications of an IPO exit, including:

- The residency of entities within the structure
- The availability of treaty protection for non-resident investors
- The availability of foreign shareholder CGT exemptions
- Any “aggressive” tax positions adopted.

### ***Employee equity***

An IPO is a typically a time for employees to gain liquidity for their equity so the tax consequences of the exercise of options and disposal of shares needs to be considered. New equity plans are also normally introduced to cater for a public environment. Plan

design is key to achieve outcomes for all stakeholders including tax efficiency for management and the company.

### ***The purchasers***

Generally, the tax implications for purchasers should be outlined within the prospectus. This includes any material historical tax exposure in the listing group.

### ***Stamp duty***

While there are some exceptions (ie depending on the listed structure adopted), ordinarily there should be no share transfer duty imposed on a purchaser as a result of an IPO.

In certain circumstances where stamp duty IPO exemptions do not apply, regard will need to be given to “land rich” or landholder duty.

### ***Transaction costs***

Significant transaction costs can be incurred by the listing company. The GST and income tax associated with these costs can also be significant. The GST recoverability and income tax deductibility of transaction costs is often a complex matter, and can be influenced by the IPO structure adopted.

### ***Potential IPO structures***

The appropriate IPO structure will always depend on the particular facts and circumstances of the listing company, the vendor and the purchasers. The structure adopted will often be a balance of the needs of these stakeholders. Some common IPO structures include:

- Direct Sale to the Public where the existing vendors sell existing shares directly to the public. A variation is a buy back of existing shares and an issue of new shares to the public.
- Top Hat where a new holding company offers shares to the public then acquires shares in the existing company.
- Pre-Sale Top Hat where a new holding company is inserted above the existing company and then the new holding company is listed.

## Tax considerations

- Saleco where a new company is established to procure shares in the existing company and make them available to the public through a listing.

Relevant considerations when choosing the appropriate structure includes legal liability of the vendors and existing directors, the desired debt and equity structure for the listed group, appropriateness of the constitution of the existing head company for listing, accounting treatment of the structure, potential stamp duty imposts and the taxation treatment of the structure and of vendors.

# 17 About PwC

## ***PwC legal services – An introduction***

PwC is a regulated Multi-Disciplinary Partnership in certain States of Australia providing, among other things, legal services.

PwC represents a new approach to the provision of legal services, developed in direct response to the needs of our clients and an increasingly competitive corporate environment. We are dedicated to providing the services that a modern business needs. We are particularly well placed to meet the needs of our international clients, providing assistance on local or cross-border tax and legal issues.

What differentiates us from other professional service providers in Australia is our multi-disciplinary approach to, and involvement in, the integrated delivery of professional services to clients. This context of service delivery gives us a unique perspective into our clients' wider business issues and enables us to deliver legal advice in the context of what works for our clients and their businesses. Our legal team will work in tandem with colleagues at PwC to provide all encompassing advice and solutions to your business issues – no matter how complex they are.

With offices in Sydney and Melbourne, we are strategically placed to provide legal services throughout Australia and the Asia-Pacific region.

## ***We work with you***

We believe that best practice legal solutions are developed within a wider business context. Our lawyers speak the language of business, working with you to develop an understanding of your commercial objectives and express advice in commercial terms. We bring together teams of specialists to work alongside clients as trusted business advisers. We structure and project manage transactions from start to finish. Our ultimate aim is to help clients transform their businesses and increase their value.

Our clients come to us from every industry including financial services, information technology, communications, entertainment, energy, mining and consumer and industrial. We offer every client industry-focused legal solutions, tailored to their business requirements.

## ***Managing relationships***

Relationships with our clients are managed through a Client Relationship Partner. This partner has sole responsibility for ensuring that high quality, commercial legal solutions are provided to meet client needs on a local and international level. The Client Relationship Partner is supported by a team of lawyers who have an in-depth knowledge of the client and the industry in which the client operates. Our relationships with clients are built on trust, communication and dedicated client service.

## ***Global tax and legal services***

Our advice is tailored to meet the needs of our clients' complex business issues.

Legal services are offered in the following areas:

- Corporate and Commercial
  - income tax and transaction tax due diligence
  - income tax and transaction tax structuring
  - vendor exit tax planning
- Commercial and Regulatory Litigation
- Employment Law
- Environment and Climate Change Services
- Property
- Tax Controversy.

## ***PwC transaction services – An introduction***

With over 4,000 dedicated specialists around the globe and more than 575 specialists in Asia-Pacific, you can benefit from our experience in serving clients



that include the world's leading companies and private equity houses.

We can help your company access the global capital markets, and make acquisitions, divestitures and strategic alliances. With services that span the entire deal spectrum, we can ensure a focus on the short and longer term return from each deal.

In every engagement we have the same overriding objective – to maximise the return on your deal. We do this by bringing together relevant expertise backed up with vast industry knowledge.

### ***Public reports work***

Public documents are issued by companies and trusts in a variety of different circumstances, including:

- a prospectus or Product Disclosure Statement in relation to an Initial Public Offering of shares or units on a stock exchange
- subsequent public issue of securities (or 'Rights Issue')
- Information memoranda for schemes of arrangement
- Bidder's Statement in respect of a takeover of a listed company
- Target's Statement responding to a Bidder's statement.

It is common for these public documents to include an Investigating Accountants Report in relation to the financial information, both historical and forecast, presented by the company.

It is also common for the company and/or its other advisors/underwriters to require a form of due diligence sign off from Accountants over the due diligence process associated with preparing key Financial Information, along with other forms of advice to the Due Diligence Committee.

### ***How PwC can help you?***

When it comes to your public reporting requirements, our financial due diligence skills and experience enable us to produce Investigating Accountant's Reports, providing the necessary assurance to shareholders and other stakeholders. Our ability to work closely with clients advisors and liaise with the regulator as required helps to facilitate a smooth due diligence process and a public document that is fit for purpose.

Within Transaction Services we have dedicated Capital Markets experts who can assist in addressing the financial reporting needs of various forms of public documents.

This team is well connected to our Global Capital Markets Group, allowing any cross border dimensions to your transaction to be addressed with maximum efficiency. Whether it be parallel raising in the US, or a debt raising in Asia or Europe, we pride ourselves in being able to provide a seamless service that can support all of your financial reporting obligations. We realise that multi-jurisdictional transactions create complex and what appear to be conflicting regulatory requirements for financial information, and have a strong track record for assisting companies navigating a path that satisfies all stakeholders.

### ***Global transaction services***

Our advice is tailored to meet the needs of our clients' complex business issues.

Services are offered in the following areas:

- Corporate Finance
- Financial Due Diligence
- Project Finance and Property
- Transition and Integration
- Vendor Services
- Commercial Due Diligence
- Model audits.

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